



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT 3655 OF 1995**

**BABER ALIBHAI MAWJI .....PLAINTIFF**

**VERSUS**

**GREENFIELDS INVESTMENTS LIMITED .....DEFENDANT**

**RULING**

The application before the Court is dated 30<sup>th</sup> September 2011 and is brought under section 98 and 3A of the Civil Procedure Act (Cap 21), and Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff in the said application is seeking orders that the Registrar of this Honourable Court do execute the necessary transfer forms for the property registered under the Government Lands Act (Cap 280) as L.R.214/273 (Original Number 214/42/1/2) (hereinafter referred to as the suit property), in favour of the Plaintiff/Applicant, and that the costs of this application be borne by the Defendant. The said application was heard by this Court on 17<sup>th</sup> November 2011.

The Plaintiff's grounds are that he instituted the suit herein by way of originating summons dated 15<sup>th</sup> December, 1995, seeking to be declared to have become entitled by adverse possession to the suit property and consequently be registered as the sole proprietor of the said property. Judgment by this Court was delivered on 30<sup>th</sup> July, 2003, wherein Honourable Justice Richard Kuloba granted the relief sought by the Plaintiff. The Defendant subsequently preferred an appeal therefrom to the Court of Appeal in **Greenfield Investments Limited v Baber Alibhai Mawji Nairobi Civil Appeal Number 155 of 2004**, which Court on 30<sup>th</sup> April, 2010 (P.N. Waki, D.K.S Aganyanya and J.G. Nyamu, JJA) dismissed the Appeal and affirmed the judgment of the Honourable Justice Richard Kuloba.

The Plaintiff states that despite numerous requests, the Defendant has refused and/or neglected to execute the conveyance of the suit property in his favour. The Plaintiff avers that in the circumstances, it would only be fair and just that this Court directs the Registrar of the High Court to execute the necessary transfer forms on behalf of the Defendant who is the registered owner, in order that the suit property be registered in the name of the Plaintiff as directed by the court.

The Plaintiff has annexed to his supporting affidavit sworn on 30<sup>th</sup> September 2011 copies of a certified copy of the judgment dated 30<sup>th</sup> July 2003 and decree issued by the Honourable Justice Kuloba, copies of the judgment and order of the Court of Appeal dated 30<sup>th</sup> April, 2010, a copy of a request letter dated 24<sup>th</sup> August 2011 by his Advocate Satish Gautama, Senior Counsel addressed to Messrs Oraro & Company Advocates on behalf of the Defendant, and the conveyance document in triplicate.

The Defendant admits that the judgments of this Court and the Court of Appeal awarded the suit property to the Plaintiff by virtue of adverse possession. The Defendant states that it is highly aggrieved by the said

decision and is keen on pursuing an Appeal therefrom, and that indeed, following the establishment of the Supreme Court and the passing of the Supreme Court Act and Rules made thereunder, the Defendant has instituted appeal proceedings in the Supreme Court against the said decision.

The Defendant submitted that they have not been furnished with any decree or order directing them to execute any instruments, and that section 98 of the Civil Procedure Act is inapplicable in this case, as the High Court and Court of Appeal's decisions were declaratory and did not order the Defendant to execute any instrument. Further, that section 3A of the Civil Procedure Act is also inapplicable, and the Defendant relied on the decision of the Court of Appeal in **Wanguhu v Kania (1987) KLR 51**, where it was held that in cases where specific rules and procedures are provided by statute, then the courts should limit the exercise of their inherent jurisdiction under section 3A. The Defendant also stated that in any event, the Plaintiff will suffer no prejudice if he awaits the determination of the proceedings before the Supreme Court, as the Court order vesting the said property in the Plaintiff by adverse possession has been registered against the title of the suit property

The Defendant avers that the said appeal has a high chance of success, and raises a matter of great public importance touching on the constitutional right to property and the law relating to limitation of actions. The Defendant further avers that the said Supreme Court proceedings would be rendered nugatory, in the event that this application is allowed before the hearing and determination of the proceedings before the Supreme Court. Further, that to hear and determine the application herein in the face of the proceedings before the Supreme Court would also defeat the role and function of the Supreme Court as the Court of final judicial authority as set out under section 3 of the Supreme Court Act. The Defendant has attached to the Replying Affidavit sworn on 17<sup>th</sup> November 2011 by Sultan Hasham Lalji, a Director of the Defendant, the proceedings pending before the Supreme Court, a draft petition of Appeal and a copy of an official search of the suit property.

After consideration of the pleadings filed and evidence tendered and the submissions made by counsel at the hearing of the application, the first issue that I will examine is the effect of the pending appeal proceedings in the Supreme Court on this application. My finding is that the Defendants application for leave to appeal to the Supreme Court cannot influence the decision of this Court for two reasons. Firstly, Order 42 Rule 6(1) of the Civil Procedure Rules provides that no appeal or second appeal shall operate as a stay of execution of a decree or order appealed from. Secondly, any orders for stay pending appeal can only be validly sought and given either in the Court of Appeal which is the superior court that gave the last judgment in the suit filed herein, or in the Supreme Court being the court where the appeal from the Court of Appeal's decision is being preferred.

I will therefore proceed to the remaining issue before this court, which is whether section 98 of the Civil Procedure Act is applicable in this case. The said section states as follows:

“Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.”

Section 98 comes into effect when there is neglect on the part of a party in complying with orders and decrees of this court. I agree with the Defendant's counsel that there is no evidence presented by the Plaintiff of a decree or order as defined in section 2 of the Civil Procedure Act (Cap 21), and prepared in the manner envisaged by Order 21 Rule 7 and 8 of the Civil Procedure Rules seeking the Defendant's execution of a conveyance. In addition, it is my view that the Defendant has no right over the suit property that is capable of transfer by way of a conveyance or any other instrument, since their right has been effectively extinguished by the judgment given in this suit dated 30<sup>th</sup> July 2003, and upheld by the Court of Appeal on 30<sup>th</sup> April 2010

In my opinion the correct procedure to be followed is as provided for by sections 104, 105 and 106 of the Government Lands Act, which require a certified copy of the judgment, decree or order evidencing the title acquired to be transmitted to the Registry of government lands, and registration to be effected in the form required by the Act. It is my view that instead of dismissing the Plaintiff's application on this ground, it is the duty of this Court to ensure that justice is done, and to facilitate the necessary procedures pursuant to the provisions of Article 159(2) of the Constitution, and sections 1A, 1B and 3A of the Civil Procedure Act. For this reason I hereby order the Defendant to bring up to the custody of this Court the original title deed or document with respect to the suit property namely, L.R.214/273 (Original Number 214/42/1/2) which is registered under the Government Lands Act within 30 days, and that the said title deed or document to be thereafter secured in the strongroom of this Court's Registry pending further orders of this Court.

Orders accordingly, and each party shall bear their own costs.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_2<sup>nd</sup>\_\_\_\_ day of \_\_\_\_February\_\_\_\_, 2012.

**P. NYAMWEYA**  
**JUDGE**