No. 2744

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 158 OF 2009

DAMAR ODAK .....APPELLANT

-VERSUS-

MOSES OCHICHI (Suing as personal representative of Fanuel Ochichi - deceased).....RESPONDENT

JUDGMENT

(Being an appeal from an Order of Eviction and Ruling of the Hon. G. H Oduor Deputy Registrar at Kisii, dated 31st July, 2009 in HCCC No. 227 of 1998, executed on 2nd April, 1991)

The facts leading to this appeal as can be surmised from the record of appeal as well as written submissions of respective counsel for the appellant as well as respondent are that the respondent's father, the late **Fanuel Ochichi** filed a civil suit against the appellant in this court being Kisii HCCC No. 227 of 1988. He was successful in that endeavour and obtained the following orders against the appellant:-

- **That the plaintiff was the allotee of plot No. 108 at Oyugis town jointly with two others.**

- **That plot No. 108 Oyugis is not part of plot 38 in the same town.**

- **That the defendant had unlawfully encroached upon plot No. 108.**

- **That the plaintiff was entitled to quiet and peaceful possession and use of plot no. 108 without interference from the defendant or any other person whatsoever.**

- **That there was no award for damages.**

- **That the defendant be and is hereby ordered to remove any part of the remaining fence put by her on the plaintiff's plot at once.**

- **That costs of the suit to the plaintiff.**

The judgment of the court in terms above was delivered on 1st November, 1990.

On 26th October, 1993, however, the appellant mounted a suit in this court against the respondent's father and Oyugis Town Council being Kisii HCCC No. 551 of 1993. In this suit the appellant claimed that she was the allottee of plot No. 38 Oyugis and that the respondent's late father had attempted to put up structures on the same. She therefore prayed to court that the respondent's father be stopped and or injuncted from so doing.
By consent of the parties, that suit was on 29th November, 1995 referred to arbitration by the District Land Registrar and Surveyor, Homa Bay District. That was done and in his award, the district land registrar ruled that the plot belonged to the appellant. He also held that plot number 108 came later on when the appellant had partially developed her plot. This award was filed in court and later adopted as a judgment and decree of the court on 18th January, 2001.

On or about 2nd October, 1998, the respondent's father passed on. The respondent then petitioned for a grant of letters of administration ***ad colligenda bona*** for purposes of executing the decree passed in Kisii HCCC No. 227 of 1998. Having obtained the same, the respondent commenced execution proceedings on 9th August, 2002 quoting the decree sought to be executed as having been issued by court on 2nd April, 1991. Subsequently, a notice to show cause why the appellant should not be committed to civil jail for failing to comply with the order of court directing her to remove the fence was issued and served on the appellant. However to date what became of that notice to show cause is unknown going by the court record.

On 22nd April, 2009, the respondent filed yet another application for the execution of the same decree. In the application, again the date of decree to be executed was stated as 2nd April, 1991. This time around the appellant was required to show cause why she should not vacate plot No. 108 Oyugis market, remove the fence she had put up on the said plot and that the local OCS, do supervise the execution of the order. On 15th June, 2009, when the said Notice to show cause came up for hearing interpartes before the Deputy Registrar of this court, there was no appearance for the decree holder and or her counsel. The respondents counsel was however present and proceeded to oppose the same.

In a reserved ruling delivered on 31st July, 2009, the Deputy Registrar rendered himself thus on the application:- ***"… in conclusion I deem that the J/D has not shown sufficient reason as to why execution should not issue against her. I hereby issue an order that the defendant vacates plot No. 108 at Oyugis forthwith. She is further ordered to remove fence put up in the said plot herself. The OCS Oyugis police station is ordered to ensure compliance..".*** That order by the Deputy Registrar triggered this appeal. In a seven (7) point memorandum of appeal, the appellant complained that:-

"1. That the learned Deputy Registrar misdirected himself on points of law by finding that decree dated 02.4.1991 in the above suit is still enforceable in law after twelve (12) years.

2. That the learned Deputy Registrar erred as on points of law and fact when he failed to note that there was only a court judgment dated 01.11.1990 in favor of the plaintiff and respondents of which no decree had been extracted and served upon the defendant.

