



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Succession Cause 257 of 1995

IN THE MATTER OF THE ESTATE OF RUTERE M'MWITI (DECEASED)

LAWRENCE
KIREMU RUTERE APPLICANT
VERSUS

ANGELO MWABI RUTERE RESPONDENT

RULING

There are 3 applications that were argued before me in this matter and they are all the subject of this ruling. The background of this matter is that this court, by its judgment dated 29th October 2009, found that Lawrence Kiremu Rutere (Lawrence) was a son of the deceased in this estate. His brother Angelo Mwobi Rutete (Angelo) petitioned in June 1995 for grant of letters of administration intestate in respect of his father's estate. In petitioning, he failed to include the name of Lawrence his brother as a beneficiary. In the end, when the grant was confirmed, Angelo and his sons inherited the only parcel of land of this estate namely, *Nkuene/L-Mikumbune/366*. His sons are Phineas Bundi Mwobi and George Muthuri Mwobi. After confirmation of the grant, Angelo subdivided the above stated property into 4 parcels namely, *Nkuene/L-Mikumbune/920, 921, 922 and 923*. Angelo registered parcel number 923 in his name and registered parcel numbers 921 and 922 in the names of his sons and finally sold parcel number 920. This court revoked the grant issued to Angelo. Lawrence filed an objection which was the subject of this court's judgment of 29th October 2009. By that judgment, this court ordered for the rectification of the register in respect of parcels No. 921 and 922 and ordered the said two parcels be registered in the name of Lawrence. It does seem that after the delivery of that judgment, that Angelo or whoever acted on his behalf was hell bent on defeating the orders of this court and on denying Lawrence his right of inheritance. What transpired is that parcel numbers 921 and 922 which at the time of the judgment were registered in the names of the sons of Angelo were further transferred to other parties after the judgment of this court. Gilbert Gichunge Francis (Gilbert) obtained registration in his name of parcel number 922. James Kiremu Naaman (James) obtained registration in his name of parcel number 921. It is in that background that the applications dated 13th,

15th and 23rd April 2010 were heard. I shall begin by considering the Chamber Summons dated 23rd April 2010. If this application is successful, the other two applications will not succeed. That Chamber Summons is brought on behalf of Angelo. He seeks the stay of execution of the judgment of this court dated 29th October 2009. He seeks stay pending the hearing and determination of his appeal before the Court of Appeal. The 2nd prayer of that Chamber Summons by Angelo seeks restitution of occupation and possession of parcel number 921 to him pending the hearing and the determination of this appeal. He stated that he had already filed a Notice of Appeal at the Court of Appeal, that is, on 4th November 2009 against the judgment of this court because he was aggrieved by the judgment. Without stating the exact date, Angelo said that Lawrence had in April 2010 erected a fence around Angelo's parcels of land and again he did not give the parcel number he alleged Lawrence erected the fence. Angelo however said that in erecting that fence, Lawrence had restricted his access to where his homestead was. Angelo further stated that he feared that Lawrence would evict him. In response to that application, Lawrence said that he is in possession of parcel numbers 921 and 922 as he has always been. He also confirmed that he had fenced those two parcels of land. For one to seek to stay judgment pending appeal, such an application should be made as soon as that judgment was delivered. That is to say such an application should be made without any reasonable delay. The judgment that Angelo seeks to stay was delivered on 29th October 2009. He seeks to stay judgment by his application dated 23rd April 2010. That is, he seeks to stay that judgment six months after it was delivered. He had an obligation to explain the delay in filing that application. Delay always requires explanation. In this regard, I am well guided by the Court of Appeal decision **Nderitu Gicheru Vs. Cecilia Gathoni Gatere** Civil Application No. 122 of 2008 where D.K.S. Aganyanya J.A had this to say:-

“It is now settled law that whenever there is a delay, the party guilty of the same should offer some explanation for it before an extension of time in his favour can be considered: Kenya Ports Authority Vs. Silas Obengele Civil Application No. 297 of 2004.” (unreported).

