REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 5 OF 2009

VINCENT KIMANI::1ST APPLICANT

ARCADIUS NJORA CHEGE::2ND APPLICANT

ONESMUS BURUGU "C"::3RD APPLICANT

VERSUS

MICHAEL NJORGE "B"::RESPONDENT

RULING

The appellant/applicant approached the seat of justice by way of a memorandum of appeal dated 27th day of January 2009 and filed the same date. The memo had five grounds summarized as "**failure to deliver the ruling in time contrary to law, a ruling was made before hearing the appellant, failed to take note of the fact that two decrees had been issued, by interpreting the judgement of Onyancha J wrongly as it never dealt with inheritance and that parties were not given a chance to argue out the issue that there were two decrees"**

On the appeal was anchored an application dated 18th day of May 2009, and filed on the 21st May 2009 whose single relief was a plea for stay of execution of the decree issued at Gatundu on the 21st day of January 2008 pending the hearing and determination of the appeal.

Njagi J heard parties on merit and delivered a ruling on the 16th day of September 2009, dismissing the application for the following reasons:-

1. The applicants have not spelt out what substantial loss may result unless the order is made.

2. The judge appreciated the likelihood of a party suffering substantial loss in land matters, but it was up to the parties to demonstrate to the court that substantial loss which the appellant/applicant had failed to do.

3. That it is a requirement that a claimant for such a relief has to seek the same without unreasonable delay. In the learned judges opinion the order were made on the 20th day of January 2009, and appeal commendably presented on 27th day of January 2009, in a period of one week, and the court had expected the appellant/applicant to move with speed to seek an order for stay . That it was not until 21st May 2009, when the application was presented and in the learned judges

opinion he was not able to say that the delay was reasonable.

4. **The last ingredients to be considered was the issue of security. The learned judge regretted that the appellants/applicant had not offered any security since this was obligatory under the relevant rules.**

The net result of the assessment by the learned judge was that, **"whereas he opined that the applicants had a cause for seeking stay pending appeal, they had eroded that cause by their failure to comply with the mandatory dictates of order XLI sub rule (2) by failing to demonstrate what substantial loss they will suffer coming to court after some unreasonable delay and failing to offer any security."**

The appellant/applicant became dissatisfied with that ruling and moved to the same court and filed an application dated 15th October 2009 and filed on the 27th day of October 2009 seeking 4 reliefs namely:-

1. **Spent**

2. **That the Honourable court be pleased to review and vary its order dated 16th September 2009.**

3. **That the honourable court be pleased to issue such further orders that it deems convenience.**

4. **That costs be provided for"**

There are grounds in the body of the application summarized as there being in existence of important matter which has come to light, they have exercised due diligence in presenting the application for review, review is sought in the best interests of justice, there is threat to subdivide the land and this may be transferred to 3rd parties to the detriment of beneficiaries and if review is not made and stay order granted, parties might suffer irreparable damage.

There is a supporting and a supplementary affidavit whose central theme is that, the court which heard the application giving rise to the ruling of 16/9/2009 did not have the benefit of scrutinizing certain documents relating to the following relevant issues:-

(a)On 7/10/1981 the respondent's brother had agreed by consent that he was satisfied with 4 acres.

(b)The ruling has disinherited the deponent and others.

(c)Another ruling was issued on the 20th day of July 1993 to clarify the ruling issued on the 10th day of July 1981.

(d)The mother of the respondent appealed against the ruling of clarification of 20/7/93 which was clarifying the consent of 10/7/81 which appeal was dismissed by Okubasu J on the 23rd October 1984.

(e)That two trustees were appointed namely one Burugu Chege and Vincent Kimani Chege.

(f) A decree was extracted which one Michael Njoroge objected to leading to the filing of appeal No. 912/93 which was rejected by Bosire J as he then was.

(g)An appeal from Bosire J's orders to the court of appeal was also dismissed by the court of appeal.

(h)Michael Njoroge went to Gatundu law courts and filed a fresh case which was dismissed leading to an appeal being filed to the high court from that decision which was dismissed by Onyancha J, on the 14th May 2007.

(i) That Michael Njoroge then used the ruling to extract the decree dated 21st July 2008 hence the need

to stop them from interfering with the suit land.

The Respondent filed a replying affidavit deponed by Michael Njoroge (B) on the 6th day of November 2009, and filed the same date. In summary these are the high lights:-

(a)Applicants have filed a notice of appeal against the same ruling and for this reason, review is not available to them.

(b)Applicants have not disclosed all orders made by Gatundu court for stay of execution.

(c)That there is only one decree a rising from the orders in the judgement of 10/7/1981 arising from the award of 9th April 1981 and confirmed as a judgement of the court on 10th July 1981.

(d)The said confirmation order was never appealed against and the documents relied upon by applicant are doctored.

(e)Arcadius Njora Chege is a beneficiary of a portion known as Ndarugu/Gathaiti 252(B) by the very confirmation of 10/7/1981 which he has not included in the application for stay.

(f) Contends that Onyancha J confirmed the confirmation of the award in the judge's ruling of 14th May 2007, which the applicant never appealed against.

(g)Since neither party appealed against the award, then they are bound by it more so when other judges beside Onyancha namely Okubasu and Bosire JJ as they were (now JAs) have also reaffirmed the award.

