



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2710 OF 1989

DAVID MWANGI NDUATI.....PLAINTIFF

VERSUS

NJOROGE MUKAMI.....DEFENDANT

RULING

I: BACKGROUND OF APPLICATION OF 16.6.04

1. The application of 16.6.04 sort orders of this court to set aside the judgment of 4 September 1991 Mango J (now deceased).
2. The reasons being that at the time orders issued of 7 July 1988 appointing plaintiff as personal representative the original plaintiff lacked legal capacity to be sustained as a legal representative as he lacked letters of administration ad litem or full grant.
3. The judgment was therefore fraudulently obtained and ought to be set aside.

II: BACKGROUND

4. This is a dispute involving two brothers. During the land consolidation one bother called Makuni Nduati was away in the Rift Valley. His brother who remained in Muranga was registered as Trustee and duly held land on behalf of Makumi Nduati. The other brother Njoroge Makumi declined to give portion of this land when Makuni Nduati retuned home in the 1980's
5. It is believed that Njoroge Makumi gave Makumi Nduati 5 acres of land. This was not satisfactory. The said Makumi Nduati then filed suit. The matters were referred to arbitration before a District officers and Elders. This decision was held to be a nullity. As a result a new suit being this present suit was duly filed. It therefore meant that on 7 July 1988 the Resident Magistrates Court at Murang'a permitted the present plaintiff David Nduati – personally the son of the deceased Makumi Nduati, to be substituted as the legal representative. By then, Kenyan Laws were lax and the case law of Touristic Union International v Jane Mbeyu case CA 145/90 had not been decided.
6. The said plaintiff sued and succeed in his claim.
7. The application of 16.6.04 therefore wished that the original judgment of Mango J be set aside due to this flaw.
8. This Application came for hearing on 22 March 2007.

III APPLICATION ON 16.6.04

9. The arguments by the applicant is indeed very interesting. This is that if the party has no letters of grant administration or ad litem, they had no locus to file suit. The whole judgment by Mango J was a nullity and ought to be set aside. In reply the respondent stated that this application has come after 14 years. It is therefore a nullity and should therefore not be allowed.

IV FINDING

10. Proceeding in the Kenya Courts in 1980's were very tax. The issue of filing suit without grants of letters of Adminsitration was up held in the cases of Meintz- (Boisre J) which held that no letters of grant was required to be filed in order for one to be a legal representative. This was supported by a Court of Appeal decision of Nyarangi, Chesoni but Kneller (descenting). This position was of course wrong in law. The fact though if a decision has been made and has not been set aside nor appealed against it is the law. During the period when this law was stating that letters of grant need not be applied for was the same period as this suit being heard. The law at the time was that the grant of letters need not be applied for a legal representative. It therefore meant that at the time this suit was being conducted and finalized that was the position of the law. This suit was finalized on 4.9.91. The five bench judges heard and overturned this wrong decision sometime in 1995. If this case was still alive and pending then it would mean that an application to have the suit struck out on the same grounds would be made and succeed.

11. The other aspect is that this point was never pleaded in the pleading nor in the defence. A party is bound by his pleading and would therefore not bring a new matters which he had not pleaded nor was it an issue for determination before Mango,J.

12. The last aspect is that this review – the third or fourth before this court, has been brought to court 14 years after the judgment was delivered and finalized. The delay was indeed inordinate.

Conclusion

13. I decline to set aside and or review the orders of Mango J under Order 3 A Civil Procedure Rules. The application of 16.6.04 be and is hereby dismissed with costs to plaintiffs/respondents.

Dated this 27th day of March 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

M. Mwilu for Wandugi & Co. advocate for plaintiff/respondent

M. Marete for Kiplenge,Ogila & Mugambi Advocates for the defendant/applicant