



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

HCCC NO. 2169 OF 2000

GEORGE GIKUBU MBUTHIA.....PLAINTIFF

VERSUS

DORSILA AYUMA SHIRAKU.....1ST DEFENDANT

BENJAMIN AYIRO SHIRAKU

(Personal Representative of the

Late James Shiraku Inyundo).....2ND DEFENDANT

L. M. OMBETA T/A OMBETE &

COMPANY ADVOCATES.....3RD DEFENDANT

PENINA A. N. OLOO T/A OLOO

& CO. ADVOCATES.....4TH DEFENDANT

FOZIA MOHAMED

(Trustee For Fordosa Ahmed Abdille).....5TH DEFENDANT

THE ATTORNEY GENERAL..... 6TH DEFENDANT

RULING

The Plaintiff filed a Notice of Motion dated 12th June 2012 in which he is seeking the following orders from this court which I shall reproduce verbatim for their full effect:

1. That, the decree given by the Hon. Court Mr. P. J. Ransley on 10th February, 2006 be declared void.
2. That, the orders given by A. K. Ndung'u – Deputy Registrar on 16th May 2012 in favour of the 1st, 2nd, 3rd and 4th Defendants be declared void.
3. That, the Certificate of Taxation in favour of the 1st, 2nd and 4th defendants for Kshs.1,819,965/= and in favour of the 3rd defendant for Kshs.1,632,050/= all dated 7th June 2012 be declared void.

4. That this court do order the Registrar of Titles Nairobi Registry to cancel and expunge from the record of LR 36/895/1 Eastleigh entry No. 12 to the Fozia Mohammed as Trustee for Fordosa Ahmed Abdille made on 14/1/2000.
5. That the Registrar of Titles do countermand and destroy the Provisional Certificate of Title of L.R 36/895/1 Eastleigh given to Fozia Mohammed and expunge entry No. 13 from the Registrar
6. That the costs of the application be paid by the Defendants

The grounds for the application arise from a judgment delivered in this suit by Ransley J. on 10th February 2006 and consequential actions that followed that judgment. The Plaintiff in his Notice of Motion and supporting affidavit he swore on 13th June 2012 gave a history of the suit he filed herein and claims that Ransley J. made a grave error of law in his judgment when he ignored an injunction given by Angawa J. in HCCC No. 470 of 1999. Further, that it therefore follows that the taxation proceedings and Orders given by the Deputy Registrar on 16th May 2012 and the Certificate of Taxation dated 7th June 2012 are void *ab initio*. The said injunction granted by Angawa J. in HCCC No. 470 of 1999 purportedly restrained the 1st and 2nd Defendants from selling or transferring the suit property. The Plaintiff further claims that HCCC No. 470 of 1999 is still pending.

The Plaintiff filed submissions dated 7th May 2013 wherein he gave a summation of his entire case and argued that under section 1A (3) of the Civil Procedure Act, the Defendants had a duty to obey the orders by Angawa J., and that disobeying and abusing the said orders violated the overriding objectives or “oxygen” principle therein. He supported his arguments by two sets of authorities, the original list and bundle was dated 24th April 2013 and the further list and bundle of authorities was dated 7th May 2013.

The Defendants opposed the Notice of Motion and filed submissions on the same. The 1st, 2nd, 3rd and 4th Defendants’ counsel in submissions dated 13th May 2013 argued that the application was meant to void what this court has already undertaken after a full hearing on merit, and was an abuse of the process of court process as the court is now *functus officio* and cannot revisit its judgment and rulings. Further, that the Plaintiff was seeking to prevent the due execution of the orders against him and the Bill of costs.

These arguments were reiterated by the counsel for the 5th Defendant in submissions dated 22nd May 2013, who in addition argued that the Plaintiff’s application was *res judicata* under section 7 of the Civil Procedure Act, as the issues raised have been adjudicated upon in their entirety. Further, that the only option available to the Plaintiff was that of review under Order 45 of the Civil Procedure Rules if wished this court to revisit the matter.

The 5th Defendant’s counsel also submitted that the High Court under Article 165(6) of the Constitution only has supervisory jurisdiction over subordinate courts or anyone exercising a judicial or quasi-judicial function but not over a superior court. That it was therefore only the Court of Appeal under Article 164(3) of the Constitution that had jurisdiction to reverse or uphold the judgment of Ransley J. The counsel relied on various judicial authorities to buttress his arguments.

I have considered the pleadings and submissions by the parties. I need to first determine the preliminary issue that has arisen of whether this court has jurisdiction to consider the Plaintiff’s application. The Plaintiff has in this regard brought his application pursuant to the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and Article 160(1) of the Constitution. Section 1A and 1B of the Civil Procedure Act provide the overriding principles that should guide this court whenever it is hearing and determining civil matters. They provide as follows:

“1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and

affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of

the Act and, to that effect, to participate in the processes of the Court

and to comply with the directions and orders of the Court.

1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.”

Section 3A of the Civil Procedure Act provides for the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Article 160(1) of the Constitution on the other hand buttresses the independence of the judiciary and provides that in the exercise of judicial authority, the Judiciary shall be subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority.

It is my view that the provisions of law relied upon by the Plaintiff are directive principles that guide this court when it is deciding any dispute, so as to achieve the ends of justice. They do not grant any specific remedy; neither can they be relied upon for specific remedies. One must ground their application for a remedy on substantive provisions of the law which can then be reinforced by the directive principles. I am in this regard persuaded by the decision of Odunga J. in **Peter O. Ngoge T/A O P Ngoge & Associates vs Ammu Investment Company Limited [2012] eKLR** wherein the judge held as follows:

“With respect to the provisions of Sections 1A and 1B of the Civil Procedure Rules, it is my view that the said provisions do not confer jurisdiction upon the Court to hear or grant any orders. Just like the inherent powers of the Court reserved under section 3A of the Civil Procedure Act these provisions only recognize the need to attain the overriding objective in the exercise of the powers conferred on the Court under the Act or any of its provisions. In other words the said provisions do not purport to overrule any of the provisions of the Act but only provide that in the exercise of the powers under the Act the Court ought to ensure that the overriding objective of the Act is attained. Therefore to ground an application under sections 1A and 1B and purport to argue that by so doing Order 49 rule 7 of the Civil Procedure Rules is inapplicable is, in my respectful view, a misconception. In Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009 the Court of Appeal expressed itself as follows:

‘In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act’ ”.

The substantive law that allows this court to re-open a judgment is section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, which provide for review of decrees and orders. There are specific grounds in the said provisions when an order or decree of this Court can be reviewed, which the Plaintiff has not raised, nor established. These are 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.

On the contrary, the Plaintiff is asking this court to quash and declare void a judgment of a superior court of equal standing on its merits. This Court has no such jurisdiction under Articles 162 and 165 the Constitution and section 13 of the Environment and Land Act which provisions are the source of its powers. It is also expressly forbidden to rehear suits or issues already heard and determined on their merits under the provisions of section 7 of the Civil Procedure Act. The remedy available to the Plaintiff when questioning a judgment such as the one herein on its merits is that of appeal.

I accordingly decline to grant the orders sought by the Plaintiff in his Notice of Motion dated 12th June 2012 for the aforementioned reasons. The Plaintiff shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____23rd ____ day of ____September____, 2013.

P. NYAMWEYA

JUDGE