Parties filed written submissions and then gave oral high lights on the same. Those for the appellant/applicant are dated 11th December 2009 and filed on the 14th day of December 2009, and the following have been stressed:-

- They rely on the error because the decree of 21/1/2008 does not tally with the decree issued on the 10/7/1981 which had been confirmed by the D.O. writing a letter in 1993 and which letter was accepted by the court and later confirmed by Okubasu J and mentioned by Onyancha J in his judgement.

- The court is invited to take note of the chain of rulings in HCCA NO. 71/83 decided by Okubasu J as he then was now JA, Misc Applications No. 912/93 decided by Bosire J as he then was and now JA CA number 214/97 all of which go to show that there was an error in the decree of 10/7/81 amended by the decree of 20/7/93.

- The court also to note that Onyancha J heard the case in full and confirmed that no dependant was left out of the inheritance but the decree of 21/1/2008 appealed against has disinherited a total of 26 dependants.

- One Joseph Wathigari who is the source of the problems by complaining that he was given a small portion had expressed satisfaction of him being given four acres in the year 1981, which led to him being given 24 acres by the decree of 21/1/2008 and in the process disinheriting 26 family members.

- It is the applicants stand that, had these details been presented to Njagi J as at the time the learned judge made the orders sought to be reviewed, the learned judge would have been of a different view from the one he held when he dismissed the application for stay.

- The land subject of inheritance is said to measure 27 acres and if one person gets 24 acres and one acre is required to be surrendered to the county council, then that will mean that the rest of the members of the family will be disinherited.

- They have also established sufficient course and the court is invited to note that there are family

members who should receive justice and not injustice on account of each other.

- The court is invited to apply the overriding objective principle under sections 1A and 1B of the civil procedure rules.

- The move to execute after 27 years stand faulted as the same is irregular in the absence of them having sought leave to execute first.

The Respondent filed written submissions dated first of December 2009, and filed on the 9th day of December 2009, and supplementary submissions dated 15th day of March 2010, and filed the same date and then highlighted orally and the following points have been stressed:-

- Application dismissed had sought stay pending appeal. The same was dismissed because the applicant had not satisfied the criteria for granting stay pending appeal. They submit the same position prevails as no new ground has been introduced to support their plea for stay pending appeal.

- It is undisputed that upon delivery of the ruling sought to be reviewed, the applicants filed a notice of appeal and since there is an appeal in place by seeking review herein, they are inviting the court to sit on appeal of its own ruling.

- The court to note that this litigation has spanned a period of 29 years and for this reason this court should not prolong it any further.

- The genesis is of the litigation is the elders' award adopted in 1981 to which neither party raised complaint. It therefore follows that the applicant is guilty of inordinate delay in seeking the court's intervention.

- The court is urged to ignore submissions touching on the appeal because the court is not seized of the appeal at this stage.

- Contends the issue of limitation of actions Act cap 22 laws of Kenya arising in order to bar execution does not arise as the limitation of actions Act does not apply to succession proceedings and the court is invited to be guided by the provisions of section 4 of the same Act.

- The court is invited to distinguish the case law cited by the applicant and be guided by the case law cited by them.

- The miscellaneous amendment Act cited does not help the applicant as it cannot operate retrospective to affect transactions done under an Act of parliament passed many years back.

- Approval of the decree by the opposite party does not as such a procedure is only available at the high court level.

- Contends the court is functus officio and cannot revisit the issue as objection to the judgement of 10/7/1981 was ruled upon by Okubasu J on 23/10/84 which orders have not been upset and which were confirmed by Bosire J.

- Contends that once the elders award was adopted parties are caught by its content as there is no way the adoption can be undone a fact recognized by both Okubasu J and Bosire J as they were.

- Contends Onyancha J confirmed the judgement of the lower court and that of Okubasu J and Bosire J and reiterated that there will be no redistribution of the estate contrary to the judgment of 10/7/1981 which in the process locked out any objection to the judgement of 10/7/81 which had been entered in terms of the award.

- Contends that although the application seeks to review the ruling of Njagi J, they are in essence

attacking the 1981 judgement.

- Contends there has been no demonstration of existence of any error Njagi J, committed in his ruling of stay, neither have they shown any sufficient cause and for this reasons the application is vexatious and an abuse of the due process of the court.

- The court is invited to note that the applicants are guilty of non-disclosure of material particulars and for this reason they are not entitled to any relief from the court.

- The applicant for review stands non suited because the application for stay was presented by one Vincent Kimani where as the current application has been presented by one A. Njora Chege who is not one of the appellants and for this reason the applicants has no locus standi.

- There is also another party one Mburugu who was not a party in the lower court and who is not a party to this appeal who is also forcing himself into these proceedings and for this reason the application stands invalidated.

- The applicant failed to disclose to this court that there had been an application for stay presented to the lower court which was dismissed.

- The application is also defective because it does not comply with the mandatory requirements of the old order 50 rule 15 Civil Procedure Rules.

- A further defect is that the applicants stand non suited because the order of Njagi J which was being reviewed has not been annexed as required by law.

- The court is invited to note that there is on record an amended notice of motion which it is not clear whether the same was filed with leave of court or not.

- Contends that the court should dismiss the application as the same is an exercise in futility.

Parties invited the court to be guided by the case law. There is the case of **MARY RONO VERSUS JANE RONO WILLIAM RONO ELDORET CA NO. 66/2002** decided by the CA on the 29th day of April 2005. The centrol theme in the decision is that the law Lords stressed that the spirit of the law of succession Act in so far as inheritance of children of both gender is concerned is that inheritance should be on equal basis.

The case **of MAPALALA VERSUS BRITSH BROAD CASTING CORPORATION (2002) IEA** decided by the court of appeal of Tanzania where it was held inter alai that:-

"It was irregular and improper of the learned judge to quash his previous judgement because this had the effect of the court sitting on appeal on its own decision. The learned judge had become funtus officio once he had pronounced his judgement.

(2) The order of the court of 5th February granting the application for review and all subsequent proceedings were a nullity and the judgement of 13 April remained valid.

The case of **SASINI TEA AND COFFEE LIMITED VERSUS OBWOGI (2003) IEA 277** decided by the court of appeal of Kenya where it was held inter alia that "**the grounds set out in support of the application for review did not satisfy the criteria specified under order XLIV rule 1 of the Civil Procedure Rules but were clearly grounds for an appeal proper."**

The case of **TOURING CARS (K) LIMITED VERSUS MUKANJI (200) 1EA 261** decided by the court of appeal of Kenya where it was held inter alia that:-

"**The lack of candar reveals in the affidavit in support of the review application alone rendered the**

application underserving. Order XLIV rule 1 of the CPR provides three heads under which a review may be applied for… where a judge finds that new and important evidence has been produced, he is under a duty to consider whether this evidence could not have been discovered after the exercise of due diligence by the party seeking to introduce it"

The case of **M' RINKANYA AND ANOTHER VERSUS M' MBISIWE (2008) 1EA 200** decided by the court of appeal of Kenya where it was held inter alia that:-

(i) **It is logical from the scheme of the Act that a judgement for possession of land in particular should be enforced before the expiration of 12 years because section 7 of the Act bars the bringing of action for recovery of land after the end of 12 years from the date on which the right accrued according to the definition given in 2 (2) (3) of the Act the institution of proceedings to recover possession of land including proceedings to obtain a warrant for possession is statute barred after the expiration of 12 years."**

The case of **MURAI VERSUS WAINAINA (1982) KLR 39** decided by the court of appeal where vide orbiter by Madan JA as he then was the following has been stated:-

"**A mistake is a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by self or counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or Condon it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so demand"**

This court has given due consideration to the rival arguments herein and the same considered in the light of the case law principles as well as legal principles relied upon by either side and in its opinion, the following are own framed questions for determination in the disposal of this matter:-

1. What are this courts general observations of the proceedings this far?

2. Are there any legal issues arising from the said general observations? If so what is this courts' response to those issues?

3. What relief is the applicant seeking from the court? What principles of law or ingredients is the applicant required to establish before earning such a relief?

4. Has the applicant brought himself within the ambit of the said principles or have the applicants assertion been ousted by the Respondents assertions to the same?

5. What final orders is this court going to make in the disposal of the application under review?

In response to own farmed question 1, the following are this courts general observations of the proceedings this far:-

(i) The appeal herein arises from a decision of the lower court in Gatundu RMs succession cause No. 15 of 1979 delivered on 20/1/2009.

(ii) The appeal is in its infancy as even the record of appeal has not been filed.

(iii) The parties to the appeal are Vincent Kimani and others as appellants against Michael Njoroge B and others. These "others" on both sides have not been disclosed.

(iv) The current application subject of this ruling has been sparked off by the appellant anchoring an application for stay pending appeal on to the memo of appeal which application was fully convased before Njagi J, who declined to grant the order sought for the reasons given in the assessment in the

application sought to be reviewed.

(v) It has transferred from the submission of both sides as well as annextures of documents relied upon by either side that this matter has had a long history spanning over a period of over 30 years. The original application had five annextures in its support. A perusal reveals that there is a ruling annextures 4 delivered on 3/7/92 by RM Soita in which observations had been made that one John Mwangi Joseph had gone to the said court seeking orders that two parcels of land namely Kiganjo/Gatel/340 and Ndarugu/Gathaite/252A be shared in the manner shown by the said applicant. A reading of the ruling of the learned magistrate delivered on 3/7/92, at page 3 line 7, from the top made observations on that **"the matter had a long history, that when the succession proceedings were commenced, the parties were referred to arbitration by the elders, the elders duly arbitrated over the dispute and filed an award into the succession file, that no party applied to have the said award set aside hence the confirming of the same. At line 12 from the top on the same page 2, it is observed that on 18th December 1982 the DMH then seized of the matter varied the award on the basis of substantial justice and Equity and ruled that one Michael Njoroge B should not be moved from 252 "A" to 340. There is observation that the elders' award had followed the wishes of the deceased. That petitions had been made to various authorities to try and reverse the situation but these were declined because the wishes of the deceased had to be upheld. That one Samuel Mureithi had even applied to the court for a redistribution on the basis of Equity but his request was rejected for the same reason that the wishes of the deceased had to be respected. At line 12 from the bottom there is observation that following the rejection on redistribution by Samuel an appeal was filed to the high court by one Tabitha in civil appeal number 71/1983 Which was allegedly rejected by the high court which high court had stressed that the award be given effect.**

There is further observation that by ordering that the award be given effect, the ruling of the lower court which had made alterations on the award on the basis of Equity and substantial justice was rendered inconsequential and for this reason the court at Gatundu was precluded from engaging itself in a redistribution exercise over and above the confirmed award hence the judgement had to be implemented as entered. At line 1-4 from the top on page 3 there is observation that the high court in its ruling had advised the parties to implement the award as filed, to abide by the judgement, entered in terms of the award in order to avoid protracted litigation which will result into waste of time and money"

The lower court went further to observe that by reason of the high court's ruling one Michael Njoroge "B" could not rely on the lower court's ruling of 18th December 1982, which had purported to vary the confirmed award for purposes of Equity and substantial justice."

