REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 2710 OF 1989

DAVID MWANGI NDUATI……PLAINTIFF

VERSUS

NJOROGE MUKAMI……DEFENDANT

RULING

By this application filed on 25th August, 2002 and dated 28th July, 2000, Kinyanjui Njoroge on behalf or in place of the defendant, Njoroge Makumi, seeks orders in this suit filed against him or his predecessor by David Mwangi Nduati, hereafter called the respondent for:-

> "1. Leave to act in person
>
> 2. Leave to prosecute an application dated 4th April, 2000 3. That the court do review its judgment of 4th September, 1991.
>
> 4. That the suit premises be granted to the applicant.
>
> 5. That the restriction on Loc2/Makomboki/618 to 624 be lifted"

The grounds on which this application is based are said inter alia to be that the applicant cannot afford legal fees and that the facts relating to the matter were at all times outside his knowledge. The applicants application is however strongly opposed on the grounds inter alia that the matter had been duly heard, appealed against and final decision made by the Court of Appeal on the appeal. Hence it cannot be reviewed by this court.

On account of the chequered history of this matter, it is the courts view that a short background would assist in crystallizing the issues which fall for the decision of this court, most of which have been captured by the respondents' detailed affidavit. According to the pleadings the dispute herein has it genesis in the family dispute between the parents of the now warring parties who were sons of one Makumi Nguru. After the death of the said Makumi Nguru and as the father of the respondent/original plaintiff Nduati Makumi was away in the Rift Valley during the registration at Lands in Central Province, the said Nguru's land was registered in the name of the applicants father/Original defendant Njoroge Makumi as Loc 2/Kanderandu/177 and Loc 2/Makomoki/190 When the respondent came back from his sojourn in the Rift Valley in the 70's or 60's, the respondents' father found his fathers land all registered in the name of his brother the applicants father herein.

Despite a request to be given his share of his fathers land, the applicant's father, Njoroge Makumi

appeared unwilling. The respondent's father then referred the matter to arbitration under the Magistrate's Amendment Act. After the clan had heard the dispute, it was ordered that the applicant's father retains the large portion namely Loc 2/Makomboki/190 but should surrender Loc2/Kadrudi/177 to the respondents father. This did not go well with the applicant's father and he appealed against the elders award, which appeal was upheld by this court as the elders did not have jurisdiction to deal with title to land.

In view of the above temporary set back, the respondent then filed the suit herein. On 3rd day of September, 1991 the court Mango J (now deceased) upheld the elders decision and ordered that Loc 2/kanderadu/177 (hereafter called "the suit premises") be transferred to the respondents father. As by the time of the Judgment the applicants father had caused the suit premises to be subdivided and transferred to his children, the court ordered the various sub divisions cancelled and transferred to the respondents father on 13th December 1991. The applicant then appealed but the appeal was struck out on 16th April, 1997 as it had been filed out of time and the leave to extend time having been also refused by the Court of Appeal on 19th April, 1996.

The original combatants have since passed away and the applicant as personal representative of the original defendant now seeks review of this court's Judgement by late Mango J. on the grounds that the suit was res judicata as it had already been dealt with in High Court Civil Appeal No. 266 of 1988. On the other hand, the respondent who is the son of the original plaintiff contends to the contrary and that the current application cannot lie as the original judgement has been appealed against to the Court of Appeal.

The grounds on which a judgment can be reviewed are largely contained in O.44 Rule 2 of the civil Procedure Rules and are if a new fact has risen or an error is apparent on the face of the judgment. The party should also not be appealing from the Judgment or is unable to appeal if it is not allowed. It may also be feasible to seek a review under S. 3A of the Civil Procedure Act if the interests of justice so demand as S. 80 of the Act does not restrict it to the grounds set out in O.44 of the Rules. S. 71A and 72 of the Act relied upon by the applicant in the application dated 4th April, 2000 which was revived do not appear to assist the applicant.

According to the applicant's application of 4th April, 2002 for review on which the applicant relied, it was contended that the respondent had obtained judgment fraudulently by not disclosing that the matter was res judicata as the issue therein had been dealt with in High Court Civil Appeal No. 266 of 1988 between the parties. It is said by the applicant that this was an error apparent on record of the judgment of this court made by the late Justice Mango. In his view, due to this non disclosure, the applicant had suffered an injustice and the matter should therefore be reviewed. Mr. Mwilu for the respondent on the other hand submitted that the application was an abuse of the powers of the court as the applicant had exercised his right of appeal and the appeal had been struck out. Consequently, in his view the applicant had no right to seek a review. He also submitted that the matter was not res judicata as HCCA NO. 266 of 1988 merely found that the panel of elders and the Lower Court had no jurisdiction to entertain the claim for beneficial ownership of land.

As can be seen from the aforesaid submissions, the issues which fell for determination are whether this applicants application was an abuse of this courts process as the applicant had appealed to a Higher Court. Secondly whether the proceedings in HCCCA No. 266 of 288 between the parties herein constituted a proceeding in which the issue between the parties had been determined so as to constitute a plea of res judicata or issue estoppel.

On the first issue, it is observed that S. 80 of the civil Procedure Act, only allows a review in respect of decree's from which no appeal has been preferred. It is however observed that by S. 3 and 3A, unless there is a specific provisions to the contrary in other written laws, nothing in the Civil Procedure Act or Rules shall limit or otherwise affect the inherent power of court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. As I am not aware of any other written law other than the Civil Procedure Act which bars courts from reviewing their orders where the ends of justice so demand, I find that this court would still be entitled to review its orders if the ends of justice so demand. In this case, even though the applicant had "preferred" on appeal against the lower court decision it is my view that as the appeal was not determined on merits, it would still be open to this

court to review its original orders if the ends of justice so demand. It is also my view that“appeal means “a” “valid” appeal in which the merits are considered and not one where issues are skirted and decisions made based on mere technicalities. I therefore hold that this matter is validly before this court as the applicants appeal was struck out and not decided as it had been filed out of time.

Was the respondents suit res judicata? According to Civil Procedure and rules of natural justice, a matter only becomes res judicata if dealt with by a court with competent jurisdiction. In the instant case, the decision in HCCC NO. 266 of 1988 merely decided that the panel of elders did not have jurisdiction to entertain a dispute relating to ownership of land. Those proceedings and determination therein were null and void and are as if nothing had been done.

Their proceedings could not therefore give rise to the plea of res judicata.

Finally is there any other issue from proceedings and the judgment which call for action in the interest of justice? Looking at the entire proceedings herein it is observed that the land indispute was ancestral and both parties were entitled thereto. Although the title was only in the name of applicants father, he clearly held it in trust for the other brother. The Judges decision cannot therefore be faulted. The applicant’s application has not therefore brought out any new fact which could jolt this court’s conscience so as to review or recall its earlier decision.

In view of the above I find that this application does not show any new grounds on which this courts decision should be reviewed in the interest of justice. I therefore dismiss it. As regards costs, I find that this is an unfortunate family dispute and in an effort to promote reconciliation I make no order as to costs. Each party to bear its own costs. Orders accordingly.

Delivered and signed this 13th day of December 2002

G. P. Mbito

JUDGE

13.12.02 Coram: Mbito J.

Kinyanjui Njoroge Applicant in person

Olewe for Wandugi for Respondent

Order: Read and signed.

G. P. Mbito

JUDGE