REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO. 8 OF 1997

NELSON NAMASWA & 4 OTHERS :::::::::::::::::::::::::::: PLAINTIFF

VERSUS

JAMES WANYAMA :: DEFENDANT

R U L I N G

1. The applicants brought a notice of motion dated 30/1/2015 in which they sought among other orders that this court be pleased to review and or set aside the ruling and or order of the court made on 20/12/2011 and that the court be pleased to issue orders allowing the applicants application dated 2/12/2010 in its entirety.

2. The applicants had obtained Judgement in their favour on 2/11/2004. The respondents who were dissatisfied with the Judgement preferred an appeal to the court of Appeal vide Eldoret Civil Appeal No. 151 of 2006. In the meantime, the applicants made attempts to execute the decree in their favour with little success. This was because the respondents could not agree to sign the necessary documents to enable the decree be executed as they expected. This resistance by the respondents made the applicants to file an application dated 2/12/2010 in which they sought among other orders, an order that the court do authorise the Deputy Registrar of the court of sign transfer forms and other related documents on behalf of the respondents so as to give effect to the decree of the court issued on 13/3/2008.

3. The applicants application mentioned hereinabove was heard by the late Justice S. Muketi who in a ruling delivered on 20/12/2011struck out the applicant's application with costs. The reason for striking out the applicants application was that the matter was already in the court of Appeal and that she did not want to give orders which will be in conflict with what the court of Appeal will decide on.

4. The applicants contend that the matter which was pending in the court of Appeal has since been determined. The respondents Appeal was dismissed with costs to the applicants on 3/10/2014. The applicants therefore contend that since the respondents appeal has been dismissed and since it was the only reason why their application of 2/12/2010 was not allowed, the court's ruling of 20/11/2011 should be reviewed and or set aside and the application of 2/12/2010 be allowed in its entirety.

5. The respondents opposed the applicants application based on grounds of opposition filed in court on 25/2/2015 in which they contend that the application of 2/10/2010 was dismissed summarily without considering it on merits and that the applicants are seeking orders contrary to laid down procedures. The respondents also contend that the applicants are resorting to short cuts to have matters which are contested determined.

6. Mr Karani for the respondents conceded to the review but urged the court to invoke the provisions of order 45 (5) of the Civil Procedure Rules and have the application of 2/10/2010 re-heard. So the only issue for determination herein is whether the application of2/10/2010 should be re-heard. Mr Karani argued that that the respondents had filed a replying affidavit in opposition to the application of 2/10/2010 and that the issues raised therein were never addressed. Mr Simiyu for the respondents argued that Mr Karani had not stated reasons why his clients are not signing transfer documents and therefore order 45 rule (5) of the Civil Procedure rules cannot be invoked.

7. The Provisions of Order 45 Rule (5) states as follows;-

"When an application for review is granted, a note thereof shall be made in the Register in regard to the re-hearing as it thinks fit".

It is clear from the provisions of order 45 Rules (5) that it is not mandatory for the court to re-hear a reviewed application or case. The court has discretion to make such order in regard to re-hearing as it thinks fit. In the present case, the replying affidavit referred to by Mr Karani annexed an order of the Court of Appeal in respect of Civil Appeal No. 143 of 1992. The appellants in that appeal were the present respondents and the respondent in the appeal was Saboti/Kwanza Land Control Board. The appellants appeal was dismissed because the appellants were not present. The Judges of the Court of Appeal observed that the issues raised in the appeal were peripheral and that Civil Appeal No. 151 of 2006 is the one which will deal conclusively with the dispute between the parties. As I said before in this ruling, Civil appeal No. 151 of 2006 has since been determined. The Judgement of Justice Nambuye as she then was was left intact.

There is therefore no need to have the application of 2/10/2010 re- heard. The Judgement in Civil Appeal No. 151 of 2006 conclusively determined the issues in dispute between the parties. The issues in Civil Appeal No. 143 of 1992 were merely peripheral as the court of Appeal observed while dismissing the appeal.

8. The decree in favour of the applicants has been pending unexecuted for 11 years. The execution of that decree will not only benefit the applicants but the respondents as well. The court was informed that 11 out of 12 partners have since died. It is important that the land in issue be sub-divided so that the beneficiaries of the 11 deceased persons and the one surviving can enjoy the fruits of their Judgement. It is on these grounds that I decline to order a re-hearing of the application dated 2/10/2010. The applicants application is hereby allowed with the result that the applicants application dated 2/12/2010 is hereby allowed in its entirety. The applicants shall have costs of the application.

It is so ordered.

Dated, signed and delivered at Kitale on this 25th day of march, 2015.

E. OBAGA

JUDGE

In the presence of Mrs Wakoli for Mr Simiyu for applicants and Mr Kidiavai for Mr Karani for the respondents. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

25/03/2015