The afore set out is the information which Njagi J had before him when he declined to grant the order for stay and his Lordships gave reasons for the same. In the application for review of 15/10/2009, the applicant has annexed the ruling of Njagi J sought to be reviewed. There are part proceedings annexture ANC (b) showing an entry of 27/7/81 whereby the lower court made observations that the award had been adapted as presented and reaffirmed, that acreages had not been given but should any issue arise about acreages then the court would be moved normally in the same proceedings on 7/10/81 there is mention that one Joseph Wathugari initiated to the court that he was satisfied with the 4 acres he had been given.

There is also reliance on a decree allegedly given on the 10th day of July 1981, but extracted on 21st day of January 2008. It is indicated to have been made in terms of the award dated 9th April 1981 filed in court and confirmed as an order of the court. The salient features of the same are that:- **"under item 1 the award dated 9th April 1981 and filed in court was ordered confirmed as an order of the court. Under item 2 land parcel number Ndarugu/Gatei/340 was to be succeeded by starting from Eastern side and as devided on the ground in favour of Patrick Muruma, Michael Njoroge , Samuel Muriithi, widows homestead, Michael Njoroge B, Passage, john Mwangi, Vincent Kimani, , Burugu Nduchu and the church area. These were to be succeeded as devided on the ground. Under item 3 land parcel number Ndarugu/Gathaite/252A to be succeeded by Kiambu county council one (1)**

acre.

(2) Joseph Wathigari the balance. Under item 4 land parcel No. Ndarugu/Gathaite/252B was to be succeeded by Arcadius Njora.

There is another decree annexture 4. A reading of the heading reveals that it had arisen from an application heard on 3rd day of July 1992/3? It is further indicated that the Respondents had not opposed the same and the following orders were made:-

1. This Honourable court shall sign the necessary documents to facilitate the transfer of land parcels No. Kiganjo/Gatei/340 AND Ndarugu/Gathaite.252 "A" as per the award dated 18th December 1982.

2. That the two portions were to be shared as per the award as follows:-

<u>Kiganjo/Gatei/340</u>

1. Patrick Bungu- 3.15 acres

2. Michael Stephen Njoroge – 505 acres

3. Samuel Mureithi – 1.40 acres

4. Widows homestead:-

(a) Mineh Wangari

(b) Tabith Wamgari 0.33 acres

(c) Mary Nduta

5. Michael Njoroge "B" 2.50 acres

6. Passage – 0.36 acres

7. John Mwangi Joseph – 2.60 acres

8. Vincent Kimani Chege – 3.5 acres

9. Onesmus Burugu "C" – 6.10 acres

10. Church area – 0.45 acres

Ndarugu/Gathaite/252 "A"

1. Vincent Kimani Chege – 4.65 acres

2. Joseph Mwangi Joseph – 3.56 acres

3. Onesmus Burugu "C" – 3.75 ACRES

4. passage 6ft and county council passage – 0.75 acres.

5. Onesmus Burugu "A" – 5.09 acres

6. **Jacinta Wanjira – 1.00 acres**

7. **Njora Chege – 0.25. acres**

8. **Joseph Wathigari – 4.00 acres**

9. **Kiambu county council – 1.00 acres**

Costs be in the cause.

Given under the hand and the seal of the court.

Signed P.M. Mutani SRM 20th July 1993.

Annexture ANC5 is a search certificate for parcel number Ndarugu/Gathaitel/252"A" issued by the relevant authority on the 27th day of March 2009. It shows that the parcel of land comprise 24.1 acres. Other information on the document is that the proprietor is one Mburuku Chege owning 10.34 acres , Vincent Kimani Chege with 11.96 acres and Kiambu county council with 1.00 acres. There is also a caution by one Michael Njoroge Chege claiming a beneficiary interest.

Annexture ANC 6 is proceedings in Misc application No. 912 of 1993 in Nairobi high court and a ruling by Bosire J as he then was now JA. Scheming through it reveals that the learned judge as he then was made observation that **"there was an application which had come up for hearing before the judge, but counsel for the respondent had raised objection that the matter was Resjudicata.**

At page 3, of the ruling the learned judge as he then was made observation that the matter had achequered history having started in the District magistrates' court at Gatundu as a succession cause. That by consent of the parties the matter was referred to the village elders for arbitration. The village elders heard one Joseph Chege and three widows and some of his children. They gave an award which was later recorded as a judgement of the court in Gatundu. The award in effect distributed the deceaseds' estate that it appeared the arbitration had been ordered under the old order 45 CPR which vide its rule 16 allowed any aggrieved party to apply for setting aside or variation within 30 days of receipt of notice of the filing of the award. That no such application was made leading to the award being adopted as ajudgement of the court.

