



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 24 OF 2008

PATRICK KENNETH MUTHURI.....1ST APPELLANT

MOSES GITONGA M'IKIARA.....2ND APPELLANT

HELLEN KANARO M'IKIARA.....3RD APPELLANT

VERSUS

RICHARD KARIMI NDERITU.....RESPONDENT

RULING

1) The Appellants namely Patrick Kenneth Muthuri, Moses Gitonga M'ikiara, Hellen Kanaro M'ikiara took out the motion dated 4th February 2005 in which they sought for interalia:

THAT the Honourable Court be pleased to review, set aside and/or discharge the order made on the 21st November 2014 at the time of delivery of the judgement in this matter, directing that the rental money held by Shelter (M) Valuers Limited be released to the Respondent as opposed to the Applicants.

2) The motion is supported by the affidavit of Stephen Mwaura Gachie sworn on the 4th day of February 2015. Richard Karimi Nderitu, the Respondent opposed the motion by filing the replying affidavit of Clement K. Chege sworn on 12th March 2015.

3) On 21st December 2007, Hon. J. Were, learned resident Magistrate delivered judgement in favour of the Respondent and against the Appellants in the following terms:

1. The plot Nairobi/Block 116/429 belongs to the Defendant and is thus entitled to take possession of the same.

2. The Plaintiffs be and are hereby allowed 6 months, i.e. upto 30.06.2008 to recoup part of their investment.

3. Upon expiry of the period, they be at liberty to remove their structures and grant the Defendant vacant possession of the property of negotiate and agree on compensation for the structures with the Defendant.

4. Each party to bear its own cost

4) Being unhappy with the aforesaid decision, the Appellants preferred this appeal. The appeal was heard and finally dismissed on 21st November 2014. It would appear no party has so far filed an appeal to challenge this court's decision.

5) The Appellants are now before this court seeking to have the order issued on 21.11.2014 to be reviewed and set aside. The appellants' advocate has submitted that on the aforesaid date, when the judgement on appeal was coming up for delivery, he was represented by a junior counsel, Miss Oluoch. He avers that Miss Oluoch was not involved in the trial hence she was not conversant with the history of the dispute. It is said that during the pendency of the appeal, the judge seised of the matter had directed that rental proceeds generate from the subject parcel of land be collected by **Shelter (M) Valuers Ltd** after the Respondent had complained of non-action by the Appellant in prosecuting the Appeal. According to the Appellants' advocate, the motive was therefore to compel the Appellants to expedite the hearing and determination of the appeal thus denying them of the proceeds of the rental income. The appellants' advocate argued he had no idea that Mr. Chege, learned advocate for the Respondent would make an oral application seeking for the money collected by the Shelter (M) Valuers Ltd to be released to the Respondent and that his colleague, Miss Oluoch, not being conversant with the facts of the case did not understand the import of the oral application did not raise any objection against the oral application. The Appellant's advocate claimed that he did not know the order had been applied for and issued until he wrote to Shelter (M) Valuers Ltd seeking to know how much money had been collected so far who in turn responded by informing him that the net amount of ksh.1,014,819/- had been transferred to the firm of C. K. Chege & CO. Advocates. That response prompted the Appellants' advocate to visit the court registry to peruse the court file. It is the submission of Mr. Gachie, learned advocate for the Appellants that in all fairness and in a just and open democratic society it would be unequitable to allow the Respondent to retain monies belonging to the Appellants by virtue of having developed the suit premises themselves honestly believing to be the true owners of the subject parcel of land in question. The learned advocate was of the view that it is an unjust enrichment to allow the Respondent to benefit from the rental proceeds for premises put up solely by the Appellants.

6) Mr. Clement K. Chege, learned advocate for the Respondent, confirmed that he actually made an oral application to have the rental income collected and held by Shelter (M) Valuers Ltd released to his client. He also confirmed that Miss Oluoch, who held brief for Mr. Gachie did not raise any objection to the oral application. It is Mr. Chege's view that Miss Oluoch had full instructions and that it was Mr. Gachie's responsibility to give full instructions to his agent. Mr. Chege stated that he had released the funds less his legal fees to the Respondent. It is in his view that the motion has been overtaken by events. Mr. Chege alluded that Mr. Gachie should have instead appealed against the order releasing the funds. The Respondent's counsel further submitted that the Respondent was entitled to receive the money because the trial court had given the Appellants 6 months from 21.12.2007 to recoup their investments but they continued collecting rent from the suit property until April 2012 when the court directed Shelter (M) Valuers Ltd to collect rental income. The Respondent urged this court to find that he Appellants had recouped their investments by the time the order was made in 2012.

7) I have carefully considered the rival submissions at length. The main order prayed by the Appellants is for this court to review and set aside the order given on 21.11.2014 because it was erroneously given. The Respondent's advocate has stated that the order sought to be set aside has already been executed hence the motion has been overtaken by events. Let me state from the outset that, the application made by the Appellants' advocate meets the requirements of an application for review. This application raises the question of the extent of instructions given to advocates who are requested to hold brief. It is always presumed that an advocate who rises up in court and informs the presiding judge that he or she is holding brief has full instructions. It is therefore the responsibility of the principal advocate to fully brief his or her agent advocate. In the circumstances of this case, the principal advocate will be left to suffer for the mistakes of the junior advocate who held his brief. Mr. Gachie was enjoined to fully brief Miss Oluoch in the matter.

8) In the same breath, those advocates instructed to hold brief should take time to also acquaint themselves of the file they have been instructed to hold brief. This is the only way they can justify the legal fees they receive for holding brief.

9) There is one filed issue which the Respondent's advocate raised concerning the availability of the order. It is not in dispute that the order has been executed and that money has already been released to the Respondent and his advocate. With respect, I agree with Mr. Chege that the motion has been overtaken by events. It has been fully executed hence even if the order is set aside it will serve no useful purpose.

10) In the end the motion, is found to be without merit. It is dismissed. In the circumstances of this case, a fair order on costs is to order, which I hereby direct that each party to meet his own costs.

Dated and delivered in open court this 2nd day of July 2015

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent