



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NUMBER 73 OF 2008

JUSTUS NYAMU & 2 OTHERS.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

ALFRED SAMBUT KIBOI.....1ST INTERESTED PARTY

MOHAMED ALI MOHAMUD.....2ND INTERESTED PARTY

(An application under Articles 47, 50(1) and 159 of the Constitution of Kenya, Sections 9, 10, 13 and 20 of the Victims Protection Act, Sections 3 and 4 of the Fair Administrative Action Act and all other enabling provisions of the law.)

RULING

1. The Application herein was brought by way of Notice of Motion dated 15th November, 2016. It was brought by one **Kehar Singh** who urged the court to review and set aside entirely the orders made by Honourable Justice L. Njagi on 30th July, 2009, as rectified and amended by a further order made on 21st October, 2009, and consequently the order made on 18th May, 1994 in **Criminal Case No. 5083 of 1991** be reinstated. Further, that all consequential transactions and/or transfers done pursuant to the said order of 30th July, 2009, rectified and amended by the further order made on 21st October, 2009, be declared null and void and be set aside *ex debito justitiae*. Finally, that the costs of the application be provided for.

2. The Application was based on the grounds that the Applicant together with his brother, Mehar Singh, became the registered proprietors of a parcel of land known as **L. R. No. 36/V11/323**, hereafter the suit property, pursuant to an indenture dated 17th September, 1957 executed by one Padamshi Naya and registered on 26th September, 1957. The Applicant and his brother took immediate possession of the property. However, on or about 9th May, 1991 one Alfred Sambut Kiboi, the 1st Interested Party, approached the Applicant's employees claiming ownership of the suit property which he claimed to have purchased from one Naomi Njeri Mungai. Investigations established that there was a purported deed of indenture dated 5th April, 1991 purportedly signed by themselves which purported to transfer the property to the aforementioned Naomi Njeri Mungai. There was also a further indenture dated 29th April, 1991 allegedly signed by Naomi Njeri Mungai that purported to transfer the suit property to the aforementioned Alfred Sambut Kiboi. The conveyance in question was registered at the Government Lands Registry on the same date.

3. The Applicant informed the court that Mehar Singh had passed away on 11th June, 2005 but that the two deeds of indenture stated above were utter forgeries as neither he nor his brother signed the documents and did not know and had never met Naomi Njeri Mungai. Further, that they did not know the advocate known as Henry Owino who executed the deed of indenture and they had never appeared before him at all to execute the deed. That they had not also instructed an advocate known as Philip K.M. Chebeda to draw the said indenture. They contend that a forensic examination of the documents would confirm that they were forgeries.

4. The Applicant asserted that in order to safeguard the interest in the property they (he and his brother) instituted **HCCC No. 2654 of 1991**(now ELC No. 154 of 2016) and also filed an application seeking orders of injunction directed against the Naomi Njeri Mungai and Alfred Sambut Kiboi. The application was allowed by a ruling by Honorable Justice E. M. Githinji made on 16th December, 1991. Further, they made a complaint to the police pertaining to a forgery set out above and criminal proceedings were commenced, being **Criminal Case No. 5083 of 1991**, in which orders were issued that all the entries relating to the two deeds of indenture dated 5th and 29th April, 1991 be canceled and the property revert to the 2nd and 3rd Applicants therein. That the Applicant had learnt that there were attempts to once again transfer the suit property and he has discovered that orders were made in the present matter setting aside the orders made on 18th May, 1994 in Criminal Case No. 5083 of 1991. He submitted that the order as issued on 30th July, 2009, and rectified on 21st October, 2009, was highly irregular and should be set aside *ex debito justitiae* as the Applicant, being the registered owner of the suit property, was never informed or

involved in the proceedings. That given that the original order was made in 1994 there was no plausible explanation why the order was varied and set aside after such a long period without involving the affected party. He concluded by stating that it was just and equitable that the orders sought should be granted.

