



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CIVIL APPEAL NO. 389 OF 2001

(From the original Civil Suit No. 22 of 1996)

BENSON MURIGI NJUGUNA & ANRAPPELLANT

VERSUS

SAMUEL KIBERESPONDENT

R U L I N G

I do not know whether to call this an appeal, a reference or a revision. From the information in the record the parties herein are relatives. The first applicant is the father of the second applicant and the respondent.

However, all has not been well with them. They have been engaged in a land dispute with the respondent being sued in the Resident Magistrates Court Civil Case No. 782 of 1994 with trespassing on the applicant's parcels of land.

A decision made in the applicants favour was appealed against by the respondent who lost the appeal and was ordered to pay costs to the applicants.

On 1st March 2001 the parties recorded the following consent order regarding payment of these costs by the respondent before the Deputy Registrar of this court, (M.J. Bhatt) now deceased.

- (1) Kshs.30,000/= on or before 21/3/2001
- (2) Kshs.28,870/= on or before 18/4/2001
- (3) Kshs.18,870/= on or before 16/5/2001

“In default of a single installment as above warrant

of arrest to issue to consider Civil jail of defendant judgment -debtor.”

“The amounts were to be paid at the office of the applicants (decree holder's) advocate”. The order was signed by counsel for the applicants and the judgment debtor (respondent) in person.

According to the 2nd Applicant herein these costs were not paid as per the consent order but instead it surfaced that a memorandum of understanding dated 15/3/2001 had been entered into between 1st applicant and the respondent that a sum of Kshs.65,240/= had been paid by the latter to the former in

satisfaction of the costs of the said appeal.

The 2nd applicant was not aware of this payment and he raised a complaint in this regard with the said Deputy Registrar.

He said since he was one of the respondents in the appeal who had contributed nearly all the expenses thereof and that there was a court order as to how the costs were to be paid, there must have been a collusion between the 1st applicant with the respondent to deprive him of these costs under the guise of the memorandum of understanding.

He was also of the view that the purported memorandum of understanding over the payment of the costs was a sham and that the second applicant, whom he believed was senile could not have been a party to the said memorandum of understanding or that he was simply bulldozed into placing his finger prints thereon without the slightest idea what this was all about.

Mr. Bhatt, the Deputy Registrar (now deceased) made some observations on this matter and even sent the alleged memorandum of understanding to the Criminal Investigations Department for the authentication of the finger prints affixed thereon to confirm they were those of 1st applicant Benson Murigi Njuguna.

When the matter was mentioned on 17.7.2001, the same Deputy Registrar observed the report from the Criminal Investigations Department had been received and that it indicated that the finger prints on the memorandum of understanding were those of Benson the said Benson Murigi Njuguna.

Then he held that the sum of Kshs.65,240/= had duly been paid by the judgment debtor to the decree holder.

These costs were taxed as a result of the appeal which the applicant and his father had won against the respondent. There can be no further appeal to this court on costs arising from the same matter and this is why I did not know whether to call this an appeal, Revision or reference.

I think the best way is for me to call it a reference.

There is actually a court order on the file that the amounts of costs be paid to the decree-holders advocates.

The applicant stated he had insisted that this should be done because he feared the respondent was avoiding to settle these costs.

And that since he was the one who incurred these expenses, the memorandum of appearance was intended to deny him those costs.

Though parties were asked to put in statutory statements by the Deputy Registrar, I do not know what for, they were never referred to is the Deputy Registrar's proceedings or in his final order.

This was a simple matter. There was no need to take documents to the Criminal Investigations Department to confirm whose finger prints on the memorandum were.

The Deputy Registrar had made an order for costs to be deposited at the office of the decree holder's advocates at the insistence of the 2nd applicant.

For some sinister motives, the respondent avoided this order. He gave no reason why he did this. That the memorandum of understanding was made because he was under arrest could not have been a valid reason because the costs could as well have been deposited in court for onward transmission to the decree holders advocates.

And that the 2nd applicant was skeptical about the memorandum of understanding it was incumbent upon the Deputy Registrar to insist that the costs should be deposited with the decree-holder's advocate office.

If the respondent was genuine in paying the costs as he did, why did he enter into the memorandum of understanding with the first applicant alone, knowing well that those costs were to be paid to the applicant's jointly through their advocates?

I feel the 2nd applicant has a genuine grievance in this matter and it is only fair that I direct that the respondent deposits the sum of Kshs.65,240/= into this court within 30 days from today, since the 2nd applicant has dispensed with the services of the advocates in whose office the costs were to be deposited.

I agree with the 2nd applicant that the so called memorandum of understanding was a total fraud aimed at depriving him of these costs and was not worth of any consideration.

I so rule.

No order for costs.

Delivered this 16th day of July, 2002.

D.K.S. AGANYANYA

JUDGE