3. That the learned Deputy Registrar erred on point of law and fact by failing to hold that since application for execution dated 22.4.2009 filed by the respondents cited a wrong date of decree the notice to show cause based on it became defective and should have been struck off or dismissed

altogether.

4. That the learned Deputy Registrar erred as a matter of law and fact by holding that since the counsel of the petitioner did not cite a section of limitation law which made the decree statutory time barred and failed to cite authorities to that effect then decree on judgment dated 01.11.1990 in the suit is still good in law for enforcement.

5. That the learned Deputy Registrar erred as a matter of fact and law when he interpreted adjournments sought by the defendant in the year 2003 when the defendant was sick was an indulgent which could extend statutory time to run in favour of the respondents/decree holders to enforce decree dated 02/4/1991 in year 2009 i.e after 18 years.

6. That the learned Deputy Registrar having noted that declaration in judgment dated 01.11.1990 being clear and contents of the decree relate to plaintiff's should have addressed himself to issues raised by counsel of appellant concerning limitation.

7. That the learned Deputy Registrar erred as a matter of fact and law by failing to consider the effect of Arbitration Award by District Land Registrar between the defendant, plaintiff and Oyugis Town council over plot 108 in Kisii HCCC No. 551 of 1993 which became this court judgment on 28.11.2000 and declared that plot No. 108 Oyugis belong to the defendant i.e widows of Richard Odak..".

When the appeal came up for hearing before **Musinga J.** on 30th September, 2010, **Mr. Nyakongo** and **Mr. Okenye** learned counsel for the appellant and respondent respectively agreed that the same be canvassed by way of written submissions. Those written submissions were subsequently filed and exchanged. However by the time that was being done, **Musinga J.** had left the station on transfer. Parties therefore agreed that I should proceed, craft and deliver the judgment on the basis of the written submissions in place of **Musinga J.**

I have since carefully read an considered the said written submissions alongside cited authorities.

The first issue which I must grapple with is whether this court has jurisdiction to entertain this appeal as of right. The order appealed from was issued by the Deputy Registrar of this court. Under order 49 rule 7(1) of the **Civil Procedure Rules** the Deputy Registrar has jurisdiction to hear and determine an application made under order 22. The order appealed from was for execution of the decree covered by order 22 of the **Civil Procedure Rules**. Again under order 49 rule 7 (2) of the **Civil Procedure rules**, an appeal from a decision of the registrar under the above order is appealable to a judge in chambers. In the premises, **Mr. Okenye** is not right when he forcefully argues in his written submissions that this appeal cannot lie as the Deputy Registrar was not dealing with a formal preliminary or interlocutory application made before the suit was ready for trial in terms of order XLVI rule 7 now order 47 rule 7 of the **Civil Procedure Rules** and that since the order was issued on a Notice to show cause, any aggrieved party thereof should come to court by way of objection proceedings.

The Notice to show cause proceeded ex-parte before the Deputy Registrar. In other words, the decree holder did not appear to prosecute his notice to show cause. Thus the submissions of the appellant in opposing the same remained unchallenged and or rebutted. To my mind the appellant had successfully shown cause why the decree could not have been executed against her. In the absence of any input to the contrary by the respondent, the Deputy Registrar's hands were tied. He could not wriggle out of the situation by referring to the number of adjournments in the matter previously that had been instigated by the appellant and the fact that the matter was old. Those were irrelevant considerations in arriving at the decision as to whether or not the appellant had shown sufficient cause as to why she should be called

upon to satisfy or comply with the decree.

The decree sought to be executed was dated 2nd April, 1991, yet there was no such decree or judgment between the appellant and respondent. This was an issue of law going to jurisdiction. The only judgment of court in favour of the respondent capable of execution was one delivered on 1st November, 1990. As it is therefore the learned magistrate proceeded to make the order on a defective and or non-existent decree. This was a valid reason why the decree should not have been executed against the appellant in the first place. The respondent seems to acknowledge the fact that there was an error in the notice to show cause as regards the date of the decree sought to be executed. However, he submits that, such an error is curable by virtue of sections 79A, 99 and 100 respectively of the **Civil Procedure Act**. That is all fine. However, such remedy should be invoked before the order is made. It cannot be invoked on appeal. Nothing stopped the respondent from moving the court as appropriate to amend the date of the decree before the application was heard orally on the date of the hearing of the application. But again the respondent did not appear on that date. He cannot now fall back to those provisions of the law to try and resurrect his case, when he should have invoked them before the Deputy Registrar made the order.

