



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CIVIL CASE NO.198 OF 1991**

**CHARLES MWANGI MUTUANGURE.....PLAINTIFF**

**-VERSUS-**

**HINGA SIMON GICHOMO.....1<sup>ST</sup> DEFENDANT**

**MURANG'A COUNTY COUNCIL.....2<sup>ND</sup> DEFENDANT**

**RULING**

Should a court lay any weight on the good faith of litigants, that litigants will act in good faith in the execution of its orders or that they will do whatever they wish in the name of that order? That is the question that has bothered me as I have read through the file in this unfortunate matter. The same must come to an end.

On 16<sup>th</sup> November 1992, Tunoi Judge as he then was recorded the following orders by consent: -

- 1) The plaintiff is entitled to 2 acres of land out of land parcel no.Loc.9/Kanyanyaine/383 and shall be registered as the proprietor thereof.
- 2) The portion allocated to the plaintiff will be subject to negotiation by parties.
- 3) Mention on 26<sup>th</sup> January, 1993.

The plaintiffs were Charles Mwangi Mutuangure and Karuga Wandai & Co. Advocates and defendant was Johana Gichomo.

Since that time the matter of the specific portion was never settled been resolved and the same was mentioned over the same issue before Ang'awa, Juma, Mitey, Khamoni JJ until it found me.

The only issue was that the 2 acres were not sorted out on the ground.

Johana Gichomo died. His place was taken by Hinga Simon Gichomo and in due course Murang'a County Council. The matter of the plaintiff's two acres was ignored by the latter participants, who proceeded as if the court had not said anything. The Plaintiff has been relentless, pursuing them in this matter, to have that order effected.

Let us come to my role in the matter, and why this application is before me.

On 5<sup>th</sup> February 2018 I gave parties time to go fix the issue on the ground. They were to return on 19<sup>th</sup> March 2018.

On that 19<sup>th</sup> March 2018 the defendant and his counsel Mr. Kimaru were both absent. Mr. Wahome Gikonyo and the plaintiff appeared. Mr. Wahome Gikonyo submitted: -

*“There is an agreement on record that the plaintiffs 2 acres will come from the part where he had planted his tea bushes. I pray that the 2 acres come from Loc 9/Kanyanyaine/1778 where the plaintiff tea bushes are. Deputy Registrar to sign all the documents for transmission and transfer”*

I stated on record:

*“I have perused the typed proceedings it appears to me the above orders will bring this matter to its logical conclusion. The same are granted with no orders as to costs”*

I was wrong!

On 19<sup>th</sup> September 2019, I received an application under certificate of urgency seeking orders: -

- 1) This Application be certified as urgent and heard ex-parte in the first instance.*
- 2) This Honourable Court be pleased to set aside the Orders issued on 19<sup>th</sup> March 2018.*
- 3) The costs of the Application be provided for.*

The grounds for the application were to be found in the supporting affidavit of Daniel Kimaru sworn on 12<sup>th</sup> September 2018 and as set out on the face of the application as follows:

- 1. THAT the matter was coming up for mention on 19<sup>th</sup> March 2018 to confirm whether the parties had reached a consent.*
- 2. THAT the Advocate so instructed checked the online cause list on 16<sup>th</sup> March 2018 and the matter was not listed for mention.*
- 3. THAT this Honourable Court by granting the orders exposes the Applicant to irreparable loss and damage which cannot be compensated by way of costs.*
- 4. THAT if the orders are not set aside, the plaintiff may proceed and subdivide the Applicants land.*
- 5. THAT it is in the interest of justice that the Orders issued on 19<sup>th</sup> March 2018, be set aside pending the determination of the Application dated 23<sup>rd</sup> October 2017.*
- 6. THAT unless the Order issued on 19<sup>th</sup> March 2018 are set aside, the Applicant will be prejudiced and suffer great harm.*
- 7. THAT the Applicant herein is ready and willing to abide by any conditions set by the court.*

