



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 332 of 2010

JAN BOLDEN NIELSEN.....PLAINTIFF

VERSUS

HERMAN PHILIPUS STEYN

Also known as Hermannus Phillipus Steyn.....1ST DEFENDANT

HEDDA STEYN.....2ND DEFENDANT

NGURUMAN LIMITED.....3RD DEFENDANT

R U L I N G

1. By a Notice of Motion dated 3rd September, 2012 the 3rd Defendant sought, inter alia, various orders against the Plaintiff as follows:-

1) THAT the order of interlocutory injunction given by the Honourable Mr. Justice Odunga on 30th March, 2012 be varied to allow for the definition and delimitation of the extent of the physical boundaries of the Plaintiff's homestead commonly known as Oldonyo Laro.

2) THAT the order of interlocutory injunction given by the Honourable Mr. Justice Odunga on 30th March, 2012 be varied to limit the extent of the said order's geographical application to within the physical boundaries of the Plaintiff's homestead commonly known as Oldonyo Laro.

3) THAT the order of interlocutory injunction given by the Honourable Mr. Justice Odunga on 30th March, 2012 be varied so as to grant the 3rd Defendant unrestricted access into and out of any and every part of the property comprised in title No. Narok/Nguruman/Kamorora/1, save for and except the Plaintiff's homestead commonly known as Oldonyo Laro

4) THAT the order of interlocutory injunction given by the Honourable Mr. Justice Odunga on 30th March, 2012 be varied so as to grant the 3rd Defendant quiet and unrestricted possession, occupation and enjoyment of any and every part of the property comprised in title No. Narok/nguruman/Kamorora/1 to the extent that such possession, occupation and enjoyment does not interfere with the Plaintiff's homestead commonly known as Oldonyo Laro.

5) THAT pending the hearing and final determination of this suit, the Plaintiff be restrained by an order of injunction whether by himself or through his servants, agents and employees or otherwise howsoever from interfering with the 3rd Defendant's right of access into and out of any and every part

of the property comprised in title No. Narok/Nguruman/Kamorora/1.

6) THAT pending the hearing and final determination of this suit, the Plaintiff be restrained by an order of injunction whether by himself or through his servants, agents and employees or otherwise howsoever from interfering with the 3rd Defendant's enjoyment of quiet possession and occupation of any and every part of the property comprised in title No. Narok/Nguruman/Kamorora/1, save for and except the Plaintiff's homestead commonly known as Oldonyo Laro.

7) THAT this Honourable Court does give such consequential, further or other order(s) as it may deem just.

8) THAT the costs of this application be provided for.

2. After hearing the parties on the said application, as well as two other applications one seeking the consolidation of this suit and two other suits pending in the High Court at Nakuru and the other one seeking the striking out the name of the 3rd Defendant from the proceedings, this court delivered a consolidated ruling on 10th December, 2012. In that ruling, the court held, inter alia, I held as follows:-

“47. Accordingly, for the foregoing reasons, I will allow prayer nos. 3 and 4 of the motion dated 3rd September, 2012 with a rider that:-

Provided that these orders are subject to the order made on 30th March, 2012 in that, the 3rd Defendant shall not have access to or shall not purport to exercise its right of enjoyment of quiet possession and occupation in the suit property on the Plaintiff's homestead known as Ol donyo Laro or the 11 out posts or camps or any other area currently operated or occupied by the Plaintiff.”

3. On 13th December, 2012, the 3rd Defendant returned to court with an application expressed to be brought under Sections 1A, 1B,3A, 99 and 80 of the Civil Procedure Act and Article 159(2) of the Constitution. In that application the 3rd Defendant sought an order to review the said ruling and the deletion of Nos. “3” and “4” appearing in the portion of the ruling I have paraphrased above and replace the same with prayer Nos. “5” and “6”. The application also sought that that part of the ruling that introduces the proviso as set out above be set aside.

