

IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause 484 of 2004

IN THE MATTER OF THE ESTATE OF MUGAMBI MURURIA DCD

AND

SIMON MUCHIRI MUGAMBIPETITIONER

RULING

This court by its ruling of 15th November 2007 gave the following orders;-

- 1. That an order be and is hereby issued restraining Simon Muchiri Mugambi by himself his servant or agents from entering, interfering with the applicants possession of plot No. 204 (old 305) Pumwani Nairobi and further the said Simon Muchiri Mugambi is hereby restrained from interfering collecting rent or in any way dealing with the tenants on the said plot. This injunction shall subsist up and until the hearing and determination of the summons for revocation of grant.*
- 2. The court further issues a prohibitory order over the plot No. 204 (old 305) Pumwani Nairobi until further orders of this court directed towards Simon Muchiri Mugambi who is hereby restrained from effecting any changes to the title of that plot in effecting the confirmed grant in this matter.*
- 3. The costs of the summons dated 12th July 2007 shall abide by the subsequent application for revocation of grant.*

The petitioner Simon Muchiri Mugambi in petitioning for the grant herein included amongst the estate assets plot No. 204 formally 305 Pumwani Nairobi. On the grant being confirmed the petitioner went on the said plot and ordered the tenants to henceforth pay rent to him. That action by the petitioner led Cyrus Murage Kariuki to seek restraining orders. Those restraining orders were given by this court's ruling of 15th November 2007. Muchiri the petitioner has now moved this court by summons dated 8th April 2008. By that application he seeks a review of those restraining orders. He has based that application on the ground that a judgment in High Court Civil Nairobi No. 1426 of 1994 of 21st May 1997 ordered Cyrus Murage to transfer plot 204 formally 305 Pumwani Nairobi to Mugambi Mururia deceased. The said Mugambi Mururia deceased was the father of Muchiri the applicant and it is his estate that is the subject of this matter. Muchiri stated that Cyrus Murage failed to disclose to this court that judgment. Muchiri in making the present application for review failed to disclose that the judgment of 21st May 1997 and its consequential orders was set aside by the order of 13th May 1999 in HCCC Nairobi 1426 of 1994. That order setting aside the judgment was annexed to the replying affidavit of Cyrus Murage. Muchiri by his further affidavit argued that in that same suit the high court of Nairobi had ordered the deputy registrar to sign transfer documents relating to the suit plot to put in effect the judgment of 21st May 1997. Muchiri in making that statement again fails to consider the effect of the orders made by the court on 13th May 1999 whereby the high court at Nairobi set aside the judgment of 21st May 1997 and its consequential orders. One of the consequential orders was the order authorizing the deputy registrar to sign the transfers. Bearing that in mind there is no basis for this court to review its orders of 15th November 2007. Accordingly the application dated 8th April 2008 fails and is dismissed with costs to

Cyrus Murage Kariuki. Further the order the subject of the review application should have been extracted and annexed to the application. In the case of *Jivan v Jivan & another* (1929 -30) 12 KLR. The Court of appeal held;

“... the question emerges as to the precise character of the grievance which must be experienced by a person applying for a review under Order XLII. A person applying for a review under that order must be “aggrieved by a decree or order.” The words “decree” and “order” are here used in the sense set out in the definitions in Section 2 of the Civil Procedure Act. Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree his application should be for a review of the judgment upon which it is based. But ... however aggrieved a person may be at the various expressions contained in a judgment or even at various rulings embodied therein, unless the person is aggrieved at the formal decree or the formal order based upon the judgment as a whole, that person cannot under Order XLII appeal before the judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The ratio decidendi expressed in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievance to a party to a suit. In these proceedings no resultant decree on the 29th August, 1930, has yet come into existence. It is the duty of a party who wishes to appeal against, or apply for a review of a decree or order to move the court to draw up and issue the formal decree or order.”

In bringing the application the subject of this ruling Muchiri derailed the granting of directions to Cyrus Murage in respect of the hearing of the summons for revocation filed by Cyrus Murage and dated 5th July 2007. At the reading of this ruling the court will give directions of the hearing of that summons.

Dated and delivered at Nyeri this 14th day of October 2008.

MARY KASANGO

JUDGE