The main argument by the applicant is that unless the orders issued on 19<sup>th</sup> March 2018 are set aside; the applicant will suffer prejudice and great harm. In the affidavit counsel explains why he never showed up on 19<sup>th</sup> March, 2018 that the matter was not cause listed on the online cause list. He also explains at paragraph 8 and 9 of the affidavit that the order I issued is not in consonant with Tunoi J’s order as my order relates to Loc.9/Kanyanyaini/1778, while the Judge’s order relates to Loc.9/Kanyanyaini/383 and this 1778 had been purchased by the 2<sup>nd</sup> defendant (Muranga County Council) who was now the registered proprietor of Loc 9/Kanyanyaini/1778.

The application was opposed via Grounds of Opposition filed by the firm of Wahome Gikonyo Advocates, on behalf of the respondent on 20<sup>th</sup> September 2018 to the effect that:-

- 1. The application is misconceived and incompetent.*
- 2. The application is bad in law, a gross abuse of the process of the court and untenable.*
- 3. The application is fatally and incurably defective.*
- 4. The application is frivolous and vexatious.*
- 5. The application is otherwise without merit and should be dismissed with costs.*

There was also a replying affidavit sworn on 10<sup>th</sup> January 2019 by Charles Mwangi Mutuangure to the effect that

*-There was inexplicable delay of more than 6 months in filing this application.*

*-That the applicant, seeking the discretion of the court, was required to place sufficient material before the court to enable the court to exercise the same.*

*-That the mutations from the transaction were signed on 25<sup>th</sup> June 2018, Land Control Board consent was granted on 14<sup>th</sup> June 2018 for sub-division, transfer forms are signed and the respondent was the holder of Loc.9/Kanyanyaini/3166 of the portion where his tea bushes were, on 13<sup>th</sup> September 2018 the Loc.9/Kanyanyaini/3166 was transferred to George Kamau Mwangi.*

The application was argued inter partes on 30<sup>th</sup> January 2019.

Mr. Kimaru for the applicant was reiterated the content of this affidavit and was at pains to explain why he never attended court. Further that the orders of 19<sup>th</sup> March 2018 were never served on him, that the order subdivided otherwise public land and the order of Tunoi J was made on 16<sup>th</sup> November 1992 when the applicant was not a party to the proceedings herein.

He also challenged the fact that the respondent had not complied with the directions of the court in filing his reply within the requisite time and urged the court to strike it off. He also pointed out that the letter referred to by the respondent of 20<sup>th</sup> January 1993 was with reference to a different case No.189 of 1992 while the matter at hand relates to case No.198 of 1991 (OS) and that among the signatories to that letter only one was a party to this suit.

In his submissions in opposing the application Wahome Gikonyo relied on the Grounds of Opposition of 20<sup>th</sup> September 2018 and the affidavit of Charles Mwangi Mutuangure;

-That the applicant had failed to discharge the burden of placing sufficient material before the court to enable the court exercise its discretion.

- i) There was delay of over 6 months –inordinate and inexcusable.
- ii) Justice Tunoi’s decree was 27 years old and litigation must come to an end.
- iii) That applicant had not demonstrated the harm it would suffer from the orders of 19<sup>th</sup> March 2018, that as a public entity the applicant had lost nothing and would have to give way to the rights of the private person.
- iv) That date of 19<sup>th</sup> March 2018, was taken by consent and counsel for applicant had no business checking for his matter on the online cause list. That he had not even annexed a copy of that online cause list to support his claim that the matter was not listed therein.
- v) That application had been overtaken by events- evidenced by the submission of the land, and transfer to a 3<sup>rd</sup> party.
- vi) That the applicant had slept on his rights and equity does not serve the indolent.
- vii) That the respondent is a 90-year-old man who needed to take a rest from litigation and more so this case was backlog giving Judiciary a bad name and this litigation must come to an end.