4. The grounds for the application were set out on the face of the motion and in the Affidavit of Kennedy Nyaencha sworn in support thereof. The 3rd Defendant contended that in the application dated 3rd September, 2012, the injunctive reliefs were contained in prayer Nos. 5 and 6, that it was by accidental slip or omission that the court referred to Prayer Nos. 3 and 4 in granting the injunctive orders, that the proviso made to the injunctive orders granted were in the nature of injunction in favour of the Plaintiff yet none of the parties had asked for such orders and that there were no pleadings for the grant of such orders. That the said order enlarged order of 30/3/2012, that the same nullified the injunctive order of 10th December, 2012, that the same was incapable of enforcement, that the court did not specify the location of the 11 outposts or camps of particularize the area operated by the Plaintiff, that the same restricts the 3rd Defendant's rights as the registered proprietor of the suit property and that the court had acted without jurisdiction.

5. At the hearing of the application, Mr. Nowrejee led Mr. Nyaencha in arguing the application Mr. Nowrejee reiterated the grounds set out in the motion as well as the Affidavit in support of Kennedy Nyaencha. He referred the court in great detail to the case of **Nairobi City Council –vs- Thabiti Enterprises Ltd (1995-98) 2 EA 231.** He submitted that there was no jurisdiction to do what the court had done, that there was an error apparent on the face of the record, that the court had committed a fundamental breach of pleading in making the order complained of where there should have been an amendment to the pleadings first, that the order was made in breach of the rules of Natural Justice, that the court had transferred land rights to the plaintiff irregularly, that in the Plaintiff, the Plaintiff was not claiming an interest in land but in the 3rd Plaintiff and that since there was no such claim, no interest in

land could be granted. Mr. Nowrejee therefore urged that the application be allowed.

6. The Plaintiff opposed the application by filing a Replying Affidavit of Peter Bonde Nielsen sworn on 18th December, 2012 and written submissions filed in court on 20th December, 2012 which were ably adumbrated by Mr. Oraro Counsel for the Plaintiff. The Plaintiff's case was that the 3rd Defendant had not extracted the order following the ruling of 10th December, 2012, that the ruling did not grant prayer No. 5 and 6 of the 3rd Defendant's application but was meant to maintain the status quo then obtaining, that the matters being sought to be reviewed had been conclusively dealt with and determined by the court, that the matters sought to be reviewed are of law which is in the realm of appeal and not review, that the issue of the 11 outposts and boundary of homestead was extensively debated and addressed in both the Affidavits and submissions.

7. Mr. Oraro, submitted that an order should have been extracted the current application was made, that failure to do so is fatal to the application. He cited the cases of **Jivanji & Another –Vs- Jivanji (1929 to 1930) XII EA LR 41** and **Mbugua & Others –Vs- Henderson & Others (2001) LLR 2130**. He further submitted that the Affidavits of the Plaintiff had raised the issues of the 11 outposts and camps, that the matters determined by the Court was not a matter for review but appeal. He relied on the case of **Francis Origo & Anor –Vs- Jacob Kumali Mungala CA No.149 of 2001 for that proposition (UR)**. He concluded that it is abuse of the court process for the 3rd Defendant to continue making a multiplicity of applications contrary to the order of the court that the parties do prepare the suit for trial within ninety (90) days.

8. I have considered the Affidavits, submissions on record, Counsels hi-lights and authorities relied on. The jurisdiction for review is limited. It can only be exercised strictly in terms of Order 45 Rule 1 of the Civil Procedure Rules. There must be an error on the face of the record, discovery of a new material which was not in the knowledge of the Applicant and could not have discovered by exercise at time of diligence of the decision in question or for sufficient reason. In the application before me, the ground upon which the application has come to court is that there is an error apparent on the face of the record.