In the case of Reliance Bank Limited (in liquidation) & 2 others Vs. Southern Credit Bank Corporation - Civil Application No. 118 of 2007 (UR 78/2007) RSC Omolo J.A. had this to say:-

“Then there is the delay of 64 days to which I have referred and in my view that delay remains unexplained, and as I have stated, any amount of delay, even if it be one day ought to be explained in some.” Emphasis provided.

Without Angelo explaining the delay in filing the present application his application must fail. In making the application, Angelo also failed to state what stay he required. He should have been specific in the stay he seeks bearing in mind that at present either he or his sons have transferred parcel numbers 921 and 922 as stated before. Those parcels of land were the ones that this court by its judgment of 29th October 2009 awarded to

Lawrence. The prayer for stay of execution for the above reasons is incompetent. The 2nd prayer made by Angelo for restitution possession must also fail because Angelo does not state which of the two parcels of land, that is, parcel numbers 921 and 922 he had been denied possession. Secondly, it must fail and most importantly because Angelo does not state in his affidavit in support of his application that he was dispossessed of any land. The nearest he comes to it is in paragraph 7 where he says that Lawrence had erected a fence. In paragraph 8 he says:-

“I am apprehensive that the protestor (Lawrence) herein is in process of evicting me from the said suit land and demolish my entire homestead thereby rendering me and my family to suffer irreparable and further prejudicing my appeal.”

It is clear that the above deposition does not support the 2nd prayer for Angelo. It does not show that he has been dispossessed of any land. Accordingly, the Chamber Summons dated 23rd April 2010 is without merit and is dismissed with costs to

Lawrence. I will now consider the Chamber Summons dated 13th April 2010. That application is filed by Gilbert. He seeks the court to review the judgment of this court of 29th October 2009. He deponed in support of that application as follows:-

2. ***That on the 23/12/2009 I entered into a sale agreement with Phineas Murithi Mwobi for the purchase of the whole of the L.R. No. Nkuene/L-Mikumbune/922 at the agreed price of Kshs. 1,300,000/=.***
3. ***That before executing the sale agreement, I personally carried out a search of the land from the land registrar and found that there were no encumbrances registered on the land.***
4. ***That I also carried out a physical inspection of the land, and I did not find any physical encumbrances on the land.***
5. ***That I only agreed to enter into the sale agreement after satisfying myself that the land was available for sale as there were no encumbrances noted in the register or physical on the land.***
6. ***That the sale agreement was reduced into writing and witnessed by an advocate.***
7. ***That I have already committed colossal sums of money into the purchase of the land.***
8. ***That subsequent to the sale agreement, the L.R. Nkuene/L-Mikumbune/922 was transferred to me.***

9. *That I am now the registered owner of the land as a bona fide purchaser for value and without any notice.*
10. *That I was not made aware of the existence of the order of the court made on the 29/10/2009.*
11. *That if the order of the court is not set aside, I will stand condemned without being heard and I will be deprived of land and will suffer substantial loss.*
12. *That I seek the protection of the court as I brought the land in good faith from the registered proprietor.*

Review which is sought by Gilbert is under Order XLIV Rule 1 of the Civil Procedure Rules. That Rule is in the following terms:-

“1. (1) 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 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 judgment to the court which passed the decree or made the order without unreasonable delay.*
- (2) A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”*

The Court of Appeal in the case **Harold Kidem Mganga & Ano. Vs. Constance Mwai Mtoto** HCA NO. 244 of 2004 in respect of that Rule had this to say:-

“Since the application was for review it was upon the appellants to show that there had been the discovery of new and important matter or evidence which was not within their knowledge or could not be produced by them at the time the decision was made. The appellants could succeed if they were able to show that there had been some mistake or error apparent on the record. They could also succeed if they could show any sufficient reason why the previous decision should be reviewed.”

