



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.823 OF 1992

MARIAM OMAR BAHAMAD

SALIM MASHJERRY
PLAINTIFFS

VERSUS

MOHAMMED HATIMY TALIANI

SATCHDEVA & CO ADVOCATES
DEFENDANTS

Coram: J W Mwera J

Khatib for 1st Defendant
Munyithya for 2nd Defendant
1st Plaintiff absent
2nd Plaintiff in person, present

RULING

On 29.12.2003 the 2nd plaintiff acting in person filed an application of the same date under Order 39 r 2,3,4,5,9 CPR and Section 3ACPA. The court was told or meant to understand that the 2nd plaintiff was also acting (as a recognized agent) for his wife, the first plaintiff herein. Although it was not clear why Order 39 rr 2,3,4,5,9 CPR were invoked it transpired that the plaintiffs' desire is the finalizing of this case which was instituted in 1992. It has been heard by more than one judge, resting with Waki J, as he then was, before whom the trial concluded and he even started writing a judgement which he did not complete. It is for the record that Waki J then went to Nairobi High Court on transfer and was later appointed to the Court of Appeal.

Thereafter as the 2nd plaintiff said in the present application the judge was later "*implicat ed*". All this litigant wants is for any other judge to complete writing and to deliver the judgement herein.

Mr Khatib for the 1st defendant appreciating the history of this case observed that although it had been characterized by acrimony, suspicions and whatever up to the point we are at, the prudent course to take is by way of trial *de novo*.

Mr Munyithya for the second defendant also remarked the same way and agreed that cumbersome as it may be, it will be fair that a fresh hearing be gone into. Both counsel made reference to Order 17 r 10 CPR.

The court took time to peruse the law as well the typed proceedings as per the file. This is a long old case that has gone through several hands. It touches on a large sum of money and the purchase of real property using part of it. It is also observed that there have been points of conflict, stress and acrimony all along. Thus early determination is desirable. However having recourse to law may not see us going the way the plaintiffs seek i.e. that another judge continues by writing the rest of the judgement Waki Judge started and then delivering it. Order 17 r 10 CPR says the following regarding:

“Power to deal with evidence taken before another judge.” (Emphasis added)

The foregoing are the marginal notes to the said rule 10(1) which reads:

***“10(1) Where a judge is prevented by death, transfer or other course, from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left. (b)*”**

Concisely put under O 17 r 10 CPR, a judge may proceed with evidence already taken down to conclude a suit which for any reason set out, his predecessor would not conclude. It can thus be added that after concluding the taking of evidence (the trial) the successor can then proceed to draft and deliver judgement. In the present case the trial (i.e. taking of evidence) had been concluded. Even the trial judge (Waki J) had started writing the judgement. Such state of things does not fall within Order 17 r 10 CPR.

Order 20 CPR says this in the relevant parts about JUDGEMENT.

“2(1) A judge may pronounce a judgement written and signed but not delivered by his predecessor.”

That is not the case here. There is no complete judgement written, signed but not delivered by Waki J, which another judge may now be asked to deliver. Had there been such a judgement then Order 20 r 3(2) CPR would apply:

“3(2) A judgement pronounced by a judge other than the judge by whom it was written shall be dated and countersigned by him in open court at the time of pronouncing it .”

From the foregoing this court is minded to direct that the proper and prudent course to take in the cause is for the trial to start de novo. Considering the history of the suit parties will do well to retrieve their exhibits, compile (any) agreed bundles, file issues and take fresh hearing dates in the next 45 days.

It is accordingly directed.

Delivered on 19th January 2004.

J W MWERA

JUDGE