5. The Application was supported by an affidavit sworn by Kehar Singh in which he reiterated the issues set out above. Also annexed were pleadings from **Civil Suit No. 2654 of 1991 (Mehar Singh s/o Hari Singh & Kehar Singh s/o Hari Singh v. Naomi Njeri Mungai & Alfred Sambut Kiboi)**, an indenture dated 17th September, 1957 between Padamshi Naya the Applicant and his brother, a ruling by Honorable Justice L. Njagi dated 30th July, 2009 and other documents relevant to the matter.

6. The application was canvassed on 20th March, 2018. Ms. Hanan for the 2nd Interested Party relied on the written submissions and list of authorities filed on 22nd January, 2018. Ms. Sigei for the Respondent lent her support to the submissions filed on behalf of the 2nd Interested Party. The application was previously heard on 28th February, 2017 but was reopened following the admission of the 2nd Interested Party. During the initial hearing the application was orally canvassed by learned counsel, Mr. Githinji appearing for the Applicant, Mr. Sambu held brief for Mr. Opiyo for the 1st Interested Party and Ms. Kimiri acted for the State.

7. After the 2nd Interested Party was enjoined, a Replying Affidavit on behalf of the Applicant was filed sworn by one Kulwant Sihra as the appointed attorney on behalf of the Applicant on 18th May, 2017. In response to this further affidavit, one Mohamud Salaa Abdule swore a Further Affidavit on 31st May, 2017. He deposed that he was acting as appointed attorney on behalf of the 2nd Interested Party. No further written or oral submissions were made by the Applicant after the joinder of the 2nd Interested Party.

8. Mr. Githinji submitted that there were two Notices of Motion filed on 20th April, 2009 and 9th October, 2009. That the Motion dated 20th April was by an Applicant called Alfred Sambut Kiboi but whose name was crossed out by pen and replaced by Justus Nyamu & 2 others. That on the application dated 9th October, 2009 the Applicants were Justus Nyamu & 2 others with Alfred Sambut Kiboi named as an Interested Party. He submitted that this was however not reflected in the ruling made pursuant to the latter application with Alfred Sambut Kiboi's name being omitted. He submitted that Alfred Sambut Kiboi was introduced to the matter by counsel appearing for him in the instant application and that orders were granted in his favour notwithstanding that he was not an accused person or complainant in the initial criminal proceedings. Counsel urged the court to note that the introduction of the 1st Interested Party to the proceedings was a deliberate act of deception. He pointed out that in the application filed on 22nd July, 2009 the Applicant and his brother were named as the complainants in the original case and they should have therefore been involved in the proceedings as the court was being called upon to interfere with the title to their land. He submitted that the court erred in failing to allow them to canvass the application.

9. He submitted that the "stranger" to the matter, Alfred Sambut Kiboi, asked for the reconstruction of the lower court file which did not meet the threshold set out in the exercise of the High Court's power under Section 362 of the Criminal Procedure Code. He submitted that the reason for the missing record was that the matter was heard in 1994, and when it came up again in 2009 one of the parties was dead while the other was domiciled in the United Kingdom. Further, that under **Section 364 of the Criminal Procedure Code** the Applicant and his brother, or successor in title, should have been made aware of the revision application given that the original case was withdrawn through negotiations.

10. He pointed out that Mr. Owino Opiyo Advocate in his replying affidavit filed on 16th December, 2016 deposed that he was not a party to the case but this was not true as he swore an affidavit in the original matter and was the one who supplied the court with the proceedings of the initial criminal case in its bid to reconstruct the file. He pointed to the fact that Mr. Owino Opiyo advocate was a state witness in the initial criminal case a testimony that he was privy to the goings-on in the case contrary to his depositions. Further, that Mr. Owino was not truthful in his replying affidavit when he deposed that the 1st Interested Party was a state witness. He submitted that this amounted to perjury. He pointed out that Mr. Owino's deposition that the Applicant lacked *locus standi* was a direct contradiction of his earlier submission that the Applicant was a complainant in the original criminal case.

