



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 46 of 1993

KARANJA KARENJU..... APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....:1ST RESPONDENT

JOEL K. MUNGAI2ND RESPONDENT

RULING

The record herein reveals that on 22nd February 2001 Githinji J, as he then was now JA after a brief listening of counsel for both parties made the following orders:

1. By consent dispute is referred to District Surveyor Nyandarua District, Mr. Andrew Mugo for determination from registry maps whether or not the disputed land officially existed or not.
2. The District Surveyor to file his report within 30 days.
3. The determination by the District Surveyor Nyandarua shall be final and binding on plaintiff and 2nd defendant.
4. Mention or further orders on 9th May 2001.

The Plaintiff has filed an application by way of Notice of Motion under Order XXI Rules 22(1) of the Civil Procedure Rules, the court's inherent jurisdiction under Section 3A and 91 of the Civil Procedure Act dated 26th day of July 2007.

The 2nd defendant raised a preliminary objection to that application dated 13th September 2007 and filed on 17th September 2007 to the effect that the application dated 26th July 2007 is Res judicata and the entire application is an abuse of the due process of the court. This ruling is in relation to the preliminary objection.

The basis of the objection is that on 9th May 2007 a similar application was made when the applicant to that application sought an adjournment to apply for review. That issue was canvassed by them and it transpired that the consent of 22nd February 2001 had been varied by the consent of 13th July 2006 as

confirmed by the Deputy Registrar's ruling of 9th May 2007.

In response counsel for the applicant to the said application submitted that what had led to the Deputy Registrar's ruling of 9th May 2007 was the application for an adjournment whose end result is either the adjournment is granted or refused.

- (2) the preliminary objection cannot hold because there is no mention that there are final orders by a competent court to the effect that the said consent orders of 22nd July 2001 are either set aside or refused.
- (3) The objection does not come within the ambit of the provisions of Section 7 of the Civil Procedure Act.
- (4) They contend that the Deputy Registrar's powers are limited to what has been donated by Order 48 Civil Procedure Rules and setting aside of orders made by a judge is not one of them.

In reply counsel for the objector maintained, the action of the Deputy Registrar falls under Order 48 rule 5(1) (b) and explanation 4 of Section 7.

- (2) As long as those orders were not appealed against, they are final and these issues cannot be revisited.

On the court's assessment of the facts of this preliminary objection, it is clear that several issues have been raised for determination.

- (1) Whether the objection qualifies to be a preliminary objection or a point of law firstly. Secondly whether the argument displayed herein satisfies the ingredients of a preliminary objection.
- (2) Whether the consent order of 22nd February 2001 was varied by the consent of 13th July 2006.
- (3) Whether the issue of the said consent orders of 22nd February 2001 was canvassed before the Deputy Registrar and gave rise to the Deputy Registrar's ruling of 9th May 2007 therefore, closing further discussion of the issue of stay or review of the consent order of 22nd February 2001.
- (4) Whether the Deputy Registrar has powers to competently rule on matters pertaining to the said consent orders of 22nd February 2001.

As set out at the beginning of this ruling, the content of the order of 22nd February 2001, went like this:-

- (i) Dispute was referred to the District Surveyor Nyandarua Mr. Mugoi for determination using the Registry Maps.
- (ii) The report was to be filed in court within 30 days from the date of service upon them of the said order.
- (iii) The said determination by the said District Surveyor was to be binding on the plaintiff and the second defendant.
- (iv) Matter was to be mentioned subsequently for further orders.

Looking through the record reveals that the orders made by Mugo J on 13th July 2006 are as follows:

“(1) the application dated 8th June 2006 be and is hereby allowed in terms of prayers 3 and 4.

- (2) *The OCS Njabini police station to provide security during the visit by the District Surveyor.*

(3) *Mention on 28th September 2006 to ascertain compliance.”*

In order to review what had been prayed for in prayers 3 and 4 of the application of 8th June 2006 one has to revisit the same on record. This court has done so and found that the said application was brought by Notice of Motion dated 8th June 2006 and filed on 12th June 2006. Prayers 3 and 4 read:

(3) *That an order be issued directing the District Surveyor Nyandarua District to visit the land and point out the location of the road of access alongside Parcels Title Number Nyandarua/Muruaki/114, 190, 121 and 191 subdivided 1289, 1336, 1863 and 1864.*

(4) *That there will be no order as to costs.”*

Further perusal of the record reveals that on 28th September 2006, parties appeared before Mugo J and since the representation was for the parties to confirm if the District Surveyor had complied with the court's order of 13th July 2006, it is noted on the record that the counsel for the plaintiffs Mr. Gachigi confirmed that a visit had been done by the District Surveyor on 7th September 2006 and a report had been filed. On that account, the court was asked to direct that parties do take copies of the said report and thereafter parties were to have matter mentioned on a subsequent date to confirm full compliance. Counsel for the second defendant is recorded as having confirmed that that was the position. The court then proceeded to record the following consent:

“By consent

(1) *Parties to be supplied with copies of the District Surveyor's report filed on 28th September 2006 upon payment of any attendant costs.*

(2) *Mention on 25th October 2006 to record consent on the application dated 8th June 2006.”*

On 25th October 2006 parties appeared before Mugo J once again. The record reveals that counsel for the plaintiff and second defendant were present. Counsel for the plaintiff informed the court that the District Surveyor's report had been supplied to the parties and it appeared that there were no issues pending in the circumstances.

There was no consent from the counsel for the 2nd defendant. The court then made an order by consent to the effect that the application of 8th June 2006 was to be marked as spent.

Further perusal of the record reveals that there was an application dated 22nd February 2007 and filed on 27th February 2007 for new counsel to come on record on behalf of the plaintiff which application was allowed by consent of both parties on 7th March 2007.

Thereafter the counsel for the 2nd defendant had presented his bill of costs for taxation on 14th December 2006, served on 28th February 2007. It is the bill which came up for taxation on 9th May 2007. That is when counsel for the plaintiff intimated to the court that they were in the process of filing an application to set aside the consent order of 22nd February 2001 and if that application succeeds then there will be no need for a bill of costs.

It is indicated clearly that counsel for the second defendant opposed the application for an adjournment for the reasons recorded. It can be seen from the said submissions of counsel that he informed the court that subsequent to the order of 22nd February 2001 there was an application dated 9th August 2001 which sought orders to review the orders of 22nd February 2001 which application on review was dismissed and the suit herein was also dismissed. On that account the order sought to be reviewed had been dismissed.

That they even tried to appeal but failed to go further on that account the court was asked to decline the orders sought.

In reply counsel for the plaintiff submitted that an application to set aside the consent orders of 22nd February 2006 was different from an application for review.

The ruling of the court made on 9th May 2007 states at the outset that it was a ruling as per the plaintiff's counsel's request for an adjournment so that in the meantime he be able to file an application to set aside consent orders made on 22nd February 2001 which resulted in the bill of costs in favour of the 2nd defendant.

It is noted in the said ruling that counsel for the second defendant had opposed the application for the adjournment on the grounds among others that it was a delaying tactic calculated to deny the 2nd defendant with the bill fruits of the taxation.

After due consideration of arguments of both sides the learned Deputy Registrar made the following observations:

“After having perused the file, I have found out that the orders in which an intended application to set aside is sought to be filed, are consent orders. The court cannot know what grounds will be adduced or averred. What one is sure is that an attempt to review the order was made but the court declined the review.”

The plaintiff seems to be changing his advocates whenever he loses an application and should not be allowed to use this as an excuse to delay the conclusion of this matter.

The counsel now on record was instructed to take over this matter no earlier than 6th February 2007. If the affidavit is anything to go by one wonders why the plaintiff has not filed the application since then. The attempted explanation is not convincing.

In any case there is no order of stay of taxation by the High Court. That seems to be the only order that can stop this taxation. This is respectively so because this is an old matter being a 1993 matter and as it were litigation must come to an end.

I am therefore inclined not to stay this taxation and I hold and direct that the 2nd defendant do proceed to tax his bill of costs on 27th July 2007.

The costs of 9th May 2007 and today 23rd May 2007 to be added to the bill as the same having been awarded to the 2nd defendant.”

The setting out of the entire discretion of the Deputy Registrar is simply to demonstrate and reflect in this ruling what the content of those observations were to assist the court to determine whether they demonstrate existence of ingredients in support of a preliminary objection or whether they display ingredients for Res judicata.

Since there was mention for the application dated 9th August 2001 which had been presented for review of the orders of 22nd February 2001 and which was dismissed on 10th November 2001 as well as orders dismissing the entire suit, there is no harm in reflecting them on record.

The court has failed to trace the application of 9th September 2001 on the record. But there exists grounds of opposition to that application dated 22nd October 2001 and filed on 23rd October 2001. But the court has the ruling made by Githinji J. as he then was (now JA) delivered on 22nd February 2001.

The salient features of the same are as follows:

(1) The application dated 9th August 2001 was to review the consent order made on 22nd February 2001 brought under Order XLIV rule 1 Civil Procedure Rules.

(2) On page 1 of the said ruling the court set out the terms of the said consent already set out in this ruling.

(3) At page 2 of the said ruling the learned judge set out the following:-

“On 4th May 2001 Mr. A. K. Mugoi the District Surveyor Nyandarua filed his report as follows:

“I have investigated the matter by going through all our records both in the District and the Province. The original registered index map which is kept under the custody of the Provincial Surveyor Nyeri, shows that there is a road access existing between parcels 114 and the adjacent ones. I have marked the entire road reserve with red marks for ease of reference. In conclusion I would say the road reserve exists, I have enclosed R. 1.M copies for your perusal.

(ii) The learned judge noted that the District Surveyor had annexed the Registered Index Map which is signed by the Provincial Surveyor Central Province.

4. That the Plaintiff had averred that the Director of Survey had illegally and unconstitutionally excised a 20 feet portion from the plaintiff’s land title No. Nyandarua/Muruaki and made it a public road.

5. That the reliefs sought included an order for the return of the portion or in the alternative compensation.

6. That the plaintiff had filed an amended plaint on 10th February 1998 in which he joined several defendants as a party to the suit.

7. That in the amended plaint he had averred that the 20ft portion excised from his land was for use by the second defendant as an access road to defendants parcel of land No. Nyandarua/Muruaki/531.

8. The grounds of review were set out at page 4 of the said ruling as:

(i) That the Map presented to the District Surveyor Nyandarua does not reflect the true position on the grounds

(ii) That there is a fundamental difference between the map presented and the latest map issued by the Director of Surveys.

(iii) (a) That there is a likelihood that the map presented may have been fundamentally interfered with. He has appealed a copy of the map of Muruaki Scheme and states in paragraph 9 of the supporting affidavit that he was supplied with that map by the Director of Surveys on 25th August 2001 and that the map shows that no road reserve has ever existed.

9. The learned judge set out three grounds entitling an aggrieved party to review at the same page 3 as:-

(a) Discovery of a new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could be produced by him at the time when the decree was passed or order made or

(b) on account of some other mistake or error; apparent on the face of the record or

(c) For any other sufficient reason

10. That since the case did not go for hearing and since the court did not record any proceedings then grounds of review Nos 1 and 2 above do not apply ((i) and (ii)) to this application.

11. That although the applicant did not say so, it is clear that he is asking the court to review the orders of 22nd February 2001 on the grounds that there are sufficient reasons for reviewing the order namely that the determination by the District Surveyor is based on wrong map.

12. The general principles for setting aside consent judgments and orders are comprehensively vested in the case of **KENYA COMMERCIAL BANK VERSUS BENJOH AMALGAMATED LIMITED AND ANOTHER C. A. 276 OF 1997** (unreported) and these are:-

“(i) prima facie an order made in the presence and with the consent of counsel, is binding on all parties to the proceedings or action and all those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by agreement, contrary to the policy of the court or if it was entered into without sufficient material facts generally on the grounds which would justify setting aside a contract.”

13. That in the case, there was no dispute that the order was by consent and was recorded by advocates, with authority of the respective parties

(ii) advocate has apparent authority to compromise a suit on behalf of his client.

(iii) That in this case it is not claimed that the consent order was obtained through fraud, mistake or in ignorance of material facts or contrary to policy of the court.

(iv) The consent order itself is not prejudicial to any party.

(v) It is the subsequent determination by the District Surveyor which has aggrieved Plaintiff and consequently the part of the consent order which unless the determination by the District Surveyor is final and binding.

14. That by virtue of the provisions of Section 18 (1) 18 (2) of the Registered Land Act the Director Surveyor is required to prepare and maintain a Registry Map for every registration District or the land Registrar may cause one to be prepared

(i) By virtue of section 89 (1) of the Evidence Act the court may presume inter alia that maps purporting to be made or published by the authority of the government or any department were so made and are accurate.

(ii) By Section 6 (1) of the Registered Land Act, a registry map has to be maintained in Land Registration District.

(iii) By Section 19 of the Registered Land Act the Registrar has power to alter registry map and to prepare new editions as prescribed in Section 19

(iv) The plaintiff had produced a Photostat copy of the map he was relying on numbered 255. He was requested to produce the full size which he did and when the court compared the two and arrived at the conclusion that the two maps bear the same sheet number that is (134/1/18) skd 21 and also relate to the same Registry section. The one produced by District Surveyor confirms all the amendments effected from 1st August 1979 to 1st September 1999 numbered 1 to 37 with each amendment describing the nature of amendment made, which amendments arise from the sub-division of various parcels of land of the Registry map as shown in the respective Amendments.

