REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1983 OF 1980

MBOGO GATUIKU.....PLAINTIFF/ RESPONDENT

VERSUS

1. DANSON MWANIKI
2. DAVID ROBINS GITAU
3. ATTORNEY GENERAL.....DEFENDANT/ APPLICANTS

RULING

Coram: Mwera J.
Gichohi for Plaintiff/Respondent
Isindu for 2nd Defendant/Applicant
Court Clerk Njoroge

The 2nd defendant herein (David Robins Gitau) moved the court on 13.4.11 to grant orders under several provisions of the Civil Procedure Rules, the Civil Procedure Act and the Registered Land Act (RLA). His lawyer, Mr. B. Isindu, got leave to come on record and argue the prayers under Order 40 rules 1, 4, Order 12 rules 2, 7 of the Civil Procedure Rules, sections 3A, 63 (c) (e) of Civil Procedure Act and sections 128, 129 of Registered Land Act (RLA). The prayers were:

(i) that the plaintiff be restrained from any way dealing with 3 parcels number LOC. 8/GATARA/141, LOC 8/GATARA/1132 & 133;

(ii) that there be a review to set aside or vary the court's ***ex parte*** orders/decree of 22.05.1990;

(iii) that an inhibition do issue regarding dealings with the three parcels of land in (i) above; and

(iv) that the registration of transfer from the 2nd defendant (David Robins Gitau) to Mbogo Gatuiku (or Gatwiku) in respect of Gatara/141 whose subdivision gave birth to GATARA/1132, 1133, 1134, 1135 be nullified and the land register accordingly rectified.

Some 5 grounds, with ground 2 split in several sub-grounds, bore the following: that the 2nd defendant/applicant purchased from the 1st defendant and was registered over land no. LOC. 8/GATARA/141, the suit land in 1971. Then in March 2011 he found out that the plaintiff had had the suit land transferred to himself following an ***ex parte*** order of this court dated 22.05.90, following his motion dated 16.01.90 which was never served on the applicant. The transfer was not a result of trial of the suit herein except that the application dated 16.01.90 went on without proof that it had been served. That all the time the plaintiff had M/s Muthoga, Gaturu & Co Advocate on record and had at no time applied to act in person and so could not himself conduct the proceedings of 22/05/90, now under review. On that day the plaintiff placed before the court a lower court judgement dated 30/06/72 (in SRM CC 2119/71) on whose strength the land over which the applicant had been registered earlier, was given to him. That the lower court decision could not be sustained in these proceedings because when SRM CC 2119/71 was filed in the RM's Court at Sheria House, it transpired that that court had no jurisdiction to handle the case. As such, that case was a nullity and could not be transferred to this court to be acted upon. In any event the case was ***res judicata***. Further that the execution that followed was irregular because costs had never been taxed; no notice of entry of judgement was served on the applicant; no application to execute was sought and granted and the local land board consent was not sought to effect the disputed transfer. All the above thus constituted an error and the face of the record, justifying the present application for review. And that in any case the 2nd defendant's defence raised triable issues. The plaintiff had subdivided the suit land and if not checked he would deprive the applicant of his rights.

The supporting affidavit by the applicant then expanded on the grounds above. That at the time he purchased the suit land from the 1st defendant, it had no caution or inhibition to evidence that the plaintiff had an interest in it. Then in 1976 the plaintiff sued the 2nd defendant in MURANGA SRM CC 2119/71 (which was transferred to Sheria House SRM CC 3304/76, then to this court). He never saw any decree from Muranga court. His lawyers then were M/s Gautama & Kibuchi Advocates. When he failed to trace that firm, he took on his present counsel, Mr. Isindu. That the applicant knew that the 1st defendant died many years ago whereby the claim against him stood abated.

Then:

" 7. THAT in March 2011, I went to the lands office at Muranga to check on the records in respect of the suit land I was surprised to find that the plaintiff had on or about 14.05.2003 had (sic) the title transferred from me to himself pursuant to a decree of this Honourable Court and had on 2.03.2011 caused the land to be subdivided into two portions: …… LOC 8/GATARA/1132 & 1133,"

whose green card was exhibited (DRh 4). That is how he instructed counsel who advised him on the major aspects set out in the grounds (above) as constituting irregularities. It was added that even if there was a judgement at Muranga (Sheri House?) Court dated 30/06/72, a decree thereof could not be executed after 12 years which expired on/about 30/06/84. So the court ought to review its orders of 22/05/90 because of that error on the face of the record. If the plaintiff had any contractual interest in the land all that was extinguished when the 2nd defendant bought the suit land for value without notice. Then the **Muranga** decree expired before execution and so the court could not grant the prayers in the plaint, which was a fraud on the 2nd defendant. And in any case no interest could pass in absence of a land control board consent as the case was here – hence this application.

When the court granted Mr. Isindu leave to come on record it also restrained any dealing over the suit

land. M/s Muthoga Gaturu Advocates (for the plaintiff) and the A. G. for the 3rd defendant were duly served with the application, and M/s Gichohi & Co. Advocate filed a notice of appointment on 9.5.11. It is not clear if that firm of lawyers complied with Order 9 rule 9 of the Civil Procedure Rules but be that as it may.

A replying affidavit by the plaintiff followed on 2.06.11. He termed the 2nd defendant's application misconceived and being an abuse of the court process, coming 21 years after the orders. Such would prejudice the plaintiff. No new evidence had come to the fore to warrant this application. The plaintiff was now the registered owner of the suit land and with that, the matter was a closed chapter. He had even subdivided the land. He narrated that the land was initially registered in the name of his brother, the 1st defendant, who later sold it to him in 1964.The plaintiff had resided on the land since without disturbance form the 2nd defendant or his late brother. When that brother tried to rescind the sale, the plaintiff sued him in 1970:

" …… this being Civil Case No. 2112 of 1971 at the Resident Magistrate's Court in Nairobi where the court ruled in my favour and ordered that I be registered as the owner of the parcel No. LOC. 8/Gatara/141,"

and the judgment in that cause was exhibited. That when the case was going on, the plaintiff paid for an inhibition to be noted on the title of the suit land. The local land registrar did not effect it. The now deceased 1st defendant, with the 2nd defendant had the land registered in the latter's name on 2.2.1972. When the plaintiff started in June 1972 to execute his judgement, he discovered that his inhibition had not been registered against the suit plot and the land had gone to the 2nd defendant. Thereafter the land registrar (read the 3rd defendant) did not cooperate to enable the plaintiff to lodge a caution against the title. Complaining about the unregistered prohibitory order to the Chief Land Registrar (see ann. MG 3, 4), the Muranga land registrar admitted on 20/2/73 that the prohibitory order issued by the Muranga court was received on 28/10/71, duly entered in the register but was not registered. It could not be traced. Then on 2.2.72 the 2nd defendant was registered as proprietor of the suit land, by virtue of purchase and the previous owners/seller's name, Mwaniki Gatuiku, was crossed out. So all in all the registration of the 2nd defendant was in contravention of the existing court prohibitory order which both the 1st and 2nd defendants well knew of. Therefore their acts were null and void. That state of things led to the filing of this suit to annul the transfer between the 1st and 2nd defendants. That this suit began as Sheria House RMCC 3304/76 which was then transferred to this court by its order of 18.01.79 (MG.5) – hence this suit. Then on 22.5.90 he appeared before this court (as currently constituted) and having served, by prepaid post all those involved, who had not shown up, he proceeded to argue his application by presenting the judgement in RMCC 2119/7/(MG2) and the court directed the transfer of the suit land to him, accordingly. But after the decree was extracted in 1991, the plaintiff was not able to execute it due to the acts of the 2nd defendant. After 22/5/90 even being aware that the case had gone in favour of the plaintiff, the 2nd defendant did not appeal.

