



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 3087 OF 1981

MARGARET ROSE WAMBUI.....PLAINTIFF

VERSUS

SILVESTER JOHN NJOROGE.....DEFENDANT

R U L I N G

In his judgement dated 24th February 2000, **Mbito, J** entered judgement for the plaintiff against the defendant for half of all the parcels of lands mentioned in paragraphs 8(a), (b) and (c) of the supporting affidavit as well as 50% of plot Nos. Ndeiya/Kiroe/T365 and T197 if still in existence and if not in existence 50% of the sale price if they have been since sold plus costs and interests.

Subsequently, the applicant made an application dated 29th August 2005 by which she sought an order that the Deputy Registrar of the Court be authorised to execute the transfer forms in relation to Land Reference Number Ndeiya/Ndeiya/390, Plot No. 36 and 4A at Mirithu Market and Makutano respectively and plots on Land Reference Number 209/66/15, Nairobi, Ndeiya/Kiroe T. 365 and Ndeiya/Kiroe T. 197 for and on behalf of the respondent in order to satisfy the decree of 7th June 2002. That application was based on the ground that the respondent had refused or failed to execute the said transfers. That application was heard by **Aluoch, J** (as she then was) and allowed on 7th December 2006.

Suffice it to say that there was another application seeking an amendment of the tiles of the lands in question which application was disallowed by **Osiemo, J** on 20th November 2008. Thereafter there was another application dated 28th April 2009 which was heard by **Mwera, J** who, on 26th January 2010, ordered that the defendant deposits rental income on plot **209/66/43** in court within the next 30 days; that the respondent gives an audited account of rental income on the said plot no 43 within the same 30 days; that the respondent deposits within the same 30 days the title documents in court relating to plot nos. **Ndeia/Ndeyia/390, Plot 36 Mirithu Market, Plot 4A Makutano, Plot 209/66/43** (being a subdivision of plot 209/66/15 the other subdivision no 44 having been sold) and **Ndeyia/Kiroe/T365 and 197**; that plot no. **209/66/43** be valued for division of proceeds on 50-50 basis between the litigants; and that the Deputy Registrar of the Court to sign all the transfer papers giving the plaintiff her 50% share in all the stated properties. It was further ordered that the income and title documents be deposited in court. Apparently this order was not complied with because soon thereafter the applicant vide her application dated 8th April 2010, sought leave of the court to cite the respondent for disobeying the orders of 26th January 2010 which leave was granted by **Mwera, J** on 3rd June 2010. By her ruling dated 21st October 2011, **Nambuye, J** (as she then was) ordered that the respondent be arrested and committed to civil jail for six months until he purges the contempt. On 20th December 2011, **Mwera, J** suspended the warrant of arrest issued against the respondent but ordered him to bring to Court Kshs. 80,000.00 on 28th December 2011

though, the Court observed that the respondent was being evasive. Apparently the said sum was duly deposited because by a consent order recorded on 24th January 2012, it was agreed that the said sum deposited in Court be released to the applicant's advocates as part of the applicant's assessed costs and that the applications dated 18th November 2011 by the applicant and 28th October 2011 by the respondent be heard together on 20th March 2012. The application dated 28th October 2011 was withdrawn on 4th June 2012. On the same day the Court ordered the title to Land reference No. **Ndeiya/Ndeiya/390** which, was in Court, be deposited in Court. Subsequently the respondent filed an application dated 11th June 2012. It is therefore these two applications dated 18th November 2011 and 11th June 2012 by the applicant and the respondent respectively that are the subject of the present ruling.

In the application dated 18th November 2011 expressed to be brought under sections 3A and 99 of the Civil Procedure Act, the applicant seeks the following orders:

1. **The matter be certified urgent dispensing the service within the first instance.**
2. **The judgement Debtor be restrained from collecting rent from land reference number 209/66/43 Mogotio Road Parklands, Nairobi.**
3. **The Deputy Registrar be appointed as the interim manager of the suit properties herein i.e.**
 - i. **Land Reference Number 209/66/43 Mogotio Road Parklands, Nairobi**
 - ii. **Plot No. NDEIYA/NDEIYA/390**
 - iii. **Plot No. 36 MIRITHU MARKET**
 - iv. **Plot No. 209/66/43 (a sub-division of Plot No. 209/66/15)**
 - v. **Plot No. 44 (having been sold)**
 - vi. **Plot No. NDEIYA/KIROE/T. 365 and 197**
4. **The tenants in L.R. No. 209/66/43 Mogotio Road Parklands, Nairobi be ordered to deposit the monthly rent in Court.**
5. **Agricultural Finance Corporation Bank be enjoined as an interested party herein.**
6. **The Agricultural Finance Corporation Bank Head office – Nairobi be ordered to release the original title of L.R. No. NDEIYA/NDEIYA/390 to the Deputy Registrar.**
7. **The rent collected from L.R. No. 209/66/43 Mogotio Road Parklands, Nairobi be utilized to partly offset the applicants costs of kshs. 220,000 as taxed on by consent.**

Prayers 5 and 6 have, in my view been overtaken by events since the title to **LR No. Ndeiyia/Ndeyia/390** has now been deposited in Court.

The application is supported by an affidavit sworn but the applicant on 18th November 2011 in which she reiterates the history of this suit and states that the judgement debtor has all along been collecting monthly rents from one of the suit properties being **LR No. 209/66/43** which is due at the end of every month and the tenants need directions where to remit the rents since they have declined to pay the rents to the applicant's advocates. It is deposed that if the respondent who has been committed to serve a sentence starts serving his said sentence the suit properties are likely to go to waste. It is further deposed that the warrants of arrest are in the hands of the court baillif hence the respondent should be restrained from collecting rents from the suit premises. It is further deposed that the costs of this matter have already been taxed in the sum of Kshs. 220,000.00 and the rent recovered in the said **LR No. 209/66/43** should be

utilised towards the settlement of the said costs.

The respondent swore a replying affidavit on 4th June 2012 in which he deposes that he has already complied with the order for the subdivision of **Ndeiya/Ndeiya/390**, by depositing its title in this court and allowed the applicant to take possession of the same and reside thereon. With regard to LR No. 209/66/15 he deposes that the same was subdivided by his father one **Njoroge Mwangi** in 1980 into two portions being **LR No. 209/66/43** and **44** the latter of which was sold by him. He states that the said parcel was never part of his assets and hence judgement was wrongly entered in respect thereof. His said father, according to him, passed away in 1983 and left behind nine beneficiaries to share his estate hence the said land cannot form part of these proceedings. With regard to land parcel nos. **Ndeiya/Karoe/T365** and **T197**, it is deposed that the same were sold in 1978, and the proceeds therefrom utilised towards the education of the children of the marriage. **Kiambu/Karura/T207** and **Plot Number 4”A” Makutano** have never been his property, he so says. As regards **Plot No. 36 Mirithu Market**, he states that he surrendered the same to one of their sons in 1992 before the delivery of the judgement herein a fact which, according to the deponent, the applicant is aware of. In his view, the applicant is merely interested in punishing and prosecuting him for the failed marriage.

In the respondent's application dated 11th June 2012, the respondent seeks the following orders:

1. **THAT this application be certified as urgent and heard ex-parte in the first instance.**
2. **THAT there be a stay of execution of the decree herein and all pending applications herein pending the hearing and determination of this application.**
3. **THAT the judgement delivered on the 18th day of April be reviewed and set aside.**
4. **THAT any other relief that this court may deem fit to grant.**
5. **THAT cost of this application be in the cause.**

In support of the said application he swore an affidavit on the same day, he reiterates the contents of his affidavit in reply to the applicant's application and adds that at the time of the hearing of the suit he was unable to locate his father's ID Card and was unable to present evidence in regard to the other properties mentioned in the decree. In his view, the Court stands to embarrass itself by giving orders that are incapable of implementation and or orders affecting third parties not subject to the suit. This application was opposed by the applicant vide her replying affidavit sworn on 19th June 2012. In her view, the application does not fulfil the principles of review since there is nothing new disclosed that was not within the respondent's knowledge and the respondent is guilty of laches. It is averred that the respondent is a contemnor who has refused to comply with court orders and has done nothing since 1983 when he alleges his father died. It is further deposed that the respondent who was represented by counsel did not raise the present issues and that the issues were considered by **Mbito, J** in his judgement. It is further deposed that the respondent has not approached the Court with clean hands in that whereas he alleges that his father died in 1980, the respondent charged the property to Barclays Bank in 1984 which shows that the respondent is in full control of the property **LR No. 209/66/15**. It contended that the least the respondent would have done is to deposit his portion of the rents but this he has failed to do. According to the applicant the respondent should fully comply with the orders of the Court.

The application was prosecuted by way of written submissions. In her submissions, the plaintiff through her learned counsel **Mr Chigiti**, stated that prayers 1, 2, 5 and 6 have been taken care of leaving only prayers 3, 4 and 7. While reiterating the history of the proceedings, it is submitted that the respondent neither appealed nor applied for review of the judgement which would have been the best forum to ventilate the issues being raised now. It is therefore submitted that the respondent has slept on his rights. It is further submitted that the respondent has not disclosed the status and income generated from the properties and that the respondent is in possession of title no. **209/66/43**. It is further submitted that the respondent has even refused to comply with the order directing him to furnish accounts. It is submitted that delay is a denial of justice and the respondent should not come to this court when he has disrespected

and abused the same.

