



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 880 OF 1977
(CONSOLIDATED WITH HCCC 908 OF 1977)

1. SAMUEL NGUNU KIMOTHO

2. MAAKA MUKUHI MUGWERU

(By substitution of legal representative of 2nd Plaintiff,
SIMON MUGWERU WATHIRWA).....**PLAINTIFFS**

VERSUS

GICHUHI KIMIRA**DEFENDANT**

R U L I N G

After a protracted trial spanning some 20 days between 28th October 1987 and 13th March 1989, this court (Akiwumi, J as he then was) delivered a long and detailed judgment on 6th October 1989. A decree issued as follows: -

“1. That the Plaintiffs be and are hereby declared the beneficiaries as to one third each of the farm (L.R. 13041) and the income derived therefrom.

2. That the farm (L.R. 13041) be transferred by the Defendant into the names of the Plaintiffs and the Defendant as tenants in common in equal shares, subject to the loan of the Agricultural Finance Corporation charged upon the farm (L.R. 13041) and all money payable to the Agricultural Finance Corporation thereunder, and that in the event of the Defendant not executing the documents necessary for the transfer of the farm (L.R. 13041) in the names of the Plaintiffs and the Defendant as directed in this order within 30 days hereof, the Deputy Registrar is hereby empowered to do the same.

3. That it is hereby ordered that the partnership between the Plaintiffs and the Defendant with respect to all the agricultural activities and that of Kenya Kennels, on the farm (L.R. No. 13041) be dissolved and wound up with effect from the 20th day of April 1997 by a proper person to be appointed by the parties within 30 days of the Order.

4. That until the winding up of the said partnership between the Plaintiffs and the Defendant the proper person to be appointed under 3 above shall take account of all dealings and

transactions between the Plaintiffs and the Defendant with respect to their partnership activities in the buying and selling of cattle and with respect to the purchase of the farm and all activities carried out thereon including those relating to Kenya Kennels and other kennels, the rearing of livestock, pigs and poultry and the cultivation of crops, and enquire into what credits, property and effects belong to the parties having taken into account all lawful debts pertaining to such partnership.

5. That until the winding up of the said partnership between the Plaintiffs and the Defendant and thereafter as may be necessary, the proper person appointed under 3 above, shall collect get in and receive debts now due or owing or henceforth to accrue or become due or owing, and other assets, property and effects and all securities, books and papers pertaining to the partnership activities between the Plaintiffs and the Defendant as referred to in 4 above.

6. That until the proper person is appointed under 3 above, the Registrar of this court shall perform the duties of such proper person as specified in 3, 4 and 5 above, or may delegate this responsibility to such person as he may deem fit, and the Registrar or such person may charge reasonable fees for the discharge of their duties hereunder which shall be payable from the assets of such partnership between the Plaintiffs and the Defendant.

7. That where the proper person is appointed under 3 above he shall for the discharge of his duties set out in 3, 4 and 5 above be entitled to charge reasonable fees which shall be payable from the assets of such partnership between the Plaintiffs and the Defendant.

8. That the Defendant, his servants and agents be and are hereby restrained from in anyway disposing of or alienating the farm or any livestock, poultry, poultry products, kennels, dogs, crops or any equipment used in the related activities on the farm or from in any way disposing of or alienating the farm or in any way interfering with the work of the proper person appointed under 3 above or with that of the Registrar or his appointee referred to in 6 above as the case may be.

9. That any sums found due from the Defendant to the Plaintiffs shall carry interest at court rates and as from the usual time.

10 That the Plaintiffs shall have their costs for the consolidated suits plus interest at court rates.”

The Defendant appealed to the Court of Appeal vide that court’s **Civil Appeal No. 186 of 1995**. In a long and detailed judgment of the court delivered on 24th April 1998 the Court of Appeal upheld the judgment of the High Court except for the date of dissolution of the partnership. The High Court had given that date as “within 90 days of this judgment or such later date as this court may direct”. The Court of Appeal gave 20th April 1977 as the date of dissolution of the partnership.

There then followed protracted proceedings regarding effectuation of the decree. At some point, the parties even tried to negotiate ways of effectuating the decree as it was perceived that there were certain difficulties in that regard. The negotiations were however not successful.

The Defendant has now come to court by **notice of motion dated 28th July 2009** seeking one main order, that the court may be pleased to order varied the decree of this court issued on 6th of October 1989 and amended on 24th April 1998. The application is stated to be brought under **sections 3, 3A, 34 and 91** of the **Civil Procedure Act** (the Act).

No grounds for the application are given on the face thereof, but there is a supporting affidavit sworn by JULIUS GICHUHI, the substituted Defendant (the original defendant, along with the 2nd original plaintiff, having passed on in the meantime). It is deponed at paragraph 9 that from the two judgments of the High Court and the Court of Appeal “it is clear that any activities undertaken by the parties after the

20th April 1977 were not partnership activities but individual activities”. It is further deponed in paragraphs 10, 11, 12 and 13 of the affidavit as follows: -

“10. That as at the 20th April 1977 the Land Reference Number 13041 had not been fully purchased as only a portion of the purchase price had been paid. See Exhibit “D” the statements from the charge bank in true copies.

11. That it is therefore correct that as at the time of the dissolution of the partnership by the Court of Appeal, the only portion of the Land Reference Number 13041 that could be held in common in the partners as decreed by the Honorable Akiwumi, J (as he then was), was a portion represented by Kshs 23,567.60 that had been paid by that date.

12. That in the circumstances, the decree issued by Honourable Akiwumi, J should be varied to read and reflect that the portion of L.R. No. 13041 that is to be held in common by the parties herein is the portion represented by the said Kshs 23,567.60. Annexed herewith and marked Exhibit “E” is drafted varied decree.

