

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 125 of 1990

ANNA NGENEKE KILONZO

JOSEPH MULINGE KILONZO PLAINTIFFS

VERSUS

KITIKA NZOVE

KITUA MUTINGI DEFENDANTS

RULING

The defendant/applicants have filed an application dated 13/10/04 seeking orders that the courts orders of 25/11/94 and all consequential orders be reviewed; set aside on account of errors apparent on the face of the record; that the plaintiffs' names be cancelled and removed from Machakos District Lands Register for land parcels Muthetheni/Kionyweni/965, 966, 967, 968, 252 and the register be reverted to what it was before the plaintiffs' names were entered therein and lastly, that there be a stay of execution pending hearing and final determination of the application and costs be paid to the applicants.

The Respondents through their counsel LM Wambua have filed a Notice of Preliminary Objection dated 10/11/04 which the court heard. The objection is three fold, that the court is functions officio this matter having given its final judgement on 25/11/94; that the issues sought to be raised are Res judicata and that the application is an abuse of the court process.

In the present case, the plaintiffs sued the defendants seeking to recover land parcels Muthetheni/Kionyweni/250 and 252. By consent of the parties the matter was sent for arbitration on 18/7/1991. The award was read to the parties on 15/9/93. On 8/10/93 Mr Kavila filed an application dated the same day seeking to set aside the arbitrator's award. The judge heard the application dismissing the application on 25/11/04 and confirmed the award as the court's judgement. It is this ruling that is challenged on grounds that the judge only considered one issue leaving out the others which was an error and that the court was further in error when it confirmed the award as the judgement of the court without due regard to order 45 Rule 17 of the Civil Procedure Rules, and, therefore, locked out the applicant from his right of appeal. That no decree was drawn and that the court made errors by transferring the land to the plaintiffs and other persons who were not party to the suit.

Mr Wambua argued that after the court's ruling of 25/11/04 and after no appeal was preferred and no other action taken, the plaintiff thereafter applied to the Deputy Registrar to sign transfer forms for the transfer of the suit land in his names and the same was granted on 29/3/96; another application dated 4/4/00 the plaintiff filed an application for tracing of the suit land excised from the suit land and the same was granted on 7/7/00 and transfers effected; an application dated 25/1/01 seeking review of the ruling of 25/11/94 which has not been prosecuted; application dated 27/11/00 seeking orders of injunction restraining the defendants from trespassing on the suit land which was granted; application for review seeking to review order of injunction of 21/2/01 and still pending; an application dated 22/11/01 in which plaintiffs applied for committal to civil jail of the defendants for contempt of court orders and it was granted on 6/6/02. Mrs Nzei then came on record on 22/11/02 and took no steps till she filed the present Notice of Motion now objected to.

It is Mr Wambua's stance that this application offends Section 6 of the Civil Procedure Act since the application dated 25/1/01 seeking same orders still stands. To this, Mrs Nzei argued that the fact that an application is on record cannot be a bar to filing of the application dated 13/10/04 as the court can stay the present one or she can have the earlier application withdrawn. On that I agree with Mrs Nzei for the applicants. It is the Respondent's contention that the application is Res judicata. As properly considered in the case of ***UHURU HIGHWAY DEVELOPMENT LTD versus CENTRAL BANK OF KENYA***, the doctrine of Res judicata does apply to applications as it does to proceedings in a suit. The application dated 8/10/93 by Mr Kavila sought to set aside the award of 31/3/93 for reasons of corruption, misconduct and concealment of material facts or for reasons that time for filing the award was not extended. The court in its ruling of 25/11/04 only considered the issue of extension of time and dismissed the application. The present application seeks a review or setting aside of the orders of 25/11/04 but for different reasons, that there are errors apparent in the face of the record.

Contrary to what Mrs Nzei submitted in her address to the court that a prayer for review can be made at any time and no party can be locked out, that is not the position. Order 44 Rule 1 (b) provides that such application for review should be made without unreasonable delay. Up to 13/10/04, it was 10 years since the order was made by Justice Osiemo. The Respondents' counsel has taken us through the various applications that have been made since 1994. All this while the applicants were aware and alive to the orders of this court. No reason was given why the delay of 10 years. The delay has been unreasonable bearing in mind that the parties had counsel on record all the time.

Considering the prayers in the application of 13/10/04 there is no reason why the same were not included in the application of 8/10/93. The common ground is that they wanted the award set aside. The errors now on record existed then. The applicants are trying to go round the earlier application by use of different terminology and under different provisions of the law but they are the same. The applicant is actually trying to have a 2nd bite at his cherry which is improper (***UHURU HIGHWAY versus CENTRAL BANK (SUPRA)***). The application is Res judicata and cannot be entertained. Mrs Nzei alluded to the fact that the court confirmed the award and locked out the applicant from appealing knowing that was an error that applicant had a right of appeal with leave. No leave to appeal has ever been sought since.

I do agree with Mr Wambua that the court is functions officio the process of execution having proceeded after judgment. The only recourse that applicant had was appeal.

For the above reasons, I do uphold the objection; I strike out the application dated 13/10/04 with costs to the Respondents.

Dated at Machakos this 26th day of January 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE