



CIVIL

- *Courts should be guided by the principle that there must be an end to litigation.*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL CASE NO. 44 OF 2011

GATUGI MUGIRAAPPELLANT

VERSUS

LAWRENCE MIRITI BAKARI1ST RESPONDENT

ONESMUS GITOBU M'NKANATA2ND RESPONDENT

RULING

The appellant has filed this appeal against the ruling of 18th March 2011 in Meru CMCC No. 7134 of 1992. Pending the hearing and the determination of this appeal the appellant seeks by Notice of Motion dated 13th April 2011 for orders of stay of execution of the order made on 18th March 2011 in that lower court case. He also seeks an order of inhibition to issue in respect of parcel nos. *Igoji/Kinoro/1324 and 1325 (suit properties)*. The affidavit in support of the Notice of Motion is very scanty and not informative at all. Whether that lack of sufficient information was meant to lead the court in the first instance to grant temporary orders is not clear at this stage. I have however found that the appellant's failure to make disclosure of this very protracted matter shows lack of *bona fide*, that is, good faith. Good faith is defined in the web page free dictionary as:-

“An abstract and comprehensive term that encompasses a sincere belief or motive without any malice or the desire to defraud others.”

To demonstrate the lack of information brought by the appellant I will reproduce his affidavit in support of his application as follows:-

2. ***That on 18/3/2011 orders of eviction were issued against me pursuant to the application dated 16th/12/2009 in Meru CMCC No. 714 of 1992. (Annexed hereto and marked “GM I” is a copy of the application).***

3. ***That aggrieved by the orders I have filed the current appeal.***
4. ***That before the application was heard I had raised preliminary objection challenging its competency by preliminary objection dated 26/1/2010. (Annexed hereto and marked "GM 2" I is copy of the preliminary objection).***
5. ***That when my preliminary objection was dismissed I filed Meru HCCA No. 130 of 2010 against the dismissal. (Annexed hereto and marked "GM 3" is a copy of the memorandum of appeal).***
6. ***That further, I had filed an application for stay of proceedings pending the hearing and determination of that appeal. (Annexed hereto and marked "GM 4" is a copy of the application).***
7. ***That I had duly opposed the application through grounds of opposition. (Annexed hereto and marked "GM 5" is a copy of the grounds).***
8. ***That I have filed this application without any undue delay.***
9. ***That unless my application is allowed I stand to suffer substantial loss by being evicted from, my ancestral land on which I have lived and developed since my childhood.***
10. ***That it is important to preserve the suit parcels of land through inhibition orders so that the appeal is not rendered nugatory.***

It was the 1st respondent's replying affidavit that informed the court the background of this matter. The background is that the 2nd respondent was successful against the appellant in the lower court case, that is, Meru CMCC No. 714 of 1992. He executed for the costs that were awarded to him by seeking to attach and sell the appellant's two properties, that is, the suit properties. The properties were sold by public auction through the court after the conditions of sale were approved by the court. The appellant's attempt to set aside that sale was unsuccessful as evidenced by that court's ruling dated 22nd October 2004. The appellant appealed against that ruling in Meru High Court Civil Appeal No. 21 of 2006. The appeal was dismissed on 7th November 2008. The appellant filed another appeal against that dismissal albeit belatedly about three or so days. The appellant failed to file his record of appeal in time and therefore sought leave from the Court of Appeal for the notice and record of appeal to be allowed to be filed out of time. The matter was heard and a ruling was delivered by Nyamu J.A. on 24th June 2010 in Civil application NAI 371 of 2007 which in part the learned judge stated as follows:-

"Turning to the requirement of prejudice I have taken not account the fact that prima facie the 2nd respondent is a purchaser for value who has had a title in his name since 1995 and that title stems from final judgments of the two courts below.

In my view, these two considerations do reflect some prejudice to the decree hold who has been denied finality since 1993 and the purchase for value, (who has in some past decisions being described as the darling of the court) the 2nd respondent has also been kept away from properties registered in his name since 1995. All in all, even if I were to determine this matter solely on the accepted factors under rule 4 my inclination would be to reject the application since the delay of one year one month has not been satisfactorily explained and in any event it is inordinate.

As stated above, I am conscious of the need of the court to have regard to the requirements of the overriding objective when exercising its powers under this Court's Rules and the provisions of the Appellate Jurisdiction Act so as to give effect to the overriding objective. Accordingly, in the circumstances described above, I cannot possibly give effect to the 02 principle by granting the application because the delay of one year one month is patently inordinate. In my view it goes counter to the 02 in that it would cause further delay and enhance costs."

It is after that ruling was delivered that the 1st respondent seems to have activated the hearing of his application dated 16th December 2009. That application was before the Chief Magistrate Court. By that application, the 1st respondent who is the registered owner of the suit properties sought an order of eviction of the appellant and all his family members. The ruling that was delivered by the lower court on 18th March 2011 is the subject of this appeal. I can only guess the terms of that ruling because the appellant did not attach it nor did he attach the extracted order. But from the tenor of the memorandum of appeal filed by the appellant, it does seem that the magistrate court acceded to the 1st respondent's application. It is the terms of that ruling that the appellant seeks stay. When the Notice of Motion dated 13th April 2011 came for hearing before me the learned counsel for the appellant Mr. Mwenda Mwarania based his argument on two broad areas. The first area was that the 1st respondent's enforcement of the lower court's decree was time barred by virtue of section 4 (4) of the Limitations of Actions Act Cap 22. Further, that the 1st respondent's application is also time barred by virtue of section 7 of the same Act. In so far as section 4 (4) of Cap 22 is concerned, it forbids the execution of a judgment after 12 years have passed. That section provides as follows:-

"4 (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."

