



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE**

Civil Appeal 7 of 2006

ERASTUS NDUNG’U CHARAGU ::::::::::: APPELLANT/RESPONDENT

VERSUS

ELIJAH MARI MWAURA & 5 OTHERS:::::::::RESPONDENTS/APPLICANTS

R U L I N G.

As is evident from the title to these proceedings, the applicants are the respondents to the substantive appeal, whilst the respondents to this application are the appellants.

The applicants are hereby seeking a stay of execution of the orders made on 3rd November, 2004, until such time as there would be compliance with the judgment pronounced by the Hon. Nambuye J, on 20th November, 2002.

The applicants also ask that the orders made on 3rd November, 2004 be declared null and void. That being the case, as perceived by the applicants, they ask the court to order that the status quo prevailing as at 3rd November, 2004 be maintained until such time as there will be compliance with the orders dated 20th November, 2002.

When canvassing the application, Mr. Barongo, advocate for the applicants first pointed out that the seven people who are the applicants and the respondents herein, had come together in 1968 to form a partnership known as Kiambu Farmers Company.

He said that each of the said seven persons had a share worth Ksh. 7,000/=, which they then used to purchase the property **KIPSAINA/BLOCK 3/SINYERERE/KIPSAINA/1 to 8.**

By virtue of their shares, each of the seven partners is said to have become entitled to a share in the land.

It would appear that the partnership arrangement barred the transfer of shares to third parties.

Notwithstanding that arrangement, the respondent herein is said to have sold his interest to a third party, Patrick Mburu.

Apparently, when Patrick Mburu did not get the property which he had bought, he instituted RMCC NO. 1975 OF 1968, and thereafter obtained judgment in his favour.

Patrick Mburu then commenced execution proceedings, by seeking the attachment of the respondents’

shares in Kiambu Farmers Company.

According to the applicants, they purchased the respondents shares and thus satisfied the decree which Patrick Mburu had obtained against the said respondents in **RMCC NO. (NBI) 1975 of 1968**.

Thereafter, the applicants sub-divided amongst themselves the shares which hitherto belonged to the respondents, and which they had bought through the court process.

The respondents thereafter lodged an appeal against the decision in **NBI RMCC No. 1975 of 1968**. The said appeal was Eldoret High Court Civil Appeal NO. 41 of 1988. That appeal was thereafter transferred to Kitale High Court for hearing and determination; and it became Kitale High Court Civil Appeal No. 7 of 2006.

However, prior to the transfer of the appeal, the Hon. Nambuye J. did issue some substantive orders on 20th November, 2002. The learned Judge ordered that;

- (i) The lower court's order made on 11th October, 1988 be reversed and set aside.
- (ii) As a consequence of the said reversal and setting aside of the order dated 11/10/88, the lower court's order of 19th August, 1986 was also reviewed and set aside.
- (iii) All the transactions in relation to the appellants' share in L.R. No. 7145/2, belonging to Kiambu Farmers Company is declared a nullity.
- (iv) The lower court was directed to serve the appellant and all other partners in Kiambu Farmers Company, afresh, with the lower court's order dated 29/11/73. Thereafter, the lower court was to ensure compliance with Order 21 rule 44 of the Civil Procedure Rules, as read together with section 27 of the Partnership Act, when determining the issues concerned.

It is the applicants case that todate, there had not been any compliance with those orders made by the Hon. Nambuye J. It is for that reason that the applicants ask that there should now be a stay of execution.

One might ask how it came to pass that the matter had reached the stage of execution if there had been no compliance with the orders already made by the Hon. Nambuye J.

According to the applicants, the respondents did file an application dated 5th February, 2003, seeking orders to compel the Land Registrar to cancel the then existing titles, and to evict the applicants from the suit property. Upon hearing that application, the court allowed it, on 3rd November, 2004.

The applicants submitted that in order to obtain those orders, the respondents concealed material facts from the court. One such material fact is the order made on 30/3/2004 when the court had directed the respondents herein to file a substantive application to pursue prayer (b) in the application dated 5/2/2003.

The respondent did not bring a substantive application, and also did not disclose to the court that they had already been directed to bring a substantive application. The applicants believe that had the respondent brought it to the attention of the court, that they had been directed to bring a substantive application, the court would not have granted orders on the application dated 5/2/2003.

Secondly, the applicants contend that the respondents ought not to have been heard in person, as the firm of Kalya & Co. advocates was still on record for them.

Thirdly, the applicants pointed out that they had not been served with any application which had been slated for hearing on 3rd November, 2004.