11. Counsel submitted that this court had the jurisdiction to entertain the matter notwithstanding that the order sought to be revised was made by a court of concurrent jurisdiction. He relied on **DPP v. Betty Njoki Mureithi[2016]eKLR** and **DPP v. Peter Onyango Odongo & 2 others[2015] eKLR** to buttress the submission. He pointed out that the Applicant was a registered owner to the suit land and when the ruling was made he should have been involved. He pointed out that the effect of the ruling was to affect the Applicant's right to property. He submitted that Alfred Sambut Kiboi was not a participant in the original trial case and therefore lacked the *locus standi* to bring the revision proceedings before Hon. Njagi. J. It was the counsel's view that the order issued affecting the Applicant's proprietorship to his land was illegal.

12. Ms. Kimiri for the State did not oppose the application and associated herself with the submissions made by Mr. Githinji. In addition she submitted that this was a case where injustice was occasioned partly due to failure by the counsel handling the matter to point out the anomaly in the matter to enable the court arrive at a just decision. That the advocate owed a duty not only to the members of his profession but more so to the court and his allegiance should have been to tell the truth and do justice. That the counsel should take personal responsibility for the resultant effect. She urged the court to issue the orders accordingly.

13. Mr. Sambu relied on the Replying Affidavit sworn by Owino Opiyo on 16th December, 2016. He submitted that this court lacked jurisdiction to entertain the application as the summary of the proceedings was ably set out by Hon. Justice Njagi. He submitted that Alfred Sambut Kiboi became a party to the proceedings because the magistrate declared the title fraudulently acquired after proceedings were withdrawn. He submitted that although the High Court could call for the record and make an order of revision without involvement of the parties in the present case, the Applicant was informed of the proceedings. Further that the ruling made by Hon. Justice Njagi was judicious and that if this court were to reverse the orders it would be sitting on appeal of a ruling of a concurrent court. He submitted that where orders are made with finality the most prudent way forward was to file an appeal. He submitted that the subject matter at hand was land which could only be dealt with by the Environment and Land Court. He cited the case of **Gladys Kaluyu Mugeuti v. Gideon Kirema Mugambi** to buttress this submission. He urged the court to note that PW 1 in the Criminal Case was Mehar Singh and therefore Kehar Singh was a

stranger to the proceedings. Further, that the fact that Mr. Owino was a witness in the original trial did not preclude him from acting as counsel in the revision application before Hon. Justice Njagi.

14. In reply, Mr. Githinji disputed that the case of **Gladys Kaluyu Mugeuti(supra)** applied in the present case as **under Section 193 of the Criminal Procedure Code** a civil matter could run concurrent to a criminal case. Further, that no civil matter existed as it had been dismissed for want of prosecution. He submitted that counsel purported to have served the parties in the civil suit which was untrue. That although a civil claim was filed by the Applicant and his deceased brother the 1st Interested Party never filed a counter-claim. Furthermore, when the title document was released back to the complainant in 1994 the accused persons were present in court. He urged the court not to support an irregularity. On the issue of jurisdiction, Mr. Githinji further submitted that this court was not sitting on an appeal of a court of concurrent jurisdiction but simply setting aside an order issued on appeal. He underscored the need to set aside the ruling owing to the fact that the effect of the ruling was to obtain a title illegally. He pleaded with the court to be bold in granting the orders sought and be not intimidated merely because the property has been sold.

15. The 2nd Interested Party's opposed the application on grounds that the court lacked jurisdiction to hear the matter; that even though the court had jurisdiction to hear the matter the Applicant was deficient of locus to bring the application. Simply that the criteria for filing a revision application under **Section 362 of the Criminal Procedure Code and Articles 165(6) and (7)** of the Constitution had not been met. Finally, that the application sought to reinstate illegal orders made by the magistrate in **Criminal Case 5083 of 1991**.