The judgment and the alleged decree sought to be executed was issued on 1st November, 1990 as I have previously stated. On 22nd April, 2009 the respondent filed this second application to execute the same. The fate of the first application filed on 9th August, 2002 is unknown. Under the **Limitation of Actions Act**, section 4(4) thereof, it is expressly provided that an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered. The respondent seems to appreciate this legal position as well for in his submissions he argues that the court can exercise its inherent discretion in favour of the respondent, that the issue was revisited before the Deputy Registrar on 15th June, 2009 and ruling thereon delivered in favour of the respondent, that it was a procedural technicality that cannot exclude substantive justice from being administered in accordance with article 15a (2) (d) of the Constitution of Kenya, and finally, the respondent has submitted that the application filed on 22nd April, 2009 upon which the Deputy Registrar delivered a ruling on 30th July, 2009 and which is the basis of this appeal was a continuation of the previous application and therefore limitation does not apply. For these submission, the respondent relied on the authority of **Nandra –vs- Chane & Co. (1973) E. A 122**.

I would answer the issues canvassed by the respondent as above in terms that he should have raised those issues with the Deputy Registrar for his ruling thereon. He did not since he did not appear during the proceedings. Legally, therefore he cannot raise them on this appeal. Secondly, discretion cannot be exercised in an oppressive manner or in vaccum. It cannot be used to confer a right which is expressly forbidden by statute. Discretion cannot be used to extend time for the doing of an act when a statute categorically provides that such an action be undertaken within a specified period of time. Discretion cannot be used to confer jurisdiction when there is none. Yes, the issue of limitation was raised before the Deputy Registrar and he made a ruling thereon. It is precisely for that reason that we have this appeal. In any event, that does not bar the appellant from raising the issue considering the fact that the Deputy Registrar misdirected himself on the same by holding that ***"… a decree is the formal expression of a conclusive court order. Mr. Nyakongo did not refer to the specific provision that would bar the implementation of a court order … of time. That it is almost 20 years since the judgment sought to be executed was passed is all the more reason why such a judgment ought to be enforced …".*** The mere fact that counsel did not point out section 4 (4) of the **Limitation of Actions Act** to the Deputy Registrar, does not mean that it does not exist. It is a matter of law and every judicial officer is expected or presumed to know the law. With a title bit of diligence, the Deputy Registrar will no doubt in his research on the subject have come by the said provision of the law. Some things need not necessarily to be drawn to the attention of the judicial officer by counsel appearing in a matter. One is at liberty to take judicial notice of trite law.

Article 159 (2) (d) of the constitution of Kenya is not the panacea of every legal problem or what ails the profession. It cannot replace advocate's sloppy workmanship. The issue of limitation is very crucial and

goes to the jurisdiction of a court to entertain a matter and cannot be waived or wished away as a mere procedural technicality. Substantial justice is not about changing the rules of engagement in a judicial process. Substantive justice cuts both ways. It cannot be used by one party to breathe into live an otherwise dead case.

Finally, the respondent cannot be heard to say that the application before the Deputy Registrar was a continuation of the previous application. The record does not support that contention. The fate of the previous application is unknown and in any event the prayers sought in both applications are totally different. Therefore the case of **Nandra** (supra) is of no assistance to the respondent.

For all the foregoing reasons, I find the appeal merited. Accordingly it is allowed. The ruling and order of the Deputy Registrar dated 30th July, 2009 in set aside. In its place, I order that the application filed in court on 21st April, 2009 be and is hereby dismissed with costs to the appellant. The appellant shall also have costs of this appeal.

Judgment dated, signed and **delivered** at Kisii this 31st day of March, 2011.

ASIKE-MAKHANDIA

JUDGE