



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 29 OF 2005

JOHN THUO MBOCHI

SIMON GACHIGI MBOCHI

(Suing as the legal representatives of

the Estate of Peter Mbochi Gichuki Deceased).....APPLICANTS

VERSUS

SIMON NJOHU GICHUKI.....APPELLANT

RULING

1. The application subject of this ruling is dated 16th May, 2019. The same was filed Pursuant to Sections 1A,1B, 3A, 63(e) of the **Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules**.

2. The application seeks to review orders of Kimaru J of the 2nd November, 2011 and to strike out this appeal.

3. The application is based on grounds that at the time of filing the appeal Peter Mbochi was deceased; the appeal was therefore incompetent and there were errors on the face of the record.

4. The Respondent Simon Njohu Gichuki objected to the application by way of a replying affidavit dated 20th August 2013. Citing the intentions to delay this matter, and that the applicants have made allegations against him maliciously.

5. The applicants' father Peter Mbochi filed a case in the Thika Magistrate's court being Succession Cause No. 182 of 1992, where judgement was entered in his favour. The respondent being aggrieved preferred an appeal to this court on 10th of June 2003 by which time the applicants' father was deceased having died on 7th October, 1999. The court on or around 10th March 2005 through information obtained from the parties directed the estate of Peter Mbochi be enjoined to this suit. This was not done. Nonetheless the appeal was heard with lawyers on both sides confirming readiness to proceed and on 27th April 2006 judgement was entered for the respondent. What is evident is that the estate of Peter Mbochi did not participate in the appeal.

6. On 22nd March 2010 the current applicants moved the court seeking to have the appeal declared a fraud , the same to be struck off, the judgement issued on 27th April 2006 be varied and/or set aside and all consequential orders including orders issued on 8th May 2008 be cancelled.

7. In his ruling Kimaru J took note of the fact that Peter Mbochi was deceased since 7th October, 1999 and the fact that this was brought to the attention of the court by the parties and time allowed for the representatives of Peter Mbochi to come on board but the said representatives failed to do so. The Judge noted further that several efforts by the respondent to effect the decree failed due to lack of interest on the part of the said representatives.

The Judge further noted that despite the procedural issues being raised, the respondent had been left out of his father's inheritance and the said procedural technicalities notwithstanding the judgment of Dulu J cannot be impeached and it would therefore not serve any purpose to upset the same. However, Judge Kimaru went ahead to set aside orders that were issued on 8th May 2008.

8. On the 12th of February 2007 the respondent moved the court for cancellation of titles issued pursuant to the lower court's judgement, titles to issue in line with Dulu J's judgement and for the Deputy Registrar to effect the relevant transfers.

Muigai J allowed the application on 13th October, 2016.

9. Judge Kimaru declined to review Judge Dulu's orders. This court is being asked to review orders made pursuant to a review application (review a review so to speak), strike the appeal and revert back to the lower court' decree.

10. There has to be an end to litigation, and indeed that is the intend of the law. Indeed, this matter has moved on from Judge Kimaru's ruling to the Deputy Registrar effecting the decision of this court.

11. A party to a suit has two options when aggrieved either go on appeal or return to the same court for review, where there is discovery of new and important matters or evidence which was not available after exercise of due diligence, or on account of mistake or error apparent on the face of the record, or any other sufficient reason.

Upon conclusion of a review that becomes end of the road for a party who chose not to go on appeal. There is no room for review of a review.

That notwithstanding Kimaru J in declining to review the judgment of Dulu J held the view that despite the procedural technicalities Judge Dulu's judgment could not be impeached; meaning despite any error the same was sound.

12. Courts do not act in vain and therefore bearing in mind two things, firstly that the issues being raised were heard and determined in the earlier review application and agreeing with Kimaru J that Dulu J's judgement despite lack of participation by the estate of Peter Mbochi is sound, this application ought to fail and it is hereby dismissed.

13. Costs to the respondent.

SIGNED DATED and DELIVERED in open court this 20TH day of FEBRUARY, 2020.

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ALI-ARONI

JUDGE