Although what is before me is an application pending the determination of the appeal bearing in mind the arguments raised before me I find that in order to deliver this ruling I will make to delve more deeply into the issues raised. On the issue whether the order of eviction is caught by the provisions of section 4 (4) of Cap 22 the answer lies in my view, in section 51 of the Civil Procedure Act Cap 21. That section provides as follows:-

"51. Where the court is satisfied that the holder of a decree for the possession of immovable property, or that the purchaser of immovable property sold in execution of a decree, has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some other persons in his behalf, and that such resistance or obstruction was without any just cause, the court may, at the instance of the decree-holder or purchaser, order the judgment debtor or such other person to be detained in prison for a term which may extend to thirty days, and may further direct that the decree-holder or purchaser be put in possession of the property."

The situation the first respondent finds himself in is that he purchased the suit properties when the decree of the lower court was executed. In my view, the decree of the lower court was executed when the suit properties were sold by public auction. It therefore follows that section 4 (4) of Cap 22 does not bar the eviction of the appellant. Similarly, I find that the action of eviction is not barred by section 7 of Cap 22. That section forbids an action being filed by a registered owner of a property after the expiry of 12 years from the date when the right of action accrued to him. The application for eviction of the appellant filed before the lower court in my view, was not an action but was an enforcement of an order of the court, that is, the order of sale of the suit properties. The appellant secondly argued that the 1st

respondent's application in the lower court for eviction should not have been entertained by the magistrate because the power to order eviction is vested in the Land Dispute Tribunal under section 3 of the Land Dispute Tribunal Act. That section provides as follows:-

“3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to-

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land

Shall be heard and determined by a Tribunal established under section 4.”

Section 3 (9) of that Act also provides as follows:-

“Notwithstanding any other written law, no magistrate court shall have or exercise jurisdiction of power in cases involving issues set out in paragraphs (a), 2(c) of(1).”

In other words, that section forbids the magistrate court hearing matters falling under section 3 quoted above. The appellant in my view was wrong in his submissions. No power is donated to the tribunal under section 3 (1) to order eviction. The power to order eviction therefore is available to the magistrate. The appellant additionally argued that he had acquired an interest on the suit properties because of his prolonged occupation of the same. The 1st respondent became the registered owner of those properties in 1995. Before then and since then the appellant and his family have continued to be in possession of the suit properties. In my view, however, the appellant has not, and I repeat, has not laid any claim before any court that he has acquired an interest in that land. That being so, the authority he relied upon, that is, **Gerishon Muindi Baruthi vs. Willays Gatinku Mukobwa and another** Civil Appeal No. 98 of 1998 does not assist him. It does not assist him because his claim that he has acquired an interest in the land remains a theory. On the whole, the appellant in filing the present application is in my view trying to delay the day of reckoning. In this regard, I will refer to the case **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 3 Others** Civil Application No. NAI 307 of 2003 [154/2003 UR] where Omolo J.A. discussed the principles which should guide the court when hearing disputes. Those principles are useful to consider in the light of this long protracted matter. He stated thus:-

“I must start this ruling by pointing out that two conflicting principles, both of great importance to those who seek the decisions of the courts on various issues, are involved in the decision we are called upon to make in the application before us. Those two principles are:-

1. That there ought to and must be an end to litigation; and

2. That justice must be done and be seen to have been done in each case that comes before the courts for determination.

The courts in the commonwealth have readily recognized that the two principles must somehow be harmonized in each particular litigation win which their application is brought into issue. In **Taylor & Ano. Vs. Lawrence & Ano** [2002] 2 ALL E.R. 353, the Lord Chief Justice Woolf, tracing the origins of the two principles, cited the speech of Lord Wilberforce in **Amphill Peerage Case** [1976] 2 ALL E.R. 411 and there Lord Wilberforce is recorded as saying:-

English law, and it is safe to say, all comparable systems, place high in the category of essential principles that which requires that limits be placed on the right of citizens to open or to reopen disputes. The principle which we find in the (Legitimacy Declaration Act 1858) is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognizes, be imperfect; the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further enquiry. It is said that in doing this, the law is preferring justice to truth. That may be so; these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and there are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals; so the law, exceptionally, allows appeals out of time; so the law still more exceptionally allows judgments to be attacked on the ground of fraud; so limitation periods may, exceptionally be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases where the facts justifying them can be strictly proved.

In my view, and with great respect, this citation sets out the basis for the long established principle that there ought to and must be an end to litigation over a particular issue.”

Even though the ruling of the lower court was delivered on 18th March 2011 the appellant waited until a day before the Easter High Court Vacation commenced, that is, 13th April 2011 to file his present application. That delay of filing his application and his appeal has not been explained. With all that in mind, I find that the Notice of Motion dated 13th April 2011 has no merit and is dismissed with costs to the 1st respondent.

Dated, signed and delivered at Meru this 21st day of April 2011.

**MARY KASANGO
JUDGE**