



**Cheruiyot v Kemei**

**REPUBLIC OF KENYA**

**High Court, at Kericho**

**civ case 70 of 96**

July 29, 2003, Alnashir Visram J delivered the following Ruling.

There are two applications before the Court. One is dated August 28, 2002 and is stated to be brought under Sections 3, 3A and 80 of the Civil Procedure Act (Cap 21) and Order XXII Rules 22, 24 and 25, Order XLIV Rules 1, 2 and 3 of the Civil Procedure Rules (hereinafter referred to as “the Rules”) together with all enabling provisions of the law. In it, the Defendant seeks in the main the following order:

“2. THAT this Honourable Court do review its judgment and decree in this suit and set aside the said Judgment and strike out the Plaintiff’s suit with costs to the defendant.” I will hereinafter refer to this application as “the Application for Review”. The second application is dated August 30, 2002. It is stated to be brought under Sections 3 and 3A of Cap 21 and Order XXI Rules 22 and 25, Order XLVII Rule 5(b) (x) of the Rules and all other enabling provisions of the law. In it the Defendant seeks in pertinent part, the following order:

*“2. THAT there be a stay of execution of the judgment and decree pending the hearing and determination of the defendant’s ... application for review of the said judgment and decree and (sic) Kericho High Court Civil Suit No. 39 of 2002 (O.S).”*

I will hereinafter refer to this application as “the application for stay.” Although Mr. Matwere for the Defendant informed the Court that both applications were coming up for hearing, he limited his Submissions to the Application for Review and I take it that he had abandoned the application for stay. Even if I were wrong in this respect, I have serious doubts whether this Court is empowered to stay the execution of the decree herein merely because the Defendant has filed another action against the Plaintiff.

The only other view that can be taken of the application for stay is that the Defendant sought stay of the execution of the decree herein pending the hearing and determination of the Application for Review. This was dealt with by the Deputy Registrar of this Court on March 12, 2003.

In his Submissions, Mr. Matwere referred the Court to paragraphs 2, 3, 6 and 9 of the Defendant’s “supportive” Affidavit sworn August 28, 2002 and argued that the manner in which this suit was transferred to this Court from the lower Court was irregular as there was no jurisdiction to file the same in the lower Court. The action was void ab initio and incapable of transfer, he said.

He referred the Court to the case of Kangenyi v. Musiramo & Ano [1968] E.A. 45. He argued that that fact was not brought to the attention of the Court. He further argued that at the time of the transfer the suit was time barred. I agree with Mr. Karigo that these are not grounds upon which this Court may review its judgment. Mr. Karigo said before me, and it was not controverted by Mr. Matwere, that the suit was transferred in 1996 by consent and no challenge to the transfer was raised ever since. To succeed on an application for review, it is imperative that the Applicant must show “*the discovery of new and important matter or evidence which, after due exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed ... or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason*” (see Order XLIV Rule 1(1) of the Rules) The Defendant did not establish any of these matters. The same Rule requires that an application for review must be brought “without unreasonable delay.” In this case, the Judgment sought to be reviewed was delivered on May 3, 2002 yet the application was not brought until August 28, 2002. This

was after close to four months. The Defendant has not told this Court why it took him so long to make the application for review. In any event, the defendant did not show this Court how the lower Court lacked jurisdiction in the matter in the first instance.

I, therefore, dismiss the Defendant's applications dated August 28, 2002 and August 30, 2002 with costs.

29 Jul 2003

A R Visram J