In answer to the application, the respondent, Erastus Ndungu Charagu, appeared in person. He first

conceded that in relation to NBI RMCC No. 1975 of 1968, he had had Patrick Mburu's debt. He also conceded that the said creditor did cause the attachment of his shares in Kiambu Farmers Company, in the process of execution of the decree he had obtained.

However, the respondent insists that he did pay off the decretal amount, by remitting money through his then lawyers, Messrs Wafula & Company Advocates. It is his case that his said lawyers forwarded payment to Messrs Gaturu & Company Advocates, who were acting for Patrick Mburu.

Upon receipt of payment, Messrs Gaturu & Company Advocates are said to have notified the court; and to have requested the court to remove the attachment of the shares belonging to the respondent.

Thereafter, the respondents obtained a court order, on 11th November, 2004, canceling the titles which the applicants had split amongst themselves.

As far as the respondent was concerned, the said orders (dated 11/11/2004) had been executed.

In my understanding, that would imply that the title to the portion of the property which previously belonged to the respondent, but which the applicants had bought during the execution of the decree in **NBI RMCC No. 1975 of 1968**, had been excised from the portions belonging to the applicants. It would then have been reconstituted into a single portion, which should have reverted to the respondent.

Meanwhile, the respondent denied knowledge of any orders made on 3rd November, 2002.

Perhaps that was an error on the part of the respondent, as the court records only indicate that the applicants made reference to an order made on 3rd November, 2004.

I have perused the record and verified that on 3rd November, 2004, the Hon. Gacheche J. did grant prayers (b) and (c) of the application dated 5/2/2003. Those orders were granted after the applicants herein failed to attend court. The said applicants had also failed to file either grounds of opposition or any replying affidavit. Therefore, the learned judge held that the application dated 5/2/2003 was unopposed.

I believe that it is significant to point out that the prayers which were granted were in the following terms:

“(b) The Land Registrar Trans Nzoia District, District Commissioner Trans Nzoia District and the officer commanding Trans Nzoia Police Division be compelled to effect the order of this Honourable court dated 22nd November, 2002, by cancelling the titles and evicting the Respondents.

(c) Costs of this application be in the cause.”

For a better understanding of that order, I feel that it is necessary to point out that on 22/11/2002, the Hon. Nambuye had held that the;

“Whole transaction from the processing

of the titles to the eviction were false and therefore unlawful, and were done to circumvent this court's judgement of 20/11/1992; they have no force of law; they have been faulted and they have been declared and rendered to be unlawful

and of no consequence and it is so ordered.”

The learned judge also held that the eviction was unlawful as it had not been based on a valid order of the court.

It would therefore follow that if the respondent had been evicted, such an action ought to have been reversed. Also, any titles as may have been issued to the applicants, were to be reversed. However, as already explained herein, that reversal would not end up totally dispossessing the applicants of all the portions of land which they had held by virtue of owning shares in Kiambu Farmers Company.

The reversal would only extend as far as giving back to the respondent such portion of the land as he had acquired by virtue of ownership of shares in the partnership. In other words, it is only that portion of land which the applicants had acquired through purchase of the respondent's shares, (during the execution of the decree in **NBI RMCC NO. 1975 of 1968**), which should have reverted to the respondent.

The respondent did tell the court that the whole piece of land which had been acquired by the partnership was now registered in his name. If that be the case, there would be no doubt at all that the respondent was not entitled to the entire piece of land. He has never laid claim to it, nor has the court ever consciously ordered that it be transferred to him.

If the whole piece of land belonging to the partnership remained registered only to the respondent, that would constitute unjust enrichment. The court does not sanction such an unjust enrichment.

It therefore follows that insofar as the judgment delivered on 20th November, 2002 remains unchallenged, by way of an appeal to the Court of Appeal, it embodies the adjudication of the High Court, on all the issues determined thereby.

Furthermore, as the Hon. Nambuye J. said, in her ruling dated 22nd November, 2002, if there are any other orders or actions that were inconsistent with the judgment dated 20/11/2002, such other orders or actions would be unlawful and of no consequence.

In that regard, the eviction of the applicants from the suit land was unlawful and of no consequence: the titles issued to the applicants out of the portion which originally vested in the respondent, is unlawful and of no consequence; the issuance of a title to the respondent, of the whole piece of land is equally unlawful and of no consequence.

For now, the respondent is entitled to a title to and occupation of only that portion of land which was registered in his name at the time when he had paid for his shares in Kiambu Farmers Company. He is therefore required to ensure that the applicants' respective portions are available to them for un-restricted occupation and use.

In effect, I find that the application dated 14/2/2005 is merited. It is therefore granted as prayed.

Dated and Delivered at Kitale, this 22nd day of May, 2007.

FRED A. OCHIENG.

JUDGE.