9. Before addressing the merits of the application, Mr. Oraro learned Counsel for the Plaintiff raised a jurisdictional issue which must first be addressed. It was contended by the Plaintiff that the application was incompetent as the order sought to be reviewed had not been extracted. The cases of **Jivanji Vs Jivanji (Supra)** and **Mbugua Vs Henderson & Others (supra)** were cited in support of that contention. In the former case, the court observed that it is the duty of a party who wishes to appeal or apply for a review of a decree or order to move the court to draw up and issue a formal decree or order. Similarly, in the **Mbugua Case (supra)**, after analyzing a litany of cases, the court held that failure to annex the decree or order sought to be reviewed in an application for review was fatal and incurable. In both cases, the court seemed to suggest that there is no jurisdiction to entertain an application for review if a formal order or decree has not been extracted and exhibited with the application for review. Indeed, that is the position the courts seem to have taken in other cases such as **Dr. Peter Malande Olindo & Anor –vs- Diamond Trust Bank Kenya Ltd HCCC No.1230 of 1999 (UR)** and **Uhuru Highway Development Ltd –vs- CBK HCCC No.29 of 1995 (UR)**. In the present case, the 3rd Defendant did not exhibit leave alone extract the order resultant from the ruling of 10th December, 2012. What is then the fate of the application?

10. A decree or order is a formal expression of the final determination of a dispute resultant from a judgment or a ruling. It is the decree or order which finally gives effect to any given decision of a court. A judgment or ruling cannot be executed. In this regard, both Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules provides that:-

“Any person considering himself aggrieved –

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay. (Emphasis supplied)

11. In my view the operative words in those provisions are **“may apply for a review of judgment to the court which passed the decree or made the order.”** What is to be reviewed is not the decree or order but the judgment. In this regard, judgment will extend to include a ruling. I say so because, whilst Section 2 of the Civil Procedure Act has defined both the terms **“decree”** and **“judgment”**, it has not done so for the terms **“order”** and **“ruling”**. I have also looked at the provisions of Order 21 of the Civil Procedure Rules, the same also provides for **“Judgment”** and **“decree”** but has not done so for the terms **“ruling”** or **“order”**. The conclusion I come to is that in using the term Judgment in Section 80 and Order 45 of the Rules, the same was meant to connote both a decision that finally determines the rights of the parties in a given proceeding. Of course a proceeding includes an application. My view is informed by the use of both the terms **“decree”** and **“order”** as the matters that should aggrieve the applicant thereby triggering the making of an application for review. Accordingly, I hold that Section 80 and Order 45 of the Act and rules, respectively permit a court, in an appropriate application, to review a judgment or ruling.

12. In view of the foregoing conclusion, what is the effect of an application for review, such as the one before me wherein a party has not extracted and exhibited either the decree or order. From the authorities relied on by the Respondent, such an application is fatal and incurably defective. I have examined the said decisions, I have not been able to see the rationale why failure to extract and exhibit the subject decree or order would make an application for review to be fatally defective. Those decisions do not explain why. As I have found out, what is to be reviewed is the judgment or ruling from which the decree or order aggrieving the applicant results from. I therefore take the view that the extracting and exhibiting of such a decree or order in an application for review is but only a procedural step to enable a court to which the application is made, to identify the subject decision and or party thereof that has aggrieved the applicant. This to my mind is the only logical conclusion one can give to the requirement or the extraction of an order or decree as there is none given by our laws or the decisions on the matter. This being the case, my view is that, this is only a procedural requirement that is curable under Article 159(2)(d) of the Constitution and does not aid in whatever way the adjudication of a dispute between parties. Accordingly, I decline to reject the application on the basis that no order was extracted or exhibited to the application. The applicant properly identified the parts of the ruling, which was the determination arrived at by the court, with which it was aggrieved. This court’s jurisdiction was therefore properly invoked and I will now proceed to consider the application on merit.

13. At the beginning of this ruling, I did set out the prayers which the applicant sought in its application of 3rd September, 2012. The application sought Prayers 1 to 8. It is clear that prayers 3 and 4 were sought to vary the injunction granted by Hon. Odunga J on 30th March, 2012 it and limit its application in area. Prayer numbers 5 and 6 sought injunctive orders which were sought to run after the determination of the subject application until the trial of the suit. Obviously, when the court gave its decision of 10th December, 2012 categorically stated that it was granting injunctive orders which were and not to vary Hon. Odunga J’s order of 30/3/2012 limit its application in area. The court could not have declined to vary those orders and then grant prayer Nos. 3 and 4 of the motion. That would be but a contradiction. Accordingly, I am in agreement with Counsel for the applicant that there was an error apparent on the face of the record whereby the court indicated that it had granted prayer Nos. 3 and 4 instead of prayers No. 5 and 6. In this regard, the ruling of 10th December, 2012 is reviewed accordingly.