16. With regards to jurisdiction the submission was two-pronged, first that the court lacked jurisdiction to sit and entertain a revision application from a court of concurrent jurisdiction or to issue any orders sought through such an application. Secondly, that the court lacked the jurisdiction to hear an application that relates to land. With regards to the first limb, it was submitted that the order that was sought to be revised was made by Justice L. Njagi which was a court of concurrent jurisdiction. This was because as a matter of practice courts eschew reviewing or revising the orders of a court of similar status unless this is sought from the same court that was originally seized of the matter. The cases of **Stephen Mwaura Njuguna v. Douglas Kamau Ngotho & another[2012] eKLR**, **Robert Mwangi v. Shepherd Catering Limited & another[2012] eKLR** and **Public Prosecutor v. Muhari bin Mohd Jani & another[1996] 4 LRC 728** were cited in support of the submission.

17. With regards to the subject matter of the application, it was submitted that pursuant to **Article 162(2)(b) of the Constitution** and the **Environment and Land Court Act, 2011** matters to do with land fall under the purview of the Environment and Land Court and that this was made clear by **Article 165(6)** which ousts the High Court's jurisdiction in relation to such matters. Miss Hanan submitted that the Applicant sought to nullify all transactions and/or transfers subsequent to 30th July, 2009 which could only be done by the Environment and Land Court as clearly set out in **Section 13(1) of the Environment and Land Court Act**. She relied on **Boniface Waweru Mbiyu v. Mary Njeri & another[2005] eKLR** to buttress this submission. Further that this court could not invoke the Civil Procedure Rules in an effort to transfer the matter to the Environment and Land Court as was set out in **Wycliffe Mwangaza Kihungwa v. Grainbulk Handlers Limited[2014] eKLR**. She urged that the application be dismissed.

18. On the issue of locus standi she submitted that the application was barred under the doctrine of laches. This was with regards to the actual delay in asserting the right to the land 22 years down the line. She noted that Section 36 of the Limitation of Actions Act set out an equitable jurisdiction to refuse relief on the grounds of acquiescence and that a determination on what meets the criteria is at the discretion of the court. She referred the court to the case of **Benjoh Amalgamated Limited & another v. Kenya Commercial Bank Limited[2014] eKLR** where 14 years was found to be too long a period to seek relief. It was her case then that twenty two years was an even more serious scenario and therefore urged that the application be dismissed as the Applicant was guilty of laches.

19. Miss Hanan further submitted that the Applicant sought the reinstatement of orders made in **Criminal Case No. 5083 of 1991** after the withdrawal of the case. That Justice L. Njagi in allowing the 1st Interested Party's application was informed by the fact that the trial magistrate erred in issuing orders after the matter had been terminated under **Section 87(a) of the Criminal Procedure Code** and that therefore the orders were made without jurisdiction and were illegal in the circumstances. That after the matter was withdrawn, the court became *functus officio* and any orders after such a withdrawal were a nullity. In conclusion she submitted that this court could not reinstate orders that were already declared illegal.

Determination.

20. This is a matter that relates to the provenance of the title to land L. R. Number 36/V11/323. While the respective submissions are legion particularly on the part of the Applicant, they all point to impropriety in the manner in which the order made on 30th July, 2009, as rectified on 21st October, 2009, was procured. It is a matter in the view of this court, unfortunately, finds that it lacks the jurisdiction to handle based on two distinct grounds. Firstly, in dealing with the matter the court would be seating in review of a ruling made by a court of concurrent jurisdiction which falls outside the scope of **Section 362 of the Criminal Procedure Code** and the court's supervisory jurisdiction as set out under **Article 165(6) of the Constitution**. In the Applicant's view this court has jurisdiction to entertain the application for purposes of doing substantive justice. In view of the Respondent and the 2nd Interested Party, if this court were to allow the application, it would be tantamount to sitting on an appeal against an order of a court of concurrent jurisdiction. The latter argument is premised on the fact that the ruling sought to be revised was issued by Honorable Justice Njagi, a judge of the High Court.

