



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 21 OF 1990

TWARUGOJI KIRIMUNYA.....APPELLANT

VERSUS

JANET TIRINDI KATHUNGURI.....RESPONDENT

RULING

Which order is for execution?

[1] Before me are two applications. One is dated 16th April 2018 and the other 9th May 2018.

Of application dated 16.4.2018

[2] This application seeks to know which ruling between the one of 26th September 1990 and 19th March 1991 is meant to be executed. I think this application seeks some kind of advisory opinion. But let me consult the record; it shows that the court delivered a judgment on 26th September, 1990 dismissing the appeal herein. It is not therefore a ruling. The court however reinforced and emphasized that the Respondent must first be given her ½ acre before the Appellant could subdivide the suit land to his sons. And the judge directed the Appellant to sign all documents necessary for the subdivision and transfer of ½ acre to Janet Tirindi. In default, the court empowered the Executive Officer of Court to sign any such relevant documents on behalf of the Appellant.

[3] The ruling of 19th March 1991 was made subsequent to the judgment delivered on 26th September 1990. It was upon an application for review dated 12th November 1990. It appears a subdivision of the suit land had been undertaken on the basis of consent recorded in the Court of Appeal among the appellant and his sons. The court dismissed the said application for review except it stated that the ½ acre due to Janet should be excised from the suit land in such manner that it excludes the three houses built by Jeremiah Njogu on the land. The ruling merely gave directions on the subdivision so as demarcate the ½ acre due to Janet. The ruling does not constitute a distinct decree or judgment from the judgment of 26th September 1990. In law, the decree drawn upon a judgment is the one that is executed. As I have stated before, I am yet to be shown any order from the Court of Appeal reversing the judgment of 26th September 1990. In the upshot, I dismiss the application dated 16th April 2018.

Of application dated 9.5.2018

[4] The application dated 9th May 2018 is challenging my ruling reproduced below in *ex tenso*:

RULING

[1] On 5th October, 2017, parties herein signed the following handwritten consent:

By consent of the parties and the advocates, it is hereby agreed the court to interpret the following orders in the following cases:

1. Court of Appeal consent of 17th May 1988 (NBI CIVIL APPL. NO 7 OF 1988- NYI NO 91 OF 1987)
2. Civil Appeal No.21 of 1990- judgment of 26th Sep 1990-ruling review of 19th march 1991.

3. Civil Application No.43 of 1991 (15 of 1990- review order of 17th May 1991)

[2] Before I begin, I must state that this court cannot alter, in the pretext of interpretation, any of the orders issued by the Court of Appeal or this court. I will merely restate what the courts ordered and the status of things as I perceive it from the orders given.

[3] The order in Civil Application No.43 of 1991 was a decision of the Court of Appeal on an application for stay of execution of a decree pending the outcome of an intended appeal from an order of the High Court (Oguk J) in Meru Civil Appeal No. 21 of 1990. The said application was dismissed with no order as to costs. However, the Court of Appeal observed that a decree had been obtained by Janet Tirindi Gathunguri giving her life interest over Twarugonji Kirimunya's half acre pursuant to a consent order. Except, that, subdivision of NTIMA/NTAKIRA/685 was yet to be completed so that each party i.e. Twarugonji Kirimunya and Janet Tirindi Gathunguri could get their respective share as ordered by Oguk J in this case. According to the Court of Appeal, the Applicant's position on the plot had not been determined on the ground. Ultimately, the Court of Appeal recommended subdivision thereof to be completed so that interested parties can ascertain which of the portions is really his. I have perused the file and I have not seen any appeal that was filed by the applicant after the advice by the Court of Appeal. The Applicant has not also provided the court with any substantive appeal that he filed after the said observation of the Court of Appeal.

[4] The order dated 19th March 1991 was made in this appeal. It was a dismissal of an application for review brought by the Applicant (Jeremiah Njogu) a son of the Appellant Twarugoji Kirimunya seeking a review of the orders of Oguk J. issued on 26th September 1990 in which the judge declared the Respondent Janet Tirindi Kathunguri to have a life interest in half acre of land out of title No. Ntima/Ntakira/685 around her existing house on that land. The court however made no order as to costs.

[5] The other order dated 17th May 1988 is a consent order made in the Court of Appeal (NBI CIVIL APPLICATION NO 7 OF 1988- formerly NYERI NO 91 OF 1987). The appeal was against the order of Tank J in CIVIL CASE NO 22 OF 1984. The parties in the appeal are Twarugonji Kirimunya and Samwel M' Murithi. In the said consent, parties agreed that, the Applicant (M' Twarugonji Kirimunya) was to transfer 1 ½ acres of No.685 to the Respondent Samuel M' Murithi, 2 acres to Jeremiah Njogu with the applicant retaining the remaining share (roughly half an acre or thereabouts), with each party being ordered to bear its own costs. In this case, Janet Tirndi was not a party.

[6] From the foregoing, unless, the contrary is proved, in my view, the order of Oguk J still subsists as it has not been reviewed by this court or reversed by the Court of Appeal. The orders in controversy are in my opinion simple, straight forward and self-explanatory and there is nothing left for this court to interpret. I note other judges have been invited to similar interpretative requests and have given their views which are not any different from mine. Any substantive order should now be obtained from the Court of Appeal upon proper pleading. I hope the matter will now rest. I now order that all files which were filed in ELC shall be transmitted to the said court for effectual determination of the issues raised therein. Those before this court should also be finalized so that the disputes are determined effectually and completely. It is so ordered.

Dated, signed and delivered in open court at Meru this 25th day of January 2018

F. GIKONYO

JUDGE

[5] Looking at the ruling above, it is clear the interpretation of the orders set out in the ruling was prompted by the consent of parties including the Applicant herein. The one by Lesit J was also sought by the applicant. Accordingly, it is unfair for the applicant to now state that the rulings '...were given contrary to Court procedures, are contradicting the same Court's existing decisions, and for that reason the same are misjudgments illegal and cannot co-exist with the rest same Court's existing judgment...'

In any case, the rulings merely stated what the orders in question provided, and did not add or subtract or alter the decisions of the court. The court was clear on that aspect. How I wish the applicant could go back to the Court of Appeal- if there are proceedings there- and ask for appropriate orders rather than keep on coming back to this appeal which was concluded long time ago. I even doubt in the state of things, whether this court has any judicial power left to exercise in these proceedings. I declare this court *functus officio*. This court will not engage itself in any interpretation session of the orders of the Court of Appeal. Meanwhile, it be known that that I will gladly oblige by any order the Court of Appeal may make- if at all. The application dated 9th May 2018 is without merit and is dismissed.

Dated, signed and delivered in open court at Meru this 29th day of October 2018

F. GIKONYO

JUDGE

In presence of

Ngeno for M/s Kaiyugira for interested party

Kirimi for Kaumbi for applicant

Applicant – present

Mutugi for respondent – absent

F. GIKONYO

JUDGE