



**REPUBLIC OF KENYA**

**High Court at Nyeri**

**Civil Appeal 166 of 1983**

**GILBERT MWANGI BANDIRI.....APPELLANT**

**VERSUS**

**NDEKE BANDIRI.....Respondent**

**RULING**

1. By a Notice of Motion dated 13th October 2012 the Plaintiff/Applicant moved the court under section 3A, order 45 rule 1 of the Civil Procedure Rules for orders:

***a. There be a stay of execution of the purported judgment against the Defendant/Appellant herein entered on 10th May 2012 pending the hearing and determination of this application inter partes.***

***b. The Honourable court be please to review and thereafter set aside its order of 10th May 2012 adopting the purported report and award of the District Land Office Nyeri dated 5th May 2008.***

2. The application was based on the grounds that there is an error of the face of the record. The Applicant is threatened with execution and the main decree in this suit did not award the Defendant/Respondent any cost or damage.

3. It was supported by the affidavit of the Applicant wherein he deponed that he was served with a notice to enter judgment dated 15th May 2012 and that the main decree did not award the Defendant/Respondent any amount of money.

4. That the court erroneously adopted the report of the District Officer Nyeri as an order of the court and the same was treated as an award and therefore the purported award was irregular and erroneous and should be reviewed and set aside.

5. The application was opposed by the Defendant/Respondent through grounds of opposition and replying affidavit filed on 16th November 2012.

6. It was deponed by the Respondent that in the year 1983 the Applicant who is his brother had filed the suit herein claiming 5 hectares of the parcel of land known then as EVURORE/NGUTHI/1282.

7. That on 19th January 1989 the court gave judgment in his favour thus the said land was subdivided into two and upon the said sub division much of his developments fell on the new parcel Evurore/Nguthi/2431.

8. That upon realizing that he will suffer huge loss if not compensated for his development now standing on the Plaintiff/Applicants portion of land on 21st March 2000 he filed an application for

compensation and which application was allowed in terms of “

***That the Agricultural Officer of the area where the suit land lies to carry out the valuation of the developments effected on plot No. Evurore/Nguthi/2431 as at 6/4/89 including the value of the permanent building thereon and file a report in court “***

9. That on 18th January 2012 the said report was forwarded to court and on 15th May 2012 the report was adopted as an order of the court but decree thereon is yet to be executed and that the Applicant has not met the conditions for review.

10. The Applicant further filed a supplementary affidavit stating that at no time has he instructed his advocates then on record to consent that development on LR. EVURORE/NGUTHI/1243 be assessed and therefore they acted without authority.

11. That the judgment was irregular and has no legal basis as the Defendant did not have a counter claim in the main suit and that the case was that the Defendant was in illegal occupation and therefore cannot purport to claim development.

12. The Applicant filed a further affidavit and stated that it appears that the Applicant has a problem with the procedure adopted for compensation and not the substantive aspect of it and that the consent orders will stand even if the court allows the application.

13. Directions were given herein that the application be determined by way of affidavit evidence and written submissions.

14. On behalf of the Applicant it is submitted that the Respondent did not have any counter claim to the main suit and therefore cannot purport to sneak a claim after the suit is concluded and that the order dated 15th October 2004 requiring valuation of the suit land to be done is vague and did not indicate the reason for valuation and it cannot be assumed it was for purposes of compensation.

15. The Applicant's Advocates then on record acted without instruction to enter into such a consent order to have the property valued and therefore pray that the said judgment be set aside as it is illegal and was not entered into by consent of the parties.

16. On behalf of the Respondent it is submitted that the Respondent filed an application seeking compensation from his development on the portion of land now given to the Plaintiff which application was allowed by consent of the parties.

17. That on 10th May 2012 the report of Agricultural Officer and the District Valuer came up for adoption and the Plaintiff although served did not attend neither did his advocates and therefore the report was adopted as a judgment of the court.

18. That no allegation of fraud misrepresentation or corrupt deals have been raised so as to have the consent order set aside.

19. I have looked at the application dated 28th April 2004 and note that the Applicant's prayer threat was that the arbitration award read in court on 2nd day of April 2004 be remitted back to a valuer to value the permanent development on land parcel No. Evurore/Nguthi/2431. Further that the valuer aforesaid do take into account and incorporate the Ksh. 36,820/- the value of the crops as per the assessment of the District Agricultural Officer.

20. This is the application which was allowed by consent on 15th October 2004 and I have noted that the consent order recorded on 8th October 2001 was for the Agricultural Officer of the area to carry out the valuation and report to court.

21. I therefore agree with the submission by the Applicant that there is an error apparent on

the face of the record as there was no award before the court to be adopted.

22. To my mind the valuation report by the District Land Officer can not be adopted as an order of the court. The court was supposed only to receive the said report and if need be make further orders therein.

23. I therefore allow the application herein and set aside the order issued by the Deputy Registrar on 10th May 2012 with no order as to cost.

24. In the interest of justice I direct that this matter be mentioned on 20th May 2013 for directions on the report filed herein.

Dated and delivered at Nyeri this 18th day of April 2013.

**J. WAKIAGA**

**JUDGE**

Court: The Ruling is read in the absence of the Advocates and in the presence of the Appellant.

**J. WAKIAGA**

**JUDGE**