(v) According to the original map produced by the applicant, his land parcel No. was contiguous on the South Side with the parcel No. 121, and with the parcel number 191 opposite side to the South East,

(vi) The disputed road according to the map produced by the plaintiff between plot No 121 part of plot

No. 114 on one side and plot No. 191 on the other side.

(vii) According to the map, from the District Surveyor Plot No. 190 does not now exist. It has been subdivided into five portions. Land parcel No. 121 does not also exist.

15. After careful scrutiny of the two maps the learned judge concluded that both are the official Registry Maps of Muruaki Registration Section of Nyandarua District, but that the Registry Map produced by the plaintiff is the obsolete Registry Map. While the map produced by the District Surveyor is the current Registry Map which was taken into account during the alteration of boundaries of various lands since 1979.

16. It is obvious that the changing of boundaries of various parcels of land necessitated by sub-division may involve the provisions of roads of access where non existed.

(ii) The map from the Director of Surveyors is not accompanied by an affidavit from the Plaintiff verifying that the map is not obsolete and that no other new edition of the registry map exist.

17. Considering that the district Land Registrar has power to make new editions of Registry maps, and omit obsolete matters from the new editions and taking into account the provisions of section 89 (1) of the Evidence Act, the learned judge concluded that the map produced by the District Surveyor is the accurate Registry Index Map for Muruaki Registration Section.

18. That for the reasons given, the learned judge found that the application for review had no merit.

(ii) As the District Surveyor had determined that the Road Reserve and (Road of access) exists and as that determination is final in terms of Order No. 3 of the consent order of 22nd February 2001 and in view of the court's judgment above, the learned Judge was of the view that the Plaintiff's suit should be dismissed with costs to both defendants.

Consequently the learned judge dismissed the application for review as well as the suit with costs to the defendant on 19th November 2001.

Against the fore going background information, the plaintiff/applicant presented the application dated 26th July 2007 and filed on 1st August 2007. The application is brought under Order XXI rules 22(1) of the Civil Procedure Rules, the court's inherent jurisdiction and Sections 3A and 91 of the Civil Procedure Act. Prayer 1 and 2 are spent. Prayer 3, 4 and 6 are current and form the basis of the objection. They read:-

(3) *That the execution of the consent order recorded on 22nd February 2001 be stayed pending hearing and determination.*

(4) *That the taxation in the matter be stayed pending hearing and determination of this application.*

(5) *That the consent order recorded on the 22nd February 2001 be set aside.*

(6) *That the respondents do bear the cost of this application."*

Going by the dating and the date stamp on filing, shows clearly that this was the application that was being anticipated by the plaintiff's counsel when the issue of taxation came up before the Deputy Registrar on 9th May 2007 and that this was the major reason for seeking an adjournment.

It is on record that indeed counsel for the 2nd defendant raised objection on the ground that what counsel for the plaintiff was intending to raise, had been overtaken by events as a similar application for review had been entertained earlier on and dismissed by the court as well as the suit, and the only issue left as pending between the parties was the issue of taxation. It is on record that indeed the Deputy

Registrar reviewed that objection and both counsels made representations on the same and the Deputy Registrar made a ruling whose salient features of the same are already on record. What is relevant to this ruling, is that the counsel for the 2nd defendant has agreed that the Deputy Registrar conclusively dealt with that issue and the issues intended to be raised by the plaintiff through the said application are res judicata. Whereas the stand of the plaintiff's counsel is that, what was raised was whether an adjournment was to be granted or not and the Deputy Registrar's ruling is confined to that.

This court has revisited the said proceedings before the Deputy Registrar and the ruling emanating therefrom and finds that the Deputy Registrar avoided making a determination as to whether the intended application was merited or not. Infact the Deputy Registrar refrained from commenting on what counsel for the 2nd defendant had raised by saying that he was not in a position to comment on what grounds the intended application would raise, and that it is on record that an attempt to review the same orders had been declined by the court. The Deputy Registrar did not go further to conclusively state that the matter had been settled. He went further to state that there was no order staying taxation and on that account declined an adjournment on account of the intended application but fixed the matter for taxation on another date.