At page 4 of the proceedings and ruling thereof, the learned judge as he then was continued with the history of the matter. It is observed that in the wake of the adoptation of the award as a judgement of the court one widow Tabitha Wangare moved the same court asking it to redistribute the estate of the deceased in a more equitable manner. The court declined to do so. The courts decline led to the filing of an appeal no 71 of 1983 with Tabitha as the appellant and Onesmus Burugu and five others as the Respondents. That the appeal went before Okubasu J as he then was. A preliminary objection was raised against it to the effect that no application having been brought under rule 16 of order XLV of the CPR, the judgement which had been entered in terms of the elder's award was un assailable and therefore the application as well as the appeal were incompetent. The learned judge upheld that submission and struck out the appeal with the following remarks:-

" **The Gatundu court could not competently engage itself in afresh exercise of distributing the deceased's' land, that exercise having been done by the elders. In his view the judgement given by the elders had to be given effect. Review was also declined because no new and important matter had been discovered to bring the matter within the ambit of the provisions of order XLIV Civil Procedure Rules"**

At page 4 the learned judge Bosire as he then was went on to observe that although the appellant in civil appeal 71 of 1983 was dissatisfied with the judgement of Okubasu J as he then was and was aggrieved, she took no immediate action to redress her grievance until August 1983 when an

application was presented to the Gatundu court seeking an order of review of the decree in the original suit. That the application was expressed to have been brought under order XLIV rules 1 and 6, order XLI rule 4(1) (2) and 3 and order XXXIX rules 1 and 2 CPR.

It is further noted that Michael Njoroge "B" was the applicant. It is noteworthy that he was one of the deceaseds' sons who was present during the arbitration before the elders. That he had sought an order in effect re-distributing the deceased estate in an Equitable manner and prayed for an order staying the execution of the decree in the suit. The application went before a senior Resident Magistrate and it was struck out in limine.

Page 6 of Bosire Js' ruling is missing in this bundle but the same has been traced in the bundle annexed to the Respondents replying affidavit deponed by Michael Njoroge B. The reasons for the Magistrate in Gatundu striking out the application presented by Michael Njoroge is because the same was Resjudicata and that the court lacked jurisdiction to reopen a matter which a superior court had adjudicated upon.

At the same page 6 the learned judge as he then was opined that the applicant in the application struck out on 9th September 1993 one Michael Njoroge became a grieved and then filed the application under review by Bosire J then Misc application No. 912 of 1993. At line 10 from the bottom on page 6 the learned judge made the following observations:-

"**More over on the basis of the facts and circumstances of this case the present application must be struck out as the applicant seeks that a matter which had been canvassed and adjudicated upon be revisited. The propriety otherwise of the earlier decision in the matter are not the issue here. Rather it is the fact that there must be finality to any litigation. The applicant and all those whose interests he is pursuing may have not received proper advice or any advice at all on the matter. He is coming too late in time for this or any courts aid and adopting a wrong procedure to obtain redress. In all the** circumstances the applicant's application is in competent. It must be and is hereby struck out with costs.

Turning to the supporting documentation by the Respondent, there is annexed notice of appeal against the ruling sought to be reviewed dated 25th day of September 2009 annexture MM1 to the replying affidavit. It does not have a court stamp of either the high court or the court of appeal to show that it was lodged in any of those Registries. Annexture NM2 the extracted order in respect of the ruling sought to be reviewed which dismissed the application for stay at the appellate level Annexture MN3 the order of 5th May 2009 issued by the R.M.S Court Gatundu succession cause No. 15 of 1979 indicating that stay of execution had been presented to the said lower court vide an application dated 28th January 2009 which had also been dismissed. Annexture MN3 an extracted order in the same Gatundu file succession cause number 15/1979. It is an extracted order of an order made on the 20th day of January 2008, whereby an alleged application for review dated 25th February 2008 had been dismissed because the decree issued on 21st January 2008, reflected what was adopted as judgemen on the 10th July 1981.

Annexture MN4 is the decree allegedly extracted in respect of the orders made on the 10th day of July 1981 which was extracted on the 21st day of January 2008.

MN4 are proceedings starting 1979 in the District Magistrates land succession cause number 15 of 1979. A perusal of the same reveals that at page 3 thereof there is an entry for 10/7/1981 before G.K. Mutai DM II reproduced here under:-

" **10/7/81**

Before G.K. Mutai

DM II

Parties present as before

Mr. Mungai present court: Award has been filed.

Order as awarded

Order: Land Ndarugu/Gatel /340 to be succeeded by starting from Eastern side:-

1. **Patrick Murima**
2. **Michael Njoroge**
3. **Samuel Murithi**
4. **Widows homestead**
5. **Michael Njoroge B**
6. **Passage**
7. **John Mwangi**
8. **Vincent Kimani**
9. **Burugu Nduhu**
10. **Church area**

NB/ To be succeeded as divided on the ground.

2. **Ndarugu/Gathaiti/282 A to be succeeded by:-**

1. **Kiambu county council one acre**
2. **Joseph Wathigari Balance**
3. **Ndarugu/Gathaiti/252 B to be succeeded by Arcadius Njora"**

Further perusal of the proceedings reveals existence of entries made in the lower court starting 23/7/81 which are relevant to the arguments herein and these run as follows:-

"23/7/81

Court: Acting on a letter addressed to this court and on courts own motion the error is rectified to show that Joseph Wathigari was awarded the only land that was redeemed by the three widows. Acreages are not mentioned by the award. Hence if there will be any dispute about the acreages the court will be moved normally. It should also be noted that when this court made an order as it was awarded it did not alter the award and it re-affirms it.