21. Mr. Githinji referred the court to a ruling of this court in **Director of Public Prosecutions v. Betty Njoki Mureithi[2016] eKLR**. In that ruling he court set aside its own order on a revision application arguing that the same was justified owing to new matters that had been brought to its attention that were not within its knowledge and the knowledge of the Respondent(DPP) when the first order was issued. In the view of the Court the setting aside of its earlier order was in the circumstances justified owing to the new and fresh evidence that was availed before it. This respected circumstances that the matter therein was being investigated by two bodies. One body concluded the investigations and vindicated the Respondent leading to a withdrawal of the application by consent. When the other body learnt of the withdrawal of the case, it moved to court seeking the setting aside of the withdrawal order on ground that it had not completed investigations. Counsel for the Respondent in opposing the request that the Court revises its own order referred the court to a Court of Appeal decision in the case of **Muya v. Republic[2004] 1 KLR 515**. In that case, the Court delivered itself as follows:

“An order made by the High Court in the exercise of its revisionary jurisdiction is deemed to be a decision of the High Court in its Appellate jurisdiction and accordingly the decision in this case was appealable to the Court of Appeal on a matter of law.”

22. In the **Betty Njoki Case**, Supra, the Court clearly distinguished it with that of **Muya v Republic(Supra)**. I see similarities of the present case with that of Muya v Republic. This is drawn from the fact that the order of Njagi,J was issued with finality. I say so because the net effect of the ruling was to transfer the proprietorship of the suit land from the instant Applicant to Alfred Sambut Kiboi. There is no doubt and facts of the case attest to the same that the ruling was issued premised on misleading information to the court, the resultant effect being a fraudulent transaction. If this court were to upset the ruling of Honorable Njagi,J the same would amount to reverting the proprietorship of the suit land as at the time preceding the order. Needless to state, after that order was issued the ownership of the land has changed hands more than once. It is now twenty two years since the journey to this dispute began. Retracting to the original position by this court would open a Pandora’s Box outside the realm of criminal jurisdiction. What would follow is a myriad of suits claiming interest in the land of which suits a criminal court would lack jurisdiction to entertain. In that case, in as much as this court empathizes with the Applicant’s situation, it is unable to give orders in his favour. The best that the court can do is to recognize that a fraud was perpetuated facilitated by counsel who obtained the order on behalf of the 1st Interested Party against whom any appropriate redress can be sought. I say so because it the counsel for this party that introduced him to the proceedings yet he had no interest all not only to the land but also to the criminal proceedings that were subject of the revision application.

23. Secondly, the subject matter of the application is land and title to land is an arena where this court’s jurisdiction is specifically ousted by **Article 162(2)(b)** as read with **Article 165(5)(b)**. In a nutshell, any party aggrieved by the ruling delivered by Hon. Njagi,J will engender to pursue an interest in the suit land which is a subject within the jurisdiction of the Environment and Land Court.

24. Another pertinent issue raised by the second Respondent concerns the locus standi of the Applicant to bring the application to court. It was argued that the Applicant has been indolent in pursuing his interest, having waited for about twenty two years to lay claim and seven years since the subject ruling was delivered. On the part of this court, having found that the matter should be canvassed a civil dispute only makes sense to conclude that this argument should be dealt with by the said civil court.

25. That said, my view is that the application will unfortunately fail. The same is accordingly dismissed with costs to the Applicant to be borne by M/S Amingá Opiyo, Masese & Company Advocates. I condemn the latter to costs bearing in mind that they were at the forefront of the giving of misleading information to the court as a result of which the ruling that is subject of the current application was issued.

DATED and DELIVERED this 17th day of July, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. M/s Rono h/b for Mr. Litolo For the Applicant.
2. Mr. Momanyi h/b m/s Sigei for the Respondent.
3. No appearance 1st Interested Party.
4. M/s Hanan for the 2nd Interested Party.