



SUMMARY NOTES

1. Land and Environment Law Division
2. Civil Appeal Practice & Procedure
3. Finalized & concluded appeal
4. Judgment 8 May 2008
5. Subject of finalized main suit and appeal

20,2040 road reserve Garissa Town.

original defendant/appeallant applicant.

a. Before DMII (Prof) subordinate courts Garissa (RMCC 33/02)

b. Trial Magistrate finds that original plaintiff /respondent is the owner of plot. That the original defendant/applicant Ahmed Ali Gure has encroached on the road reserve and plots No.20 and 29.

the High Court. Asks for judgment to be set aside.

Finds appeallant has encroached on land belonging to respondent Daudi Sethe Diff. DM II (Prof) Judgment upheld; namely, that part encroachment be demolished at the appellants' cost

I. Original defendant /appeallant files application 13 May 2008.

- i. PDP No.326/96/31 plot 29,
 - ii. Dispute on encroachment by
 - iii. Finalized subordinate court trial
 - iv. Defendant/respondent appeals to
 - v. High Court on Appeal
- i. Leave to appeal against decision
 - ii. Stay of execution
 - iii. Application opposed
Held application
 - aa. rejected for stay of execution
 - bb. no leave required to appeal
 - cc. Hon. Judge transferred.

II. Taxation – Kshs.121,087/= - Deputy Registrar

III. Original Defendant, appeallant applicant Ahmed Ali Gure files application dated:

8 April 2009

13 July 2009

14 July 2009

All struck out for being irregularity filed, Khamoni J.

IV. On 17 June 2009, notice to withdraw appeal from the High Court to the court of Appeal is filed.

V. Original Defendant appeallant Ahmed Ali Gure files application 15 July 2009 seeking orders of stay of execution and review of courts judgment.

Msagha J

res judicata;

VI.

Original Defendant/appealant files a 5th new application

- i. Application heard by Mbogholi
- aa. Preliminary Objection raised, matter
- bb. Preliminary objection upheld

on orders/judgment issued on 8 May 2008
Section 3 & 3A and Order L Civil Procedure Rules.

- i. 18 February 2010 for directions
- ii. Notice of Motion brought under

6. **Held**

i. **Court functus officio**

Court

meaning that the original judgment confirmed.

justice

- a. Trial Magistrate delivered judgment
- b. Appeal and judgment upheld by the High
- c. Notice of appeal to High Court withdrawn
- d. Conduct of appealant/applicant to defeat
- e. Application dismissed.

7. **Case Law**

NIL

8. **Advocates**

- i. A. M. Onyancha instructed by M/S Migos Ogamba & co Advocates for the appealant/applicant/original defendant
- ii. K. M Marete instructed by M/s Mutembei Gichuru & co. Advocates for Respondent/original plaintiff/deed holder

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 12 OF 2003

(Being an appeal from the decision and decree of Hon. Muriuki Mugo, Esq., the District Magistrate II (Prof) at Garissa Law Courts in RMCC 33/02 delivered on 8 January 2003)

AHMED ALI GURE..... APPELLANT/APPLICANT
(ORIGINAL DEFENDANT)

VERSUS

DAUDI SETHE DIFF.....RESPONDENT/RESPONDENT
(ORIGINAL PLAINTIFF)

RULING NO. 3

(Seeking courts direction under
Section 3, 3a Civil Procedure Act
and Order L Rule 1 Civil Procedure Rules)

I. BACKGROUND

1. I have before me an application dated 18 February 2010 brought under Section 3, 3A of the Civil Procedure Act and Order L Rule 1 of the Civil Procedure Rules.

2. Ahmed Ali Gure, the Original Defendant in the Lower Courts was dissatisfied with the decision of a trial magistrate in the subordinate courts at Garissa. He filed appeal to this High Court seeking orders to set aside the decision that declared the original plaintiff/respondent owner of a plot in which the original defendant /appeallant had encroached on. He was ordered to pull down the structure he began to construct in 1998. That judgment was delivered in the year 2003.

3. On appeal and upon hearing both parties, this court upheld the trial magistrate's decision by its judgment of 8 May 2008. The original defendant/appeallant filed an application dated 13 May 2008 for orders of:

- i. ***Leave to appeal against the decision***
- ii. ***Stay of execution***

4. This application was opposed.

5. The High court noted that no leave was required and that the appeallant could appeal to the Court of Appeal. The application for stay of execution was rejected on 26 June 2008.

6. I was then transferred out of Nairobi sometime in November 2008.

7. The original defendant/appeallant then filed an appeal to the Court of Appeal by way of a Notice. He then filed an application dated 8 April 2009, 13 July 2009 and 14 July 2009, seeking orders for stay. The application which came consecutively before Khamoni J were dismissed due to technicalities and struck out as being irregular. Not deterred, the defendant/original appeallant filed application 15 July 2009 seeking orders to review my judgment of 8 May 2008 and stay of execution. As I was not in the station, the application was heard by Mbogholi – Msagha J on a Preliminary Objection raised by the other party.

8. The court upheld the Preliminary Objection that the matter not only was res judicata but that the High Court was ***functus officio***. There was nothing left unless the appeallant sought redress in the Court of Appeal.

9. The Original Defendant/Appeallant filed a notice to withdraw the appeal to the Court of Appeal dated 17 June 2009.

10. An application of 18 February 2010 was thereafter filed by the Original Defendant/Appeallant under Section 3 and 3A and Order L Rule 1 Civil Procedure Rules, and under the courts inherent jurisdiction seeking orders

“1.

2. *That the court be pleased to give directions and or interpretation of the orders of the Hon. Lady Justice M. Ang’awa granted on 8 May 2008 together with the decree issued on 12 May 2008 thereon.*

3. *That status quo be maintained pending the hearing and determination [the] application.*

11. It is this application that is the subject of this ruling.

II. APPLICATION 18 FEBRUARY 2010

12. The grounds of which the application was brought was:

“1. *That the orders of 8 may 2008 [was] vague and ambiguous and incapable of being enforced equitably in the manner that it [had] been allowed.*”

13. During the submissions, the original defendants/applicants advocate **withdrew** this prayer stating that the orders were not vague nor ambiguous. He nonetheless relied on the second ground that:

2. ***“That there [was] no proper markings nor deed plans, beacon certificates and it is totally impossible to determine the extent of the applicant’s house on plot No. 2040 Garissa which may have encroached on the Respondent’s property as alleged.***

3. ***That it [was] in the interest of which justice and equity that the court give directions on how the aforesaid order is to be executed.”***

14. When this application came to court for hearing, I had been transferred back to Nairobi and the matter placed before me.

15. The application herein was opposed on grounds that the case had been heard and determined to its conclusion.

III. FINDINGS

16. This is a most unfortunate case. The original defendant/applicant/appeallant who brings this application has attempted to go back to the Physical Planning in Nairobi with a view of challenging this court’s judgment on February 2009. This is a form of defeating the end of justice and making the decision and findings of a court of no consequences.

17. First and foremost, the Lower court, through the trial magistrate gave both parties a full hearing. The trial magistrate heard the evidence of the surveyor from the government and the whole court visited the site. The court gave judgment that:-

“a. The plaintiff was declared and entitled to and is the legal allottee of a plot No.29 in PDP NO.326/96/31 in Garissa within Garissa Town... that the area frontage of it is a road reserve and should remain as such and that the defendant is a mere trespasser therein.

b. An order by way of mandatory injunction that the defendant do demolish and pull down to ground level the illegal structures standing on adjacent to plot No.29 in PDP No.326/96/31 at Garissa in Garissa Town.

c. An injunction restraining the defendant whether by himself or by his servants, agents or otherwise howsoever from encroaching and or trespassing and or taking possession moving into, occupying, developing and constructing and structures whatsoever on adjacent to plot No.29 in PDP NO.326/96/31 within Garissa Town.

d. General damages

e. costs of this suit.

f. Further or any other relief this Honourable Court may deem fit and appropriate.

18. The High Court upheld the judgment. The original defendant/appeallant withdrew his appeal at the Court of Appeal. This meant that the court decision of the trial magistrate upheld by the High Court stands and is the final orders of the court.

19. Being aware of this , the original defendant/appeallant sues the Municipality council of Garissa on the issue of the Part Development Plan (PDP), takes to task the Planning Officer/Director in the Physical Planning Department at Nairobi to change the plans and or so recommend.

20. This can only be seen as an attempt to circumvent the court's orders/judgment.

21. There is no vague or ambiguous orders given that required to be interpreted. This is not correct. The true position of this matter is that this court is *functus officio*. That the orders of the court must be executed forthwith and without the delay of 14 years which is unacceptable. (The applicant had constructed during the time the case was pending). This means that if a person who follows the law is deprived of the fruit of their judgment, then the law becomes of no consequences.

22. This application be and is hereby dismissed and struck out with costs at a higher scale to the original plaintiff/respondent to be paid by the original defendant/applicant.

23. I hereby order that the court orders be executed and obeyed according to law under the supervision of the Kenya Police, Officer in Charge within 7 days of today's date. That the demolition be done by the original plaintiff/respondent at the cost of the original defendant/appeallant due to the inordinate delays.

24. I further order that a copy of the trial judgment court, the High Court, Ruling No. 1, No. 2 and this Ruling No.3 be served upon the Commission of Lands and Director Physical Planning to ensure that the court's orders are complied with.

Dated this 22nd day of March 2011 at Nairobi

**M. ANG'AWA
JUDGE**

Advocates

- i. *A. M. Onyancha instructed by M/S Migos Ogamba & Co Advocates for the appeallant/applicant/original defendant*
- ii. *K. M Marete instructed by M/s Mutembei Gichuru & Co. Advocates for Respondent/original plaintiff/decrece holder*