14. The other area of contention is the proviso which this court made to the orders, it granted. That proviso is contained in paragraph 47 of the ruling as set it out verbatim in paragraph 2 above. I have already set out in detail above the respective parties’ contentions. The applicant’s position is that those orders (proviso) were given without hearing the parties on the issue, without any party asking for the same and without any pleadings therefor. On the other hand the Respondent contended that the court granted an injunction upon terms, that the issues were raised in the Affidavits properly under Order 15

Rule 2(2) of the Civil Procedure Rules and that, they were argued and determined by the court. I have carefully re-examined the Affidavits filed in the application of 3rd September, 2012. I do agree with Mr. Oraro that in paragraphs 9 and 10 of the 3rd Defendant's supporting Affidavit and paragraphs 10 and 20 of the Plaintiff's Replying Affidavit there was reference to 15 and 11 outposts, respectively. However, from the record, it would seem that at no point did the court invite the parties to address it on the actual and extent of occupation of the suit property. Indeed whilst the 3rd Defendant applied for the injunctive orders in respect of the suit property, the issue of the extent to which those orders were to apply seem not to have been argued before me.

15. In its decision of 10th December, 2012, the Court was alive to two clear things. Firstly, that the Plaintiff had an injunction in its favour granted by my brother the Honourable Mr. Justice Odunga on 30th March, 2012. Secondly, that the 3rd Defendant as the registered proprietor of the suit property had the Constitutional and legal right to the use of its property. On the first issue, the question was the extent of Hon. Odunga's injunction. This court was unable to demarcate the area of application for reasons given. On the latter issue, the court granted the 3rd Defendant the injunction sought to enable it enjoy its Constitutional and legal rights over its property. It would seem however, that in paragraph 47 of the ruling not only did the court injunct the 3rd Defendant from exercising its constitutional rights over ownership of its property which the court had sought to protect, but did so without invitation from any of the parties. That obviously would be a contradiction. In restraining the 3rd Defendant from any other areas other than as contained in the order of Hon. Odunga J, of 30th March 2012, indeed the court was granting the Plaintiff additional rights over the suit property which had not been sought by him.

16. I think that although the case of **Nairobi City Council –vs- Thabiti (Supra)** relied on by the 3rd Defendant related to a relief granted without amendment of pleadings, the principles enunciated therein are good law and binding on this court. From the record, it is clear that no party prayed for what is contained in the proviso in paragraph 47 of the Ruling. Although a court has discretion to give an injunction on terms, in my view such terms should not extend to affect the existing rights of the parties without such parties being called upon to address the court on the matter. I think this is what happened in this case.

17. In this regard, I am satisfied that the proviso given by this court in paragraph 47 of the ruling of 10th December, 2012 was in error. I do not agree with the Plaintiff that the application is an issue of law and that should be a subject of an appeal. The inconsistency between the courts intention to protect the 3rd Defendant's Constitutional right of ownership of the suit property and the proviso in paragraph 47 of the ruling is an error that I believe is subject to review.

18. Accordingly, I am satisfied that the 3rd Defendant's application is meritorious and I accordingly allow the same. In this regard, I hereby review the ruling and order of this court made on 10th December, 2012 as follows:-

a) Numbers "3" and "4" appearing at paragraph 47 of that ruling are hereby deleted and substituted with Numbers "5" and "6", respectively.

b) The proviso made to the orders of injunction granted on 10th December, 2012 is hereby set aside in its entirety.

c) There will be no order as to costs.

19. Once again the court implores the parties to expedite the prosecution of this suit to avoid any further delay in having the parties respective rights determined at a full trial.

20. Orders accordingly.

DATED and **DELIVERED** at Nairobi this 1st day of March, 2013.

A. MABEYA

JUDGE