



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Case 10 of 1980

FRANCIS ORIGO.....1st PLAINTIFF

PETER PANYAKO.....2nd PLAINTIFF

VERSUS

JACOB KUMALI MUNGALA..... DEFENDANT

RULING

On 12th May, 2000 the Resident Judge Eldoret, Lady Justice Nambuye wrote to me thus on the above case: -

"There is an application for Review pending in the above file. The Resident Judge has handled matters relating to the same issue previously. It is the feeling of the current counsel for the applicants that since they are seeking to upset the order concluding the appeal, justice demands that the matter be handled by two Judges who have not previously handled the matter or related matters.

I have caused proceedings in the file and those of the related files to be typed for Your Lordship's perusal and directions please.

All the related records plus the subject file are sent herewith by runner for Your Lordship's directions please."

The related records referred to in the Resident Judge's letter are: -

- (a) Eldoret RM Civil Case No. 920/1979
- (b) Eldoret HCCC No. 215/1999 (O.S)
- (c) Eldoret Civil Appeal No. 10/80
- (d) Eldoret Misc. Civil Application No. 12/1983.

Thus, coupled with the current file under reference (Eld. HCC No. 10/1980), there are five voluminous files in all. They, immediately give the best testimony of the long history of this matter. The dispute between the parties, however, remains essentially one, that is to say over land. It is, in my opinion, a disquieting scenario in the administration of justice and one that must not be allowed to gain root any

further in this case or any other case.

Consequential upon the Resident Judge's letter to me, I, through my Deputy Registrar, issued Notices to the Advocates for the parties to appear before me and address me on the reference and, indeed, the history of the matter.

On 15th August, 2000, I had the advantage of full addresses by Advocates for both sides, Mr. Machio and Mr. Momanyi. The following issues emerged therefrom: -

- (a) Case started in 1979 in the Resident Magistrate's Court,
- (b) It was a case over ownership of land.
- (c) After decision of the Resident Magistrate, an appeal was filed in the High Court, Eldoret.
- (d) Mead, J., then High Court Judge, Eldoret, heard the appeal and delivered his judgment in 1981. He dismissed the appeal.
- (e) Attempts were then made to file second appeal in the Court of Appeal against the decision of Mead, J.
- (f) The attempts were unsuccessful and, consequently, the Court of Appeal never heard the appeal.
- (g) Subsequently, eviction orders were sought.
- (h) At some stage, office of the Attorney-General and Provincial Administration, needlessly in my view, sought to intervene.

Eventually, a motion was filed in the High Court, Eldoret in High Court Civil Appeal No. 10/1980. The motion was seeking to Review the 1981 judgment of Mead, J. on appeal. The motion asked that the Review be heard by two Judges who have not previously handled the case. What is before me, therefore, is the Motion aforementioned. Even then, only one prayer in the Motion is before me. That is the prayer for two Judges who have not previously handled the case to hear the application for Review of Mead, J's 1981 appeal judgment.

Mr. Momanyi for the Respondent very strongly complained about the whole matter and, more particularly, the Motion now before me. He said the applicants have always frustrated execution of the judgment of the Resident Magistrate, Eldoret and Mead, J's appeal judgment of 1981. He said the matter had even gone to the Court of Appeal, though, as I said earlier, the appeal was not heard by the Court of Appeal for reasons which were given by both counsel and are on record. Mr. Momanyi criticized previous attempts by the Provincial Administration to intervene in the matter. He said the present review application is part of the continued scheme to frustrate execution of judgments obtained by his clients over ten years ago. He concluded that this application is incompetent and urged me not to set up a bench of two Judges or at all to hear it.

On the other hand, Mr. Machio, for the applicants, urged me, equally strongly, to set up a bench of two Judges to hear the Review application. He stressed that some vital witnesses did not give evidence when the case was heard in 1979 before Resident Magistrate or at first appeal in 1985 in the High Court Eldoret.

I am not hearing the Review application. I will, therefore, resist the temptation to go into the merits. I must stress however, that litigations must have their final end. They cannot proceed forever, going back and forth in court in one form of application or another. A party who is successful in civil litigation must realize the benefits of judgment in his or her favour unless, of course, he or she is prevented from doing so through due process of law.

I want to stress, also, that once a matter is in court, it must be only the legitimate parties in court to pursue

it. Third party intervention can only be entertained through legitimate parameters of the law. Anything short of that will not advance the course of justice and will weaken the Rule of Law in this country.

I sympathize with the views expressed by Mr. Momanyi. But I want to see an end to this endless saga of litigation. I want to give every party a chance to feel that all legitimate avenues of justice were explored. I will therefore, move the matter forward for hearing of the Review application which must be done with speed. Mr. Momanyi remains at liberty to take any preliminary objection on any issues that he may wish to take. It is entirely for him to decide on this at the time of the hearing.

A review should, normally, under the relevant Rules, go before the Judge whose judgment or order is to be reviewed. However, where such a Judge is no longer attached to the Court the review may be heard by any other Judge attached to the court at the time it is called up for hearing. Here, however, Mead, J. whose appeal judgment is sought to be reviewed is no longer attached to the court. Accordingly, the review may be heard by any other Judge who is attached to the court at the time of the hearing of the Review application.

It is noted, also, that the Rules (Order XLIV R 1 (b)) require application for Review to be made without unreasonable delay. Yet here, the judgment to be reviewed was delivered over 10 years ago. The Judge to hear the Review application will, of course, consider all these matters if taken up before him or her by the parties.

I was asked by Mr. Machio for two Judges to hear the Review application. Section 79 (C) of the Civil Procedure Act Cap. 21 gives me power to appoint two or more Judges to hear an appeal from a subordinate court where, in any particular case, I consider it appropriate to do so. But what is before me now is not an appeal but an application for Review. I hold the view therefore that Section 79 (C) of the Act is inapplicable.

Section 80 of the Act provides for Review. But I find no provision equivalent to 79 (C) giving me powers to appoint two or more Judges to hear a Review application. Therefore, I hold the view that Section 80 of the Act, though it provides for Review, does not empower me to appoint two or more Judges to hear a Review application.

In the Rules, Review is dealt with under Order XLIV. The provision giving the Chief Justice power to appoint or designate a Judge to hear a Review is in Rule 4 (2). But that Rule applies in circumstances different from what is in the application before. I cannot, therefore, invoke the said Rule 4 (2).

Yet Rules 5 (1) and (2) clearly envisage a situation where a Review is heard by more than one Judge. I could therefore, under appropriate circumstances, in my inherent powers, appoint more than one Judge to hear a Review application.

I now turn to the matter before me. Despite its delay and long history, I find, for purposes of this Review application, no circumstances to warrant a bench of two or more Judges to hear it. I direct, therefore, that the Review application will be heard by one Judge or Commissioner of Assize to be appointed by me in due course.

I now call upon the parties to give me their date proposals, which must fall within the month of October, 2000 to avoid any further delays in this matter.

Dated at Nairobi this 12th day of September, 2000.

B. CHUNGA

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CHIEF JUSTICE