



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Petition 166 of 2009

IN THE MATTER OF SECTION 84 (1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER**

SECTION 70 AND 75 OF THE CONSTITUTION OF KENYA

BETWEEN

JANE NJOKI MWANGI.....PETITIONER

VERSUS

CITY COUNCIL OF NAIROBI.....RESPONDENT

**KEZIAH WAITHERERO.....INTERESTED
PARTY**

RULING

The petitioner's application by Notice of Motion was brought under **Article 159 (2) (d)** of the **Constitution of Kenya**. The application seeks one substantive order as hereunder:

- “1.
2.

3. **That this honorable court be pleased to issue an order to the effect that the judgment and/or order of this honorable court made on 31st March, 2011 by the Hon. Mr. Justice Musinga be reviewed and/or varied.”**

The application was made on grounds:

- “a) THAT there is a mistake or error apparent on the face of record.**
- (b) THAT there indeed exists a sufficient reason to grant the orders sought as the honorable court lacked jurisdiction to grant compensatory judgment in monetary terms in favour of the applicant. Having found that the sale agreement between the respondent and the interested party was null and void ab initio, the learned judge ought to have reinstated possessory rights to the petitioner over the suit premises.**
- (c) THAT this honorable court will be furthering an illegality by failing to restore the applicant’s proprietary and possessory rights over the suit premises.**
- (d) THAT the applicant feels aggrieved by the decision of the learned judge and feels that the issue of jurisdiction goes to the ultimate determination of this suit.**
- (e) THAT the delay occasioned herein is not so inordinate or so great as to be considered inexcusable.**
- (f) THAT equity shall not suffer a wrong to be without remedy.”**

The application was supported by a short affidavit sworn by the petitioner which basically reiterates the aforesaid grounds that support her application.

The respondent supported the petitioner’s application and filed “Grounds of Admission” stating:

- “1. THAT the petitioner has shown substantial ground to warrant the grant of the orders for review sought herein.**
- 2. THAT the petitioner has established cause of action to warrant the grant of the orders for review sought herein in so far as there are glaring elements of mistake, irregularity and/or error or illegality that have been established on the part of the court’s judgment hence the need to grant the orders sought herein.**
- 3. THAT the petitioner’s application is consequently not misconceived, vexatious and does not amount to an abuse of the process of the court.**
- 4. THAT the application is otherwise not an abuse of the court process and ought to be granted with costs to the respondent.”**

On the other hand, the interested party opposed the petitioner’s application and filed grounds of opposition stating that:

- “a) There is no error or mistake apparent on the face of the record**
- b) The court heard and determined the petition and the prayers sought by the petitioner.**
- c) The issue of sale agreement between the interested party was never an issue pending determination nor was it determined in the proceedings (sic).**
- c) That the petitioner never sought restoration of her rights (if any) over the property and sought compensation which was granted.**
- e) The petitioner being a sub-tenant of Kanjee Naranjee, her rights over the property (if any) were extinguished upon expiry of the lease granted by Kanjee Naranjee on 27th December, 2011 when the lease granted by Kanjee Naranjee to petitioner lapsed. Accordingly the petitioner could**

not have any proprietor interests (sic) over the suit property after 27th December, 2001 the said sale notwithstanding.

- f) The petitioner's remedy if any, can only lie in damages against the respondent.
- g) The application has no merits and ought to be dismissed."

On 31st March, 2011 this court delivered a judgment in favour of the petitioner relating to a property known as **Land Reference No. 209/2489/6**, hereinafter referred to as "**the suit property**", which was owned by the petitioner's late husband, **Dickson Muiruri Mwangi**, before it was sold by the respondent in 1995, allegedly for non-payment of land rates.

The petitioner had filed a petition seeking the following orders:

"(a) A declaration do issue that the sale of the petitioners property, land reference number 209/2489/6 by the respondent to one Simon Macharia Gitahi in December 1999 (sic) on the strength of/or pursuant to an irregular and/or void decree was a violation of the petitioner's constitutional and fundamental rights under Section 70 and 75 of the Constitution of Kenya and protection from deprivation of property without compensation and protection of the law.

(b) A declaration do issue that the petitioner is entitled to compensation from the respondent on account of the unconstitutional deprivation of the petitioner's property land reference number 209/2489/6 by the respondent as follows:

- (i) Refund of rates for the years 1996 to 2001 Kshs.112,500/=**
- (ii) Value of land reference number 209/2489/6 Kshs.25,000,000/=**

Kshs.25,112,500/=

(c) An order do issue directing the respondent to pay to the petitioner a sum of Kshs.10,000,000/= for the harm inflicted upon the petitioner as a direct consequence of the respondent's actions.

