



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HCCC NO. 5 OF 1992

ISAAK KARIUKI KAMWITHA

MAGDALINE GATHONI WANJOHI.....APPLICANTS

VERSUS

JOSEPH MURIITHI NDEGWARESPONDENT

RULING

1. The application is premised under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rules 6 and 7 of the Civil Procedure Rules; the Applicant is seeking the following orders;

(i) An order for the review of the Order of this Honorable Court made by the Honourable Mr Justice Sergon on the 1/07/2010 for a fresh valuation of Plot No. 47A Othaya Town be reviewed with a view of having it set aside;

(ii) Costs.

2. The application is supported by the grounds on the face of the application and on the Supporting Affidavit made by Isaak Karuiki Kamwitha which is dated the 22nd June, 2017 wherein he depones to the fact that he is the applicant herein and is competent to make the Supporting Affidavit.

APPLICANTS CASE

3. The applicant states that he is aware of the judgment delivered by the Hon. Justice P. Tunoi (as he then was) on the shareholding of the property and that two of the co-owners were to compensate Samuel Ndegwa Kaniaru with money for the portion that was lost;

4. That the Consent Order made by the Hon. Justice J.K.Sergon on the 1/07/2010 was entered into before the applicant was enjoined as a party on the 19/04/2018 and therefore the orders issued therein were made before he was a party to the suit; secondly his Counsel depones that he had not instructed any advocate to hold his brief; and therefore it was entered into by an advocate who was not seized with instructions to hold his brief; thirdly the order for a fresh valuation was made without taking into consideration that there was already another valuation report that had been adopted by the court;

5. That no party should be heard to complain of delay in making the application as any delay was occasioned by circumstances beyond the control of the parties;

6. The applicant continued by stating that it was futile to pursue this suit as the original plaintiffs and the original defendant were all deceased; and that this current suit had abated after 12 months from the respective deaths of the parties and even by enjoining him to the suit this in itself could not revive the abated suit nor give a chance for a new decree to be made;

RESPONDENT'S CASE

7. Whereas the respondent opposed the application and relied on his replying affidavit dated the 20/03/2017; therein he deposed that the order sought to be reviewed was a Consent Order recorded by the respective parties; that the application was a non-starter, untenable and an abuse of the court process as the grounds of the application are not new and important material or evidence; that at all material times the matters were within the applicant's knowledge even at the time the order sought to be reviewed was made;

8. The ruling dated 19/07/1993 made by Hon. Lady Justice M. Angawa reviewed the judgment and the parties were directed to conduct independent valuations of the portion claimed together with the built up area; the valuation dated 22/04/1994 only valued the land and therefore the court order was not fully complied with; by a ruling dated the 11/10/2007 the Hon. Lady Justice M. Kasango made a ruling to that effect in that the valuation report did not satisfy the requirements of the order made on the 19/07/1993;

9. On the 3/10/2013 Hon. Justice J.A. Ombwaya ordered that the applicants pay Kshs.10,000/- for a valuation report to be done pursuant to the court order made by Hon. J.K. Sergon on the 1/07/2010; that the valuation report has since been filed in court;

10. That there was unreasonable and inordinate delay in bringing the instant application; and the respondent reiterated that the instant application was an abuse of the court process in that it sought to overturn the orders set out hereunder, by way of revision; the orders are as follows;

- (i) Order dated 19/07/1993 – Hon. Lady Justice M. Angawa
- (ii) Order dated 11/10/2007 – Hon. Lady Justice M. Kasango
- (iii) Order dated 01/07/2010 – Hon. Justice J.K. Sergon
- (iv) Order dated 03/10/2013 – Hon. Justice A. Ombwayo

11. That litigation must come to an end and allow a litigant to enjoy the fruits thereof; and the respondent prayed that the valuation report made pursuant to the order dated 01/07/2010 be formally adopted as the order that complied with the orders made by Hon. Lady Justice M. Angawa and that judgment be entered in line with the report;

ISSUES FOR DETERMINATION

12. After taking into consideration the presentations of both parties this court finds the following issues for determination;

- (i) Whether the suit has abated;
- (ii) Whether to review or set aside the order of 01/07/2010;

ANALYSIS

13. The applicant brought the application under the provisions of Order 40 Rules 6 and 7 of the Civil Procedure Rules which relates to injunctive orders; upon hearing the submissions of the applicant this court noted that he was indeed seeking for orders for review as opposed to injunctive orders; the orders sought would therefore fall under the provisions of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules; nevertheless guided by the provisions of Article 159(2)(b)(d) of the Constitution 2010 and also guided by the age of the case (1992) this court will overlook the anomaly relating to the cited provisions of the law and will instead proceed to determine the application on its substance;

Whether the suit has abated:

14. The first issue then is whether the suit had abated; it was stated that the original plaintiff and the original defendant having all passed on this then meant that the suit had then since abated twelve months from their respective deaths; and that the retention of the applicant did not revive the suit;

15. The important factor to note is that the suit had been heard and determined what was remaining was the execution of the decree; which was compensation and adjustment of the records at the Council's offices to change the word 'equal shares' to the appropriate percentages as per the valuation;

16. The applicable law is found in Order 24 Rule 10 of the Civil Procedure Rules 2010 which provides that suits that have reached execution stage cannot abate; it reads as follows;

“10. Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order.”