13. That further the decree of Honourable Akiwumi, J of the 6th October 1989 and amended on the 24th April 1998 having ordered for the investigation into how the partnership accounts were acquired by the parties, the holding that L.R. No. 13041 be registered in equal shares in the names of the parties herein, be suspended until the investigations into the partnership activities are complete and the court is able to determine the actual contribution of the partners in the acquisition of the partnership properties.”

A draft amended decree is annexed to the affidavit. However, the intended amendments have not been shown by underlining or by some other highlighting.

The 1st Plaintiff has opposed the application by replying affidavit sworn by himself and filed on 1st December 2009. He has deponed as follows, *inter alia*,

“4. That I am aware that there is need to finalize this matter once and for all, and as a Plaintiff I am willing to agree to negotiated finalization; but I am opposed to the proposed variation of the decree by the Defendant.

5. That in my view what is sought by the Defendant in his application would amount to changing the intent of both the Court of Appeal and this court while reaching the decision in our favour as the Plaintiffs in this matters.

6. That I am ably advised by my advocates on record that the decree was amended as ordered by the Court of Appeal and therefore no further variation may avail by the High Court at the moment.

7. That I am aware that the decree also enjoined the Defendant from interfering with the property which was owned by the partnership, and the Defendant cannot today seek to justify the property as having been only available to the partnership as of 20th April 1977.

8. That it follows that the Defendant is not right to state that the activities undertaken after 20/4/1977 were individual when indeed efforts to have the proper person to finalise dissolution were thwarted by the Defendant.

9. That the Defendant is to date still benefiting exclusively from some of the partnership property until such time that the partnership is determined.

10. That subdivision of the property L.R. No 13041 has already been done and each party has already taken possession. In my view the only issues remaining in this matter are accounts on

the partnership's other property and the Plaintiffs' costs both in the Court of Appeal and the High Court.

11. That issues of how the partnership property was acquired were determined and cannot be revisited by way of this application.

12. That the proper person having been appointed is now the only person who may move in and determine the issues as to the partnership property in the absence of any agreement between the parties, and it is futile to ask the court to vary and determine the shares of the partnership property at this stage."

The application was heard by way of written submission. I have considered the respective submissions of the parties, including the cases cited.

Let us first look at the statutory provisions on which the application has been brought. Section 3 of the Act saves the court's special jurisdiction and powers in the following words:-

"In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force."

It is a general provision.

Section 3A saves the inherent powers of the court. It is generally applicable where no other specific provision of the law caters for the matter at hand.

Section 34 of the Act makes provisions regarding questions to be determined by the court executing decree. Sub-section (1) of that section states:-

"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."

The present application purports to raise issues relating to the execution, discharge or satisfaction of the decree herein. This is the court executing the decree passed by it herein. It does appear therefore, that the Defendant has properly applied under section 34 of the Act.

Section 91 of the Act deals with restitution where a decree has been varied or reversed. It is not relevant to the present application. The Defendant probably meant to cite section 99 of the Act. But even that section would not have been of any use to him as it permits amendment of judgment, decrees or orders to correct clerical or arithmetical mistakes arising therein from any accidental slip or omission. The present application is not seeking to correct any such clerical or arithmetical mistakes in the decree.

It appears to me that the main intent of the application is to reverse the finding in the judgment of Akiwumi, J (which was affirmed on appeal) regarding the trust that he found for the Plaintiffs as against the Defendant. That finding was that the suit land (L.R. 13041) was purchased by the joint efforts of the two Plaintiffs and the Defendant, and that the Defendant therefore held the land in trust for the two Plaintiffs and himself in equal shares. There was the consequential order determining the trust by transfer by the Defendant of one third of the land to each of the two Plaintiffs and to himself.

In arriving at this main decision in a long and detailed judgment (which was upheld by an equally long and detailed judgment of the Court of Appeal) Akiwumi, J (as he then was) closely examined all the evidence placed before the court regarding purchase of the land (including the borrowing and sourcing of various sums of money from various sources towards the purchase price).

The amendments to the decree now sought seek to reopen those issues that were fully investigated by

both this court and the Court of Appeal. Such reopening of those issues is being improperly sought by way of amendment to the decree. There is no allegation that the decree as drawn and issued is not in consonance with the judgment of the court.

Even if there was a proper application before the court for review of the judgment (and the present application is not one such), it is unlikely that so many years after a protracted trial and a thorough judgment (upheld by an equally thorough judgment on appeal), the court would be persuaded to reopen issues settled in the trial and appeal.

Admittedly, there will be difficulties in effectuating certain aspects of the decree, especially as to the taking of accounts because of the long passage of time. But the main asset of the partnership was the suit land whose value (along with other lands in Nairobi) must have increased exponentially over the years. The court decreed that each of the three parties in the suit must get a one third of the land. There cannot be any difficulty in effectuating that aspect of the decree.

As to the other aspects of the decree regarding other assets of the partnership, the proper person shall deal with any problems that he may encounter in taking accounts of the dealing and transactions between the parties with respect to their partnership activities in the buying and selling of cattle, etc. However, the parties (or their descendants) will be within their rights to settle amicably themselves any outstanding issues regarding the decree.

As regards the application at hand, I see no cause at all to interfere with the decree so painstakingly arrived at by the trial court and equally painstakingly upheld by the Court of Appeal. The application has no merit and is dismissed.

As the Plaintiffs acknowledge that there are certain difficulties with regard to effectuation of certain aspects of the decree, parties shall bear their own costs of this application. It is so ordered.

DATED AT NAIROBI THIS 3rd DAY OF NOVEMBER 2011.

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2011.