Signed G.H. Muati

RM II

23/7/81
7/10/81

Before G.K. Mutai: DM II

All present in person

Mr. Kamau- court clerk

Applicant- I made an application for review of the order because there were some people who would have been given shares by the elders but they were not given anything. I made this application on behalf of those people. Also parcel 252"A" was erroneously given to Joseph Wathigari.

Signed G.K. Mutai

DM II

Mr. Karuga- Turns up

Apologizes for lateness

Signed G.K. Mutai

DM II

Mr. Karuga: We agree there is no dispute now that the land should be inherited as awarded. I withdraw his application.

Signed G.K. Mutai

DM II

Joseph Wathigari – I am satisfied with my four acres.

R.O.C.

G.K Mutai

DM II

Court

Application withdrawn.

No order as to costs.

G.K. Mutai

D.M. II

7/10/81"

MN5 is the ruling of Onyancha J in succession cause No. 2556 of 2001 already assessed herein whose net result was that the orders sought were declined for the sole reason that orders granted in Gatundu succession cause No. 15 of 1979 were in place as at the time the succession cause was filed.

Annexture MN6 is the judgement of Okubasu J as he then was in Nairobi civil appeal number 71 of 1983 whose content and summary has been captured in this courts assessment of the Ruling of Bosire J as

he then was now JA. MN 6 is the ruling of Bosire as he then was already assessed on the record.

This court has given due consideration to the afore set out assessment of the annextures relied upon by both sides and the same considered in the light of the findings of Njagi J in the ruling sought to be reviewed, the rival arguments for and against review, the pre requisites or ingredients required to be established before one can earn the relief sought and the court proceeds to make the following findings on the same:-

1. Existence of aggrieving decree or order:-

It is trite law that before one can seek the reliefs of review there has to be demonstration of existence of a grieving decree or order. Case law emanating from the court of appeal which this court has judicial notice of is to the effect that the grieving order or decree has to be extracted and annexed. In the absence of such annexing, the claimant stands none suited. Here in, the applicant has annexed a copy of the ruling sought to be reviewed. It is appreciated that a copy of a ruling is not an extracted order. However failure to annex an extracted order will not operate to disentitle the applicant a ruling on merit on his application because this is a procedural technicality curably by the provisions of Article 22 (3) (d) and Article 159 (2) (d) of the current Kenyan constitution which enjoins court of law not to decline to render justice on account of technical procedures. Striking out the substantive application on account of failure to annex an extracted order will be tantamount to declining to rendered of justice on account of points of technicality. The court therefore rules that the annexing of a copy of the ruling sought to be reviewed serves the purpose on equal footing as an extracted order.

2. **The order must be appealable or not appealable and no appeal should be in place**.

The order sought to be reviewed is appealable and indeed a notice of appeal to that effect was made out it is purported to have been taken out by the applicant. This court has however not traced a copy on the record. The copy annexed by the Respondent does not bear a court stamp of the issuing court nor that of the court appealed to. In the absence of the said notice having been lodged both in the court appealed from and the court appealed to, the same cannot be taken to be a valid notice of appeal demonstrating the existence of an appeal in terms of the applicable rules. This court therefore finds that there is no valid appeal against the orders sought to be reviewed in existence which this court can use as an excuse to reroute the applicant to the appellate seat of justice. The review order is therefore validly sought.

3. Presentation of the application for review without unreasonable delay.

This has been satisfied by the fact that the orders sought to be reviewed were made on 16/9/2009; whereas the application for review was presented on 15/10/2009 a period of less than 30 days. In this court's opinion, the application for review met this requirement and the same is ruled to have been presented without undue delay.

4. Competence of the application.

The lack of competence issue raised by the Respondent relates to the fact that the name of the person who presented the appeal and application for stay is not the same person who has presented the application for review. Indeed a perusal of the record reveals that the appellant and the person who presented the application for stay is one Vincent Kimani and others. Whereas those who have presented the application for review are two namely Arcadius Njora Chege and Onesmus Burugu "C". These have been termed by the Respondent to be strangers to the appellate proceedings. In order for this objection to hold, it has to be demonstrated that the two are not among the "**others."** When the record is scrutinized, it is discovered that these persons appeared on the record as early as 10/7/81 when the award was being confirmed. Although the name Onesmus does not appear against Burugu Nduhu. In the absence of assertion that Burugu Nduhu is not the same as Onesmus Burugu "C" who has been listed in connection with land parcel number Ndarugu/Gatheiti/340 in annexture MN4 the objection cannot hold. Whereas Arcadius Njora Chege has been mentioned in connection with parcel number Ndarugu/Gatheiti/252 "B". This was the same date the award was confirmed. The two parcels are the same parcels that form part of the subject

of the award. For this reason there is no way these applicants could be termed as busy bodies in the proceedings dealing with the subject matter, they have an interest in. Further, in the absence of stating who comprises in the "**others",** it cannot be stated that they are not interested parties whether disclosed or not an unnamed appellant stands on the same footing as a named appellant and has the same right of intervention in the proceedings on equal footing as the named one. For this reason the court finds that the application is competent as presented and the same will be ruled upon on its merits.

5. Existence of new and importance matter which due diligence on the part of the applicant could not avail as at the time the orders sought to be reviewed were made.

This ingredient is not available to the applicant firstly because it is not relied upon by the applicant. 2ndly even if it had been relied upon it would not have assisted the applicant because the information relied upon is historical in nature and there is no way the applicant could have said that it was not within their reach.