17. In the case of **Mueni Kiamba v Mbithi Kimeu Kimolo [2017] eKLR** it was held that;

“The provisions of Order 23 Rule 11 of the Old Civil Procedure Rules and now Order 24 Rule 10 of the New Rules provide expressly that substitution and abatement of suits shall not apply to execution of orders. In the case of AGNES WANJIKU WANGONDU VS UCHUMI SUPERMARKET LTD - NBI HCCA NO. 137 OF 2002, it was held that a suit could not abate at execution stage but that it was optional for a party to seek to substitute.”

18. This court is therefore satisfied that the finding in the above decision is persuasive and disposes of the issue of abatement;

Whether the applicant has established grounds for the review of order of 01/07/2010;

19. This court reiterates that the particular provisions of law that are appropriate to the facts can be found at Order 45 Rule (1) of the Civil Procedure Rules which reads as follows;

“[Order 45, rule 1.] Application for review of decree or order.

1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

20. The principles for review of an order or decree of the court are therefore clearly set down in Order 45(1) of the Rules; firstly this court can only be seized with jurisdiction if the application is brought before the judge who made the order complained of; in this instance this application should have been heard by the Hon. Mr Justice Serگون but the said judge was unavailable as he was no longer attached to station having been transferred to another station; secondly in order to adjudicate the matter there must be discovery of new and important material or evidence, which, after the exercise of due diligence, was not within the knowledge or could not be obtained and produced at the time the order was made; or that there must be a mistake or error apparent on the face of the record; or for any other sufficient reason.

21. It is important to note that at all stages through which this long drawn battle has taken Counsel Mr.Mindo, an advocate with wide experience, has been a constant feature and he confirms having acted for the original plaintiff from the date of inception of the case which was on 10/01/1992; the main suit was heard by the Hon.Justice P.Tunoi (as he then was) and a judgment was rendered declaring the shareholding of the property and confirming the encroachment; the Hon. Lady Justice M.Angawa reviewed and remedied the judgment by ordering for a valuation of the built up area and the portion belonging to the original plaintiff; unfortunately the valuation report filed did not comply with the orders made by the honourable judge and this was pointed out by two subsequent honourable judges;

22. With the presence of the legal adviser to the applicant who also acted for the original owner from inception of the suit, and from the applicant’s submissions it is altogether clear that there is no contention that relates to the discovery of new and important material or evidence that was not within the Applicant’s knowledge; there is also no contention of any mistake or error apparent on the face of the record; therefore the provisions of discovery of new material or that of an error on the face of the record cannot be invoked as neither of these grounds are found to be applicable;

23. But the above notwithstanding the position is that the applicant can still seek the order for review if there are other sufficient grounds for review apart from the two aforementioned; in this instance it is not disputed that the applicant was not a party to the suit when the consent order dated the 0107/2010 was adopted; secondly it was not disputed that the impugned consent order was irregularly obtained in that the counsel who held brief for both the plaintiffs and defendants counsel had no authority so to do; the applicants counsel categorically stated under oath in his affidavit that he had never instructed the said advocate to hold his brief; this court finds that on this ground of an irregularity in the proceedings, which was not controverted, that justice requires that orders be equitable in the circumstances the case; application be allowed

24. Before making the final finding there is the issue of inordinate delay; the delay is attributed to the inevitable demise of the plaintiffs and the defendant; all the parties had to grapple with acquiring the Letters of Administration and making the applications for substitution; the delay may have been inordinate but the cause of the delay has a reasonable explanation and neither party can be faulted;

FINDINGS & DETERMINATION

25. In the light of the forgoing this court makes the following findings and determinations;

(i) The suit had reached execution stage and therefore could not abate;

(ii) The inordinate delay in bringing the application had a reasonable explanation and neither party can be faulted;

(iii) This court finds that the applicant has satisfied the salient requirements for an order for review to enable this court grant the order sought; and that there are sufficient grounds to justify the granting of the order sought of review;

(iv) The impugned order is therefore set aside as it was obtained irregularly; the parties are directed to conduct a fresh valuation of the suit property; the valuation shall be carried out by the County Valuer and conducted in compliance with the Order dated 19/07/1993 by Hon. Lady Justice M.Angawa; the report to be filed within 60 days of the date hereof; the applicant shall bear the costs of the valuation inclusive of the fees;

(v) Each party shall bear their own costs in the instant application;

It is so Ordered.

Dated, Signed and Delivered at Nyeri this 23rd day of May, 2019.

HON.A. MSHILA

JUDGE