The application was opposed by

Lawrence on the basis that the said Gilbert had no *locus standi* to seek the orders that he seeks. Lawrence further argued that the one who sold the land to Gilbert had no title to pass to Gilbert. From the provisions of Order XLIV Rule 1, Gilbert needed to show what new discovery had been made capable of moving the court to review its judgment. It is clear that there is no new evidence brought before court because the purchase of parcel number 922 by Gilbert was after the judgment of this court of 29th October 2009 by which judgment that parcel of land was awarded to Lawrence. Gilbert purchase would not have been considered as this court was deliberating on the judgment since by then the purchase of that parcel by Gilbert had not taken place. Gilbert also failed to show that there was a mistake or error apparent on the record. Finally, Gilbert failed to show that there was any sufficient reason why the previous judgment of this court should be reviewed. I reach the decision that the application by Gilbert was incompetent in the background that Lawrence was found by this court to have all along been in possession of parcels number 921 and 922. Had Gilbert carried out a physical search of those parcels of land, he would have found it to be so. For those reasons, the application dated 13th April 2010 is dismissed with costs being awarded to Lawrence. The 3rd application is dated 15th April 2010 and is filed by Lawrence. It is brought under Rule 73 of Probate and Administration Rules. Lawrence by that application seeks for order that the registration of parcels number 921 and 922 in the names of James and Gilbert respectively be cancelled and for an order for Angelo to be found in contempt of the court order of 29th October 2009. Lawrence deponed in his affidavit as follows:-

2. ***That on 29/10/2009 this court made a judgment in this cause and ordered that L.R. No. Nkuene/L-Mikumbune/921 and 92 be transferred to me.***
3. ***That when I presented my documents for transfer to the Land Registrar Meru I found that the 1st respondent had already transferred the lands to the 2nd and 3rd respondents on 12/2/2010.***
4. ***That I immediately informed my lawyer who wrote a demand letter to the respondents but instead of complying with the said demand letter the respondents wrote back threatening to evict me from the suit land.***
5. ***That the land registrar was unable to effect the court’s judgment because the land had changed hands.***

6. ***That indeed both the respondents were aware of the court order but choose to ignore it.***

7. ***That the 1st respondent transferred the suit lands in order to defeat this court order as he was not happy with the judgment.***

8. ***That indeed he is in contempt of the court order and deserves commensurate punishment.***

9. ***That I therefore pray that the title issued to the 2nd and 3rd respondent be cancelled as the same were irregularly and illegally used.***

10. ***That unless this order is issued forthwith, I stand to suffer irreparable loss and damages.***

It is clear that although both Gilbert and James became registered owners of parcels number 922 and 921 respectively on 12th February 2010 none of them sought vacant possession of those parcels from

Lawrence. It seems that it was not until counsel for Lawrence wrote a letter dated 30th March 2010 warning the two of them that court action would be taken to stop them taking possession that a response was written on behalf of Gilbert by an advocate dated 31st March 2010. In that letter, the advocate for Gilbert alleged that Lawrence had illegally entered parcel number 922. Bearing in mind background of this matter and what transpired after the judgment of this court of 29th October 2009, I find that the application by Lawrence is merited. It would have the effect of putting into place of the judgment of 29th October 2009. It is that very judgment that Angelo, Gilbert and James sought to defeat by transferring parcels number 921 and 922. Lawrence however did not prove that Angelo personally contravened the judgment of 29th October 2009. The court therefore cannot find that Angelo was in contempt of the court. In the end, I grant the following orders:-

1. ***The applications dated 13th and 23rd April 2010 are hereby dismissed and the costs thereof are awarded to Lawrence Kiremu Rutere and the requirement of the original title documents is hereby dispensed with.***

2. ***The court does hereby order the rectification of registration of parcels number Nkuene/L-Mikumbune/921 and 922. The Land Registrar is hereby ordered to register parcel number Nkuene/L-Mikumbune/922 in the name of***

Lawrence Kiremu Rutere.

3. ***Lawrence Kiremu Rutere is awarded costs of the Chamber Summons dated 15th April 2010 to be paid by Angelo Mwobi Rutere, Gilbert Gichunge Francis and James Kirimi Naaman.***

Dated and delivered at Meru this 2nd day of July 2010.

MARY KASANGO
JUDGE