6. Existence of error or mistake apparent on the face of the record.

The error referred to is one relating to the ruling sought to be reviewed namely the ruling of 16/9/2009 and not the subject matter of the appeal or the application giving rise to the ruling sought to be reviewed. No such error or mistake has been pointed out with regard to the ruling sought to be reviewed. The court therefore finds that this ingredient too is not available to the applicant.

7. Overriding objective principle and sufficient reason.

This is what the applicant is relying on. The overriding objective principle is now clearly entrenched in civil litigation jurisdiction having been introduced by sections 1A and 1B of the civil procedure Act, cap 21 laws of Kenya the end not reveals that the same was introduced by Act 6 of 2009. A summary of this provision shows that the sole purpose is to facilitate the just expeditious proportionable and affordable resolution of civil disputes governed by the Act.

The respondent has argued that this principle has no retrospective effect on matters concluded earlier on with regard to these proceedings. The court is in agreement that it cannot relate these principles to decisions already taken with regard to this matter. But it cannot ignore it as at the time of the disposal of this application for review and the pending appeal. It will therefore be considered in the totality of the overall best interests of the participating parties.

With regard to "**sufficient reason"** the following facts appear not to be in dispute as demonstrated by documentation from both sides.

(a)That proceeding herein emanate from proceedings which had been initiated as a succession cause vide DMCC no. 15/1979.

(b)That the court did not determine the dispute but referred it to arbitration by the elders with the consent of all the parties on board.

(c)That an award dated 9th April 1981 was indeed filed in court.

(d)That no participating party moved the court under the then order 45 rule 16 CPR to have the said award varied and or set aside and the same was indeed confirmed.

(e)That the award confirmed on 10/7/81 related to distribution of certain parcels of land belonging to a deceased person.

(f) That the award read that distribution of the lands was as per the settlement on the ground which settlement did not specify the acreages of each beneficiary.

(g)That the issue of difficulty of implementation of the award on the ground was raised with the lower court at the earliest opportunity but the court merely stated that this was going to be sorted out by surveys on the ground and that the court would deal with it as and when it arose.

(h)That from 1981 this litigation has not been finalized and the matter put to rest because problems arose when the same was being implemented.

(i) That inability to implement the award gave rise to a series of litigation both in the parent court file and other forums with the sole aim of trying to go round the award but each time the issue arose the directive has always been that parties do comply with the award and that no variation to the award should be permitted.

(j) That there appears to have arisen a discrepancy with regard to what should be the correct decree. One such anxiety is demonstrated by the fact that according to annexture MN4 an annexture to the replying affidavit at page 4 of the proceedings parcel number Ndarugu/Gathaiti/252 "A" was supposed to devolve to Kiambu county council one acre, and the balance to Joseph Wathigari. However as per the applicants annexture ANC 5, which is a search certificate on the same land parcel number Ndarugu/Gathaiti/252"A", one Onesmus Burugu is holder of 10.34 acres, Vincent Kimani Chege is the holder of 11.96 acres and Kiambu county council one acre. The 2nd beneficiary of this property as per the award does not feature anywhere in the said search certificate. The search was on 27/3/2009.

(k)It is observed that applications presented to various forums assessed herein which sought reliefs contrary to the award were declined on the principles of Resjudicata.

(l) That it has been stated on numerous occasions by courts of competent jurisdiction, which have handled issues relating to the subject matter, herein have called upon the parties to respect the award and bring the litigation to finality.

(m) That a reading of the grounds of the appeal herein, the centrol theme of the complaint is that there are two opposing decrees in place and if enforced then this will cause injustice to the parties. This contention is not remote because the applicant has annexed annexture ANC3 purporting to have been in relation to orders made on 10th day of July 1981 but extracted on the 21st day of January 2008. This ANC 3 does not show acreages. There is also ANC4 indicated to have been made in pursuant to orders made by the court in 1992, and extracted on 20th July 1993. A perusal of the ANC4 reveals that the beneficiaries are the same, but new acreages have been given against its name.

Turning to the annextures to the Respondents replying affidavit, it is noted that it has its annexture MN4 which is similar in content to anexture ANC3. The list of beneficiaries is as per the content of the adopted award reflected in the proceedings (MN4). Issue will therefore arise how this decree is going to be implemented on the ground without specification of acreages attributable to each person as per area settled as at the time of the view.

(n)There is also complaint that the lower court has misinterpreted the judgement by Onyancha J, annexture MN5 to the replying affidavit and annexture ANC 1(a) to the affidavit in support of the application. The high lights of this judgement are on the record.

This court has given due consideration of the afore set out undisputed facts in (a)-(n) above, and in this court's opinion, the issue of which is the correct decree which satisfies the award herein is crucial to the disposal of this matter so that the same is brought to its finality and the courts efforts made effective. The 2nd crucial issue for determination herein is whether the decree can be implemented on the ground without specifying the acreage of each party is crucial its determination will also bring this litigation to finality.

A revisit of those issues will not be a problem by the court in view of the constitutional provision in Article 22 (3) (d) and Articles 159 (2) (d) of the constitution these read:-

"**Article 22 (3) (d) the court while observing the rules of *natural justice* shall not unreasonably be restricted by *procedural technicality.***

159 (20 (d) Justice shall be administered without undue regard to procedural technicality"

Applying these two constitutional provisions to the above reasoning , this court has no doubt the appellate court herein will have an opportunity to avail the long awaited justice to the litigants herein by giving them an effective remedy capable of enforcement. The employment of this principle copied applied with the employment of the afore set out overriding objective principle will no doubt yield the desired results namely give effect and enforce the award on the ground.