The demonstration shown above does not help the 2nd defendant to anchor his Res judicata assertion on the Deputy Registrar's proceedings of 9th May 2007 and his ruling of 23rd May 2007.

That notwithstanding the court is not prevented from going deep into the record to determine whether the said issue was dealt with earlier as alleged by counsel for the 2nd defendant. As noted earlier on in this ruling, the application of 9th August 2001 for the resultant ruling is held on the record.

In order for the 2nd defendant to anchor his preliminary objection on this ruling, it has to satisfy the ingredients in Section 7 of the Civil Procedure Act. It provides:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been substantially issue in a former suit between the same parties or between parties under whom, they are or any of them claim litigating under the same title in a court competent to try such subsequent suit in which such issue has been subsequently raised and has been heard and finally decided by the court.”

The ingredients that this court identify in the said section are as follows:

1. There must be a court.
2. There must be in existence a previous suit and an existing suit.
3. The matter in issue in the current suit must be directly and substantially have been in issue in the previous proceedings.
4. The matter must be either between the same parties or parties under whom the subsequent parties claim.
5. Must be litigating under the same title.
6. The court must be competent to try it.
7. The issue must have been subsequently raised.
8. The issue must have been heard and finally determined by the court.

The court has applied the said ingredients to the facts as gathered from the ruling on the application for review of 9th August 2001 in so far as the reliefs sought therein are concerned and then compare them with the reliefs sought in the application objected to and make the following findings:

- (1) There is in existence, a court that was seized of the application for review, there is in place that is designated to hear the application for setting aside and there is a court which is hearing the preliminary objection.
- (2) What is in existence is not a previous suit and a current suit but a review application and a current application. The court has no doubt that in its own judicial opinion anchored in its experience on judicial practice, Section 7 Civil Procedure Act does not exempt application of whatever nature from its operation. The court is therefore satisfied that the previous application of 9th August 2001 and the current one of 26th July 2007 are proper candidates for Section 7 Civil Procedure Act .
- (3) As for the subject matter in both applications, in the consent order of 22nd February 2001, the relief that was being sought in the previous application as revealed by the facts in the ruling was review while the current one seeks setting aside. But the candidate for review and setting aside is the same order of 22nd February 2001.
- (4) The matters are still between the same plaintiff and the 2nd defendant.
- (5) The parties herein are still litigating under the same title of plaintiff and 2nd defendant.
- (6) The competence of the court to deal with the application for review as it previously did and the issue of setting aside as it is intended to deal with is not in doubt.
- (7) What is sought to be set aside in the application objected to is the very orders which were a subject of the review application.
- (8) The issue for review was previously heard and finally determined. The end result was a dismissal of the application for review. Hot on its heels came the dismissal of the suit. The court has scoured through the record and it has not found an application to reinstate the dismissed suit. It therefore means that in the absence of reinstatement of the suit, the subsequent consent order of 13th July 2006, and 28th September 2006 were an exercise in futility in so far as they purported to breath life into the consent order of 22nd February 2001 which matter was fore closed by the dismissal of the suit.

In this court's opinion the suit having been dismissed, it cannot anchor any applications other than one for taxation.

The last question to be asked is whether the preliminary objection succeeds? The yard stick is found in the famous case of **MOKISA BISCUITS AND CO. VERSUS WEST END DISTRIBUTORS LTD [1969] EA 696**. At letter D page 700 Law JA, as he then was had this to say:-

“Preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of the pleading and which if argued as a preliminary point may dispose of the suit.”

Where as at letter B page 701 Sir Newbold, as he then was said thus *“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”*.

Applying the yardstick to the facts herein, the court finds that Res judicata is a point of law. The facts pleaded by the other side namely existence of consent order of 22nd February 2001 sought to be set aside are not in dispute, the dismissal of the suit as well, has not been disputed. The preliminary objection presented by the second defendant has satisfied the ingredients for raising one. As for its merits, for the reasons given on record the same succeeds. The suit herein having been dismissed, anything purporting to be done in the file as if the suit were alive is Res judicata, as all proceedings save for those dealing in taxation, were finally determined and brought to an end by the dismissal of the suit.

Accordingly the plaintiff's application dated 26th July 2007 and filed on 1st August 2007 be and is hereby dismissed on the grounds that it is Res judicata and secondly that it is anchored on a suit which has already been dismissed.

(2) The 2nd defendant will have costs of the preliminary objection as well as the dismissed application.

DATED READ AND DELIVERED AT NAIROBI THIS 24TH DAY OF APRIL 2008.

R. NAMBUYE

JUDGE