It was not true that the 2nd defendant only knew of this matter in 2011 And the plaintiff annexed correspondences (MG 7) to the effect that the Muranga land registrar was not cooperative in issuing the title to him and that on 6.4.98 the Muranga land registrar directed the 2nd defendant that he should surrender the title he held to effect the transfer and registration of the land in the name of the plaintiff, further to the orders in HCCC 1983/80. Also exhibited was an application to transfer that land directed to Kahuro Land Control Board together with the due consent (MG. 8 (a) (b)). The transfer was signed by the deputy registrar on 4.3.98. The 2nd defendant had never stepped into the subject land to assert ownership. It was denied that the plaintiff ever sued the applicant in a Muranga court. His motion dated 16.1.90 was properly entertained on 25/5/90 and due orders followed when the RM's judgement in RMCC 2119/71 was produced before court. The defendants were served but did not appear. By that

25/5/90 the plaintiff had fired his lawyers M/s Muthoga, Gathuru, and so he represented himself before court. The registration of the 2nd defendant took place 4 months after the Sheria House judgement delivered on 30/6/72, and in defiance of the prohibitory order that was already in place. Executing the decree followed. This suit was filed in 1980, to enforce that decree. There was no time – bar. So there was no error on the face of the record. The plaintiff's rights over the land were never extinguished because all the time there was a prohibitory/inhibition order in place and litigation was on at Nairobi, never at Muranga.

The 2nd defendant filed a supplementary affidavit in response to the replying affidavit, acknowledging that the matter had taken 21 years to be visited by a review application. Then court was now told that the applicant had had ill health following serious case of alcoholism. So he could not pursue his personal affairs. Then he produced Dr. Mucheru's letter dated 3.6.11 to state that. Nonetheless it was still maintained that the plaintiff did not serve a mandatory notification of entry of judgment or notice to show cause before execution (see Order 22 rules 6, 18 20 Civil Procedure Rules). The applicant did not move onto the suit land because the plaintiff threatened him with violence, not to do so. Then he filed this suit in 1976. He purchased the land for valuable consideration without notice.

The applicant claimed that he was a stranger to the bulk of the paragraphs in the replying affidavit – in all, from paragraph 7 to 29, inclusive. Then both sides submitted. The 3rd defendant counsel opted not to, stating that that issue was basically between the 2nd defendant and the plaintiff. Essentially each side reiterated what was in the affidavits.

On behalf of the 2nd defendant/applicant, it was denied that the plaintiff had interest in the land. And referring to the Sheria House judgement it was stated that the 1st defendant would either transfer the land to the plaintiff or refund his sh. 6000/= with interest (RMCC 2119/71). It was added that instead of extracting and executing a decree in that cause, he filed RMCC 3304/76 which was later transferred to this court and it became HCCC 1983/80. The court was urged to consider that the cause in RMCC 2119/71 had became ***res judicata*** and so RMCC 3304/76:
"……**ought not to have been entertained by the court in the first place because it was *res judicata*."**

Yes. That ***res judicata*** aspect sounds worth arguing but if it can be determined right away, this court cannot at this stage be asked to rule on that on the simple basis that the ruling in MISC APP. No. 147/78 by which RMCC 3304/76 was transferred to this court, is not before court for review, variation or setting aside. The order was validly given on 18/1/79 by the High Court. It remains in place.

It was added that the 21 year delay to bring this application was due to the ill health of the 2nd defendant/applicant and a medical report had been filed for consideration. That from 30/6/72 when judgement was delivered in RMCC 2119/71, a decree that was extracted following this court's orders of 22.5.90, could not be executed. More than 12 years had run (see section 4 (4) of Limitations of Actions Act) and so could not be executed.

Again, it was repeated that the plaintiff did not apply to act in person in place of his lawyers M/s Muthoga, Gathuru so as to validly argue the application that was heard on 22.5.90. There was no regular trial on that day either.

And that the plaintiff did not place before the court evidence of serving notices for the proceedings of 22.5.90 because the postage receipts did not state what was posted. This was substituted service for which no leave had been sought and granted. And that with the 1st defendant having died before those proceedings on 22.5.90, and with no legal representative to take his place, the matter ought not to have gone on. This constituted an error on the face of the record. A decree could not be extracted from the orders of 22.5.90 and a good defence was on record. In the circumstances and in the light of the principle

that a court ought to do justice to the parties before it, the orders sought are warranted. And when exercising its discretion, the court should always have the principles of justice in mind. With other points put forth, Mr. Isindu ended that submission on behalf of the 2nd defendant ***without appending his signature!***

As said earlier, the plaintiff similarly went over what was contained in the affidavits and the history of the case, coursing its way from the Resident Magistrate courts at Nairobi to the High Court and then the ruling of 22.5.90 in favour of the plaintiff. That he then encountered several difficulties on the way to get the land registered in his name until that was done on 14.5.03. Since 22.5.90 the orders/decree remained unchallenged by appeal or otherwise. Before that hearing, service was properly effected but the respondents did not appear. He had earlier withdrawn instructions from M/s Muthoga, Gathuru Advocates and on two occasions he addressed the court in person. Although the judgement in RMCC 2119/71 was delivered on 30.6.72, the 2nd defendant had managed to get registered over the suit land earlier ***but*** contrary to the prohibitory order he knew had been issued by a Muranga court in October 1971, although the land registrar had not registered it. He had misplaced it.

That this suit was clearly for enforcing the judgement in RMCC 2119/71 wherein the plaintiff was suing his brother on account of contract of sale of the suit land, while SRM CC 3304/76 was a declaration that the parcel of land in question had been given to the plaintiff in SRMCC 2119/71. Therefore there could be no case of ***res judicata.***

Regarding the extracting of a decree, such could not follow the orders of 22.5.90 where the court was merely stating that the judgement/decree in SRM CC 2119/71 i.e. between the plaintiff and his brother, be enforced by actions of the land registrar and the deputy registrar. But then the 2nd defendant had already been registered over the land in a way that the plaintiff thought was fraught with fraud and irregular conduct between the 2nd defendant and the lands office (3rd defendant). So taxation could only be about the notice of motion that was before court. Only in executing the lower court judgement would it be necessary to tax costs first.

There was no new evidence/material discovered to warrant a review and the applicant had not demonstrated what could be an error on the face of the record or any other sufficient reason (Order 45 rule (1) Civil Procedure Rules). The application had been made after an unreasonable delay without explanation. The explanation of ill health due to alcoholism was not credible with the medical report being lately brought on record via a supplementary affidavit. It was only meant to suit these proceedings. And that the medical discharges referred to in that report related to years 2007 and 2008 only – not earlier. The court should exercise its discretion in proceedings like this with due regard to justice to the parties before it. Although there was a defence on record about a purchaser for value, the plaintiff had lived on the parcel of land for long carrying out extensive developments. Both sides cited cases which this court may revert to as and when needed.

The 2nd defendant/applicant replied to the plaintiffs submissions that the doctor's report about his ailment was reliable and then going back to assert that the hearing of the notice of 16.1.90 on 22/5/90 was not served. And then the issues of intention to act in person, absence of prohibitory order on the land file, and that the applicant bought the land etc etc.

To determine this motion, the court focuses on the law invoked and the implications of the submissions ***vis a vis*** the prayers.

As set out at the beginning, the 2nd defendant/applicant invoked the powers donated by Order 9 rule 9, Civil Procedure Rules, to have Mr. Isindu take over the conduct of this matter from M/s Gautama & Kibuchi Advocates who were on record for the applicant until the orders of 22.5.90 which in essence translated in the plaintiff being registered over the suit property. Such was as good as a judgement, so the

applicant opined, and accordingly he needed leave for Mr. B. Isindu to be on record accordingly. This was granted (prayer (b)). There is a prayer that the plaintiff should be restrained from disposing of the suit land (prayer (i)). This fell under Order 40 rules 1, 4 Civil Procedure Rules. Then Order 12 rules 2, 7 Civil Procedure Rules was invoked about the court hearing a matter ***ex parte*** where the plaintiff alone appears on the set date and the power of the court to set aside such an ***ex parte*** order.