In his rejoinder Mr. Kimaru submitted that his client had bought the land from the registered proprietor and he would suffer prejudice if the order was not set aside.

I have carefully considered the application before me.

I do agree that the original order related to Loc. 9 /Kanyenyaine/383 and hence the order I issued on 19<sup>th</sup> March 2018 could be challenged on that basis. But then what is the justice of this matter? Surely justice ought to prevail and the passage of time and the interference by intervening circumstances should not change that. Mr. Mutuangure and Mr. Johana Gichomo, the original parties in these proceedings agreed on the issues before these other parties came on board. They should not be seen to change that, while the court order is in force. Mr. Mutuangure has not slept on his rights but pursued the same over the years.

I have considered the rival submissions. The application is brought under ss1A, 1B and 3A of the CPA and Order 9 rule 9, Order 10 and Order 51 rules 1 and 4 of the CPR.

Order 10 rule 11 gives the court discretion to set aside/vary any judgment/consequential decree or order made in default of appearance “upon such terms as **just**”.

Section 1A, 1B are about the overriding objectives of the Act – “to facilitate the **just** expeditious proportionate and affordable resolution of civil disputes” the duty of the court, and the duties of parties and advocates in such proceedings.

It is not denied that this application was brought 6 months after the orders of 19<sup>th</sup> March 2018. However, it is also not been demonstrated that despite their absence from court on 19<sup>th</sup> March 2018 that the respondent was actually served with those orders by the respondent. Despite their absence from the court the applicant had the right to be served with the orders the court had issued, even for information.

Granted the applicant had a duty to follow up on the matter to know how far it had gone. His advocate has taken all the blame saying that he is the one to blame for making the assumption that the matter would not proceed. Should the consequences of his indolence be visited on his client? We know the answer.

So, it is indeed correct that the applicant’s lawyer failed it and he has stated so on each. It is also correct that the order that this court sought to enforce was that which was made on 16<sup>th</sup> November 1992 by this court- the applicant has conceded that that order is still in force. The applicant argues that this court could not have rightfully made the order for the transfer of 2 acres from No. Loc. 9/Kanyenyaine/1778 because the order says No. Loc. 9 /Kanyenyaine/383. Clearly the applicant is conceding that the respondent’s right to 2 acres of land preceded its own right as a buyer those rights were conferred by this court and they have never been extinguished. The applicant and one Hinga Simon Gichomo sought to act in a manner to frustrate the fruits of the respondent’s judgment born of the consent judgment with the actual owner of the land, supported by a record of the negotiations they cannot now turn around and purport to behave as if the orders of this

court do not exist. Both were always aware of the respondent's interest.

So what is to happen? The applicant says they are ready to abide by any orders of this court. This court is empowered to act in the interests of justice and to make orders that will meet the justice of the case.

To that end, the orders of 19<sup>th</sup> March 2018 will be set aside subject to:

- 1) The titles Loc. 9 /Kanyenyaine/1777 and 1778 and all subsequent subdivisions being cancelled and revert back to Loc. 9/Kanyenyaine/ 383*
- 2) The Land Registrar Murang'a is directed accordingly.*
- 3) The Surveyor Murang'a County to, within 30 days hereof and in the presence the parties or their representatives to go to the ground and excise the respondent's 2 acres from Loc. 9 /Kanyenyaine/ 383 where his tea bushes are.*
- 4) These orders be extracted and served accordingly*
- 5) Costs to the respondent*
- 6) Mention on 4<sup>th</sup> April 2019 to confirm compliance.*

**Dated, delivered and signed at Nyeri this 7<sup>th</sup> day of March 2019.**

**Mumbua T. Matheka**

**Judge**

In the presence of:-

Court assistant: Juliet

Mr. Kimaru for applicant

Ms. Mwai for holding brief for Mr. Wahome for the respondent (Mr. Wahome walks in)

Mr. Mutuangure present

**Mumbua T. Matheka**

**Judge**

**7/3/19**