On his part, the respondent, through his learned counsel **Mr Narangui**, submits that the judgement of **Mbito, J** with respect to **LR No. 209/66/15** not being part of the respondent's properties is incapable of being complied with since it will have the effect of depriving the beneficiaries thereof of their rightful inheritance. In support of this submission the respondent has annexed his father's identity card and a copy of another title. He states he was unable to locate the father's ID card and has annexed a copy of the Chief's letter showing the list of the father's beneficiaries. It is submitted that although the issues were raised at the trial the court did not deeply delve into the same and hence arrived at an arbitrary decision which has been the cause of delays in this file. It is submitted that even at the time of the judgement land no. 209/66/15 was non-existent and hence the judgement was erroneous hence the necessity to have the same set aside. According to counsel the application herein falls under Order 45 rule 1(1). The court is further urged to exercise the overriding objective in section 1A(1) in arriving at its decision.

I have considered the applications, the affidavits on record relevant thereto as well as submissions filed. The application by the respondent for review has been made more than twelve years after the judgement sought to be reviewed. By any standard that delay is inordinate. Yet no attempt has been made by the respondent to explain the cause of this delay. One of the requirements under Order 45 rule 1(1) is that such an application should be made without unreasonable delay. What is unreasonable delay is of course a matter of fact which depends of the facts of each case. In the circumstances of the unexplained delay spanning twelve years, I have no material on which I can form the view that the delay herein is not unreasonable. In the foregoing premises I find that the applicant has not fulfilled the requirement that the application be brought without unreasonable delay.

The ground upon which the review is brought is that the learned Judge made an incorrect decision. In learned counsel's submissions, his decision was "arbitrary". At the time of delivering the judgement, it is contended that the properties in dispute were not the properties of the respondent and hence judgement was erroneously entered in respect thereof. It is now well settled in our jurisprudence that mere error or wrong or an erroneous view of evidence or of law is certainly no ground for a review although it may be a ground for appeal. Nor can it a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion See Nyamogo & Nyamogo Advocates vs. Moses Kipkolum Kogo Civil Appeal No. 322 of 2000 (2001) 1 EA 173 and National Bank of Kenya vs. Ndungu Njau Civil Appeal No. 211 of 1996 [1995-98] 2 EA 249.

In the present case the respondent's complaint is that the learned Judge (**Mbito, J**) proceeded on the basis that the subject parcels of land were the properties of the respondent and hence arrived at the wrong decision in his judgement. Whether or not the properties in dispute were the respondent's properties was a matter of fact to be decided based on the evidence. The learned Judge heard the parties and found, whether rightly or wrongly, that the said properties were the properties of the respondent and hence should be divided equally between the parties. That decision was a finding on merit and in my view could only be challenged on appeal. To determine the issue differently at this stage would amount to this court sitting on appeal against the said decision and this Court has no jurisdiction to overturn the decision of a judge of concomitant jurisdiction.

I further note that there is no evidence adduced to show that the properties in question were never at any point in time registered in the name of the respondent. The fact that the respondent's father owned some other property cannot be evidence that he owned the properties in dispute as well. An ID card similarly is not evidence of ownership and a Chief's letter, in my view, does not confer beneficial interest in a property. The respondent has not adduced certified copies of the register or even a certificate of confirmation of grant, if there is any, to support his contentions. In other words there is simply no material on which the Court can exercise its undoubted discretionary powers to review the judgement. Again as rightly submitted by the applicant, although the respondent claims that his said father passed on in 1983, the record of the land in question show that certain transactions took place in respect thereof in 1984. No explanation has been proffered by the respondent in this regard.

In the premises I find that the respondent's application dated 11th June 2012 lacks merit and the same is

dismissed with costs.

With respect to the applicant's application dated 18th November 2011 it is conceded that prayers 1, 2, 5 and 6 have been dealt with. Having considered the application I cannot see any plausible reason why the application cannot be granted. The Court has powers to ensure that its orders are implemented and since the property was adjudicated to be shared equally between the parties and the respondent has already been committed to serve sentence, it is only just and fair that the proceeds therefrom be preserved. Accordingly prayers 4, and 7 in the motion dated 18th November 2011 is allowed with the result that the tenants in **LR No. 209/66/43 Mogotio Road Parklands Nairobi** are hereby ordered to deposit the monthly rents in Court from which the taxed costs shall be offset. The applicant will also have the costs of the application.

Ruling read and delivered in court this 16th day of July 2012

G.V. ODUNGA

JUDGE

In the presence of:

Mr. Chigiti for the plaintiff

No appearance for Mr. Narangui for the defendant who is present in

person