Calling into play sections 3A, 63 (c) (e) of the Civil Procedure Rules is to invoke this court's residual powers to do justice in a matter and to avoid abuse of its process. Then section 63 Civil Procedure Act which in essence sets out the types of proceedings necessary for the effectuating of section 3A. The applicant also referred to sections 128, 129 RLA which give powers to the court to issue orders of inhibition in regard to registered dealings (prayer (iii)). The court was also asked to nullify the transfer to and registration of the suit land in favour of the plaintiff and for the land register to be duly rectified (prayer (iv). But then there was this prayer (iii) for review of the ***ex parte*** orders of 22.5.90. It read as follows in the motion:

" (d) That this Honourable Court be pleased to review, vary and/or set aside the ex parte Order and Decree made on 22/05/1990."

Although the specific provisions of law in the Civil Procedure Act and Civil Procedure Rules were not stated in the heading of the motion, from the affidavits, submissions and annextures placed before the court, it was manifestly clear that the parties had section 80 Civil Procedure Act and Order 45 Civil Procedure Rules in mind. There were arguments about errors being on the face of the record, constituted by this or that commission or omission, the issue of bringing this application after a long delay of 22 or so years since the orders of 22.5.90 etc. These fell in the ambit of Order 45 rule 1 Civil Procedure Rules whose pertinent part reads:

"1. 91) 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 the exercise of the 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 judgement to the court which passed the decree or made the order without unreasonable delay."

(2) ……"

The order of 22/5/90 which the 2nd defendant/applicant wishes to be reviewed, varied and or set aside followed on ***ex parte*** proceeding where the plaintiff in person filed a notice of motion dated 16.1.90. He took the hearing date on 4.4.90. Prior to that he had appeared before Owuor J. as she was then, again in person. During the hearing of this application it was posited that although the plaintiff appeared 3 times before court on 21.2.90, 4.4.90 and on 22.5.90 in person, he had M/s Muthoga, Gathuru Advocates on record acting for him. There was no evidence that he applied to act in person, yet he did just that on the 3 occasions. Thus the applicant saw this as one of the errors apparent on the face of the record – the court

hearing a party in person when he once had counsel whom he did not procedurally remove from the record. There are other aspects of such errors which the court will come to presently.

On this 22/5/90 the plaintiff told the court that he had sent hearing notices by registered letters **(another perceived error)** on 7.5.90 to all the defendants. They had not been coming in the past. The mailing receipts were shown to court. As for the 1st defendant, Danson Mwaniki Gatuiku, the court heard that he died (**yet another error on the face)** andhis wife was afflicted with mental illness. She could do nothing in the matter and there had been no appeal against the Muranga decision (it turned out to have been at Sheria House court) which gave the land to him. Having been shown the certified copy of the SRM CC 2119/71, the court found that the cause was completed on 30/6/72 with the judgement that the land in issue be transferred to the plaintiff. The court then ordered that the land registrar do effect the transfer and in case of any problem the registrar of the court to sign the transfer forms. The plaintiff then, after several hitches, got an application for consent of the land control board (Kahuro) signed (ann. MG 8 (a)) signed by the court registrar. The land control board gave the consent (MG 8 (b)) and the transfer was effected with the plaintiff getting a title deed dated 14.5.2003. As noted earlier the 2nd defendant got title to this same land somewhere in February 1972 before SRMCC 2119/71 was determined on 30.6.72 **BUT** when the court at Muranga had issued a prohibitory order (inhibition) on 28/10/71 which the Muranga land registrar had failed to record. So in essence the 2nd defendant got registered over the suit property while there was a prohibitory order in place which the plaintiff claims the 2nd defendant knew of. He did not refute that fact. But be that as it may. Back to the law governing review of decree or order as per Order 45 Civil Procedure Rules.