(d) Interest on (b) and (c) above at court rates with effect from February 2011.

(e) Costs of this petition.

(f) Such other orders as this court shall deem just."

The court found that the property was unlawfully sold in a public auction at the instance of the respondent and that amounted to violation of her constitutional right as spelt out under **Section 70** of the repealed **Constitution of Kenya** and under **Article 40** of the new **Constitution**. The court further observed that the petitioner had not challenged the registration of the suit property in the name of the interested party. The court ordered the respondent to compensate the petitioner in the sum of Kshs.25 Million as prayed for in the petition.

Dr. Khaminwa for the petitioner submitted that the petitioner's former advocates did not direct themselves properly in law and thus made inappropriate prayers before the court. In his view, the court had no jurisdiction to order payment of compensation once it had established that the sale of the suit property was unlawful.

Mr. Mboya for the respondent supported the petitioner's submissions. However, he stated that since the petitioner had prayed for compensation and not for reinstatement of possessory rights over the suit property the court could not have granted her orders she had not sought. In his view, the orders sought by the petitioner ought to have been declined altogether.

Mr. Njuguna for the interested party submitted that there was no error apparent on the face of the record and cited the Court of Appeal case of **NYAMOGO & NYAMOGO ADVOCATES vs. KOGO [2001] E.A. 173**. In that matter, the court delivered itself thus:

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view is also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

Mr. Njuguna further submitted that the court heard and determined the petition on the basis of the prayers sought by the petitioner. He added that the court had jurisdiction to grant the orders which were issued in the judgment.

Lastly, counsel submitted that there was unreasonable delay in filing the application since judgment herein was delivered on 31st March, 2011. The delay of almost eight months had not been explained at all.

The petitioner’s application was brought under **Article 159 (2) (d)** of the **Constitution of Kenya, 2010**, which state that:

“Justice shall be administered without undue regard to procedural technicalities.”

That constitutional provision does not require courts to disregard the provisions of the Civil Procedure Act and the rules made thereunder. It enjoins the judiciary in exercising its judicial authority to administer substantial justice without unnecessarily being fettered by rigid procedural technicalities which may not go to the root cause of a dispute. Courts cannot however throw out all the rules of procedure, that would lead to chaos and judicial anarchy.

Where there are specific provisions in the Civil Procedure Act and/or Rules, those provisions must be adhered to in bringing applications to court. Applications for review are governed by **Section 80** of the **Civil Procedure Act** as well as **Order 45** of the **Civil Procedure Rules**. The latter reads as follows:

“1 (1) Any person considering himself aggrieved –

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after 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, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The petitioner’s application was not therefore brought under the relevant provisions of the law. That notwithstanding, I will still determine the same as though it had been brought under the right provisions of the law.

The basis of the petitioner’s application is that the court lacked jurisdiction to grant compensatory

judgment against the respondent. The petitioner alleged that the court erred in proceeding to order compensation having established that the suit property had been unlawfully sold. In my view, that cannot amount to an error apparent on the face of the record to justify grant of the orders sought. That can only be a ground for an appeal. The case of **NYAMOGO & NYAMOGO ADVOCATES vs. KOGO (Supra)** is sufficient authority for this finding.

The same applies to the issue of jurisdiction. The court was satisfied that it had jurisdiction to grant the orders and in any event none of the parties raised any objection to the court's jurisdiction. It is improper for the petitioner to attempt to challenge the court's jurisdiction in the present application. That may be a ground of appeal but not for review of the court's judgment.

Thirdly, parties are bound by their own pleadings and prayers. The petitioner specifically urged the court to award her compensation for the unlawful sale of her property. She did not challenge the title that had been issued to the interested party. The petitioner's abrupt about turn to demand the return of the suit property to her is defeated by her own pleadings and prayers.

It is trite law that where a property is wrongfully sold and transferred in an auction the only remedy available to the former owner of the same is claim for damages. **Section 24 of the Registration of Titles Act** states as follows:

“Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription.”

Lastly, there was unreasonable delay in bringing this application. That delay was not explained at all. Applications for review are required to be filed without unreasonable delay.

For all these reasons, I find no merit in the petitioner's application and dismiss the same with costs to the interested party.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE, 2012.

D. MUSINGA

JUDGE

In the presence of:

Muriithi – court clerk

Mr. Njuguna for the 2nd Interested Party

Mr. K. Kimani for Mr. Khaminwa for the Petitioner

No appearance for the Respondent