This court has no doubt that the matter being a land matter and an emotive one evidenced by the numerous litigations undertaken herein by parties on both sides of the divide which facts had they been fully placed before Njagi J as they have been fully placed before this court the learned judge would not have hesitated in granting a stay of execution because if a wrong decree is enforced then that will result in as injustice to the parties which will go a long way to defeat the aim of the litigation. It is likely to give rise to offshoot litigation as it has done herein and in the process prolong the litigation further as it has been the case herein. The court therefore finds that this is a proper case for review and award of an order of stay.

In indulging the applicant the court has to bear in mind the parties' long agonizing unended journey in search of justice. The court has therefore to ensure that the beneficiaries is not going to use the stay order both as a shield and sword against his opponent it will therefore attach conditions failing which the stay order will lapse.

For the reasons given in the assessment, the court proceeds to make the following final orders in the disposal of this matter:-

1. The application for review dated 15/12/2009 and filed on 27th day of October 2009 is competent and has rightly been disposed off on its merits because of the following:-

(ii) It was presented without undue delay. This is because the ruling sought to be reviewed was made on 16/9/2009. The application for review is dated a day before the expiry of a month from the date of delivery and the same was filed in court within one month and 11 days from the date of delivery of the ruling sought to be reviewed.

(ii) The annexing of a copy of the ruling sought to be reviewed cures the defect of failure to annex an extracted order. Thus making it to be a proper candidate for disposal upon its merits in terms of the provisions in Article 22(3) (d) and Article 159 (2) (d) both of which enjoin courts of law not to decline to render justice on account of points of technicality.

(iii) Since the applicants have been shown by the documentation on the record that they were affected by the award confirmed in the lower court as beneficiaries, and since they are covered under "**others"** in the heading of this appeal they stand on equal footing to intervene on an interlocutory application in the appeal with those specifically named.

2. The overriding objective principles donated by section 1B of the CPA is available for application by this court in the disposal of this application. The issue of Restrospective application of the said principle to the previous decision by various previous forum on this issue does not arise as this court is not currently reviewing those decisions. The overriding objective principle application is ideal here because the court has to find a way of bringing to an end this protracted litigation.

3. The ingredients of discovery of new and important matter which due diligence on the part of the applicant could not avail that information as at the time the grieving order was made and existence of an error or mistake apparent on the face of the record do not apply because:-

(h)The applicant has not relied on them.

(i) The documentation relied upon is historical in nature arising from proceedings applicants have participated in and as such they could not allege that they could not access them after exercise of due diligence.

4. The ingredient of sufficient reason is available to the applicant and it is sufficient to avail the applicant the relief of review because:-

(i) It is not a mandatory requirement that all ingredients be demonstrated to exist before one can earn the relief. It is sufficient if one ingredient is demonstrated to exist.

(ii) Sufficient reason suffices because the applicant had demonstrated that indeed there are two decrees extracted at different times but which relate to the confirmed award. One is structured in the manner the award was structured as shown in annexture MN4 in the replying affidavit with no acreages being indicated against the names of each beneficiary. This is the latest decree extracted in 2008. There is an earlier one extracted way back in 1992/3 with acreages against each name of the beneficiaries. It is therefore necessary for the appellate court to revisit this issue and determine which of the two decrees is a reflection of the award confirmed herein and more particularly whether it is possible to implement the confirmed award on the ground without indicating the acreages of each beneficiaries.

(iii) Issue of misinterpretation of a high court judgement is a weighty issue which needs to be interrogated by the appellate court.

(iv) The learned judge Njagi J made observations that land is an emotive issue and where sufficient grounds is shown, a stay pending appeal would be granted. The learned judge main reason for declining stay was that not sufficient material had been placed before his Lordship. Indeed the documentation placed before the learned judge did not include the two divergently extracted decrees, one which is being favoured for execution does not have acreages indicated against each beneficiaries. This court is of the opinion that had this been the case, the learned judge would have as this court has entertained the issue as to whether the award confirmed herein and as extracted in the decree of 2008, the same is capable of being effectively implemented on the ground. I have no doubt the learned judge would have ruled the way this court has ruled that it is necessary to establish whether such a decree can bestow justice to the beneficiaries and bring the litigation to an end.

(v) It had not been brought to the attention of his Lordship that as per annexture ANC5 to the supporting affidavit, the current title holders of land parcel number Ndarugu/Gathaite/252”A” are not those adjudged to be beneficiaries by the award. This needs rectification.

5. The appellate court has the mandate to revisit that issue through its power donated by Article 22(3) (d) and Article 159 (2) (d) to render justice without regard to technicality. This provision will enable the appellate court to determine the mode of enforcing the award on the ground in order to avail an effective remedy which has been elusive to the beneficiaries herein over the last 30 years.

6. When granting the stay order this court has ensured that the applicant will not use it as a shield and sword against his opponent and for this reason the court has attached a condition to the effect that stay is granted on condition that the applicant is to move speedily to ready the appeal for hearing and disposal within 90 days from the date of the reading of the ruling.

7. In default of number 6 above the stay order to lapse.

8. The Respondent will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2011.

R.N. NAMBUYE

JUDGE