These are the governing factors:

a) a party who is aggrieved by a decree or order which can be appealed against or not, and

b) that party has since the decree/order discovered new and important matter or evidence not available at the time of the decree/order; or

c) on account of some mistake or error apparent on the face of the record; or

d) for any other sufficient reason,

e) that party may seek a **review without unreasonable delay.**

But even with whatever factor invoked by the aggrieved party, the court still has to exercise its discretion with the interest of doing justice to the parties in mind.

The 2nd defendant/applicant hinged his plea for a review principally on the basis of errors apparent on the face of the record and that interest of justice demanded that the orders of 22.5.90 be reviewed. The errors were listed as ***res judciata***: the matter having been determined in RMCCC 2119/71 it did not have to be litigated again in RMCC 3304/76 which was transferred to this court to become HCCC 1983/80. The other point was that of limitation of the action. That from the judgement in RMCC 2119/71 issued on 30.6.72 this court could not cause a decree to issue following its orders of 22.5.90 to be executed. It was time – barred in the light of section 4 (4) of Cap 22. The other point constituting an error on the face of the court was said to be that the plaintiff prosecuted his motion on 22.5.90 in person, while in fact he had a firm of lawyers on record. He had not obtained the court's leave to act in person. The other error was

said to be of the kind that no trial took place on 22.5.90 to enable the plaintiff to obtain a decree. Further that, the plaintiff did not effect proper service of hearing notices to all parties. He purported to do this by way of registered letters, yet there was no affidavit of service filed (Order 5 rules 15, 17 Civil Procedure Rules). And more, that the 1st defendant having died before the proceedings in question, the plaintiff did not move to substitute him first. And that there was a good defence on record. All the foregoing are arguable points and the plaintiff endeavoured to answer them as best as he could. But before the court moves there, it should determine first if this application was **brought without unreasonable delay**.

The order/ruling was issued on 22.5.90. This application for review was brought on 13.4.11 – about 21 years later. Has the 2nd defendant sufficiently explained why he came to court after that period of time? He began by deponing in the supporting affidavit as reproduced above:

"7. **That in March 2011, I went to the lands Office at Muranga to check on the records in respect of the suit land and I was surprised to find that the plaintiff on or about 14/05/03 had the title transferred from me to himself pursuant to a decree of this Honourable Court and had on 2/3/2011 caused the land to be subdivided into two portions – Title Numbers Fort Hall (sic) LOC 8/GATARA/1132 & 1133 ……"**

After the plaintiff's replying affidavit put to question the delay in the issue, the applicant then filed a supplementary affidavit wherein he deponed, ***inter alia:***

"4**. That I became an alcoholic due to personal problems in my family and even suffered psychological and mental illness but I have since been rehabilitated and I have recovered, hence the efforts I am currently making to put my life and affairs in order."**

The applicant then exhibited a medical report by Dr. M. Mucheru, a consultant psychiatrist, dated 3/6/11. With it were discharge summaries from an institution called Radent Hospital between 08/9/07 to 16/01/08 and from Mathari Hospital for a period between 7/4/08 and 9/5/08. Dr. Mucheru did not say that he personally attended to the 2nd defendant at Radent, Mathari or anywhere else. But he opined that the patient should continue with medication.

The court though sympathising with the 2nd defendant in this kind of ill health, was minded to agree with the plaintiff that apparently this report was made to fit these proceedings. Firstly, the applicant did not allude to such ailment in the initial affidavit. Secondly, the report was made after this application was filed and a reply to it made. Thirdly, Dr. Mucheru does not state if at any time he attended to the 2nd defendant and finally the period covered is around 2007 and 2008 – nothing from 22.5.90 to August 2007.

In sum this medical explanation the applicant has endeavoured to place before the court to explain why he has taken over 21 years to bring this review application, is rejected. It is not only
for
a long period of delay that a party needs to give an explanation. Even a day or two calls for an explanation. In this case and without going into the merits of the application, the court dismisses it on the basis that it took too long to file it. In the meantime the plaintiff has carried out developments on the subject land. With no better cause to overturn the whole thing at this point, this application is refused with costs.

Delivered on 30.6.11

J. W. MWERA

JUDGE