REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI
CIVIL APPEAL NO 128 OF 1992

CHARLES GICHINA MWANGI ……..…….. APPELLANT

VERSUS

HENRY MUKORA MWANGI ……..…….. RESPONDENT

RULING

This case has had a very long history. It was filed by the Respondent in the lower court on 2nd September, 1991 seeking Judgment against the Appellant for a declaration that the Appellant held 15 acre portion of Title No Loc. 16/Kigoro/197 (hereinafter referred to as "the suit land") in trust for himself and the Respondent and that that portion be severed to enable each party occupy his own. The Respondent succeeded in the suit in the lower court.

In execution of the decree of the lower court, the suit land was divided and one of the portions was transferred to the Respondent. The portion which was transferred to the Respondent was Title No. Loc. 16/Kigoro/1871 (hereinafter referred to as "the subdivision"). However, the Appellant was not satisfied with the decree of the lower court. He appealed to this court.

At one point, his appeal was dismissed by the Honourable Lady Justice Owuor (as she then was) but he would have none of it. He moved to the Court of Appeal which set aside Justice Owuor's dismissal of the Appeal and gave the appeal new life by ordering that it be heard de novo . The appeal was heard afresh by my Learned Brothers the Honourable Messrs Khamoni and Ransley. On 27th June, 2003 the two Judges allowed the Appellant's appeal with costs and effectively overturned the decision of the lower court.

One would have expected the matter to rest there – at least leaving the Appellant to realize the fruits of his Judgment by the usual mode of execution. That was not to be. On 22nd July, 2003 the Appellant filed an application in this court seeking to restrain the Respondent from interfering with his use of the subdivision which application was dismissed by Justice Ransley on 3rd December, 2003. The Appellant soldiered on. On 21st January, 2004 he filed an application under Order XXXIX Rule 1 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act (Cap 21) seeking, once again, to restrain the Respondent from interfering with the subdivision. That is the application which is before me presently.

At the hearing of the application, Mr Wandaka, for the Appellant, moved goal posts and told me, without amending his client's application, that what was sought was a mandatory injunction since the Respondent was in occupation of the subdivision. He cannot be allowed to do this. The Appellant cannot be allowed to argue for an order which he did not seek in his application. I need not refer to any authority as it is a well known principle of our judicial system that a party cannot be allowed to depart from his pleading.

As Mr Wandaka himself pointed out, his client has a Judgment which he may execute and not vex this Court with unmerited applications. On this conclusion, I find that the Appellant's application dated 21st January, 2004 has no foundation and I dismiss the same. However, since it is apparent that the Respondent himself is not entitled to occupy the subdivision whichever way one looks at it, this Court will not award him any costs. It is so ordered.

Dated and delivered at Nairobi this 27th day of April, 2004.

ALNASHIR VISRAM

JUDGE