REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL 55 OF 1992

IGNATIUS NDIRANGU……..APPELLANT

VERSUS

NJUGUNA J. KURIA……RESPONDENT

(An appeal from the Judgment and Decree in Nyahururu SNR.R.M..C.C.NO.109 of 1988

By Hon. J. N. Kirembu, Resident Magistrate, Nyahururu)

JUDGMENT

This is probably the oldest appeal in this court. It has a chequered history of misfortunes. The original record was burnt at Nyahururu court, the High Court appeal file disappeared and counsel for the appellant passed away. Apart from those unfortunate events the appeal itself is straight forward and was not opposed as respondent, despite service, did not attend court. The respondent sued the appellant in Nyahururu SRMCC No.109 of 1988 seeking orders that five (5) acres he had purchased from the appellant and which the latter had refused to transfer to him be excised from parcel of land No.339 Mawingo Scheme and transferred to him. The matter proceeded *exparte* before the Resident Magistrate, Mr. J. N. Kirembui who gave judgment for the respondent in terms of the above prayer. That was on 20th March, 199l. Thereafter, on 16th January, 1992, the respondent brought an application dated 20th December, 1991 seeking

H.C.C.A.NO.55/1992

"1. That this court be pleased to amend the court orders to read plot Number NYANDARUA.MAWINGO/440 instead of plot Number NYANDARUA/MAWINGO/414."

The respondent deposed in his affidavit in support of that application that he had learnt from Land Registrar, Nyandarua that parcel No. NYANDARUA/MAWINGO/414 had been changed and that the correct number was NYANDARUA/MAWINGO/440. He therefore sought an amendment to the order reading NYANDARUA/MAWINGO/414 to read 440. That application was opposed by the appellant who maintained that that was not the land the subject matter of the suit.

In his ruling dated 15th July, 1992 the learned magistrate gave the background of how the originally sold parcel of land changed from No.339 Mawingo to 414 and eventually to 440. He proceeded to allow the amendment of the order. It is that order of 15th July, 1992 that has been challenged in this appeal.

The appellant based the appeal on nine (9) grounds which were argued together. Learned counsel for the appellant submitted that whereas the suit property identified in the plaint as No.339, Mawingo, the amendment had the effect of substituting it with a distinct parcel of land. The court had no jurisdiction to entertain the application for amendment after judgment had been entered. That the decree was at variance with the judgment; that parcel No.440 being an agricultural land, consent of the

Land Control Board ought to have been obtained; that the application for amendment was defective as it did not specify which orders it sought to amend. I have considered these grounds.

The application in question was expressed to be brought under the inherent powers of the court, namely Section 3A of the Civil Procedure Act. The Civil Procedure Act and the rules made under it provides an elaborate means of dealing with a judgment by way of amendment. First, Section 99 of the said Act provides that:

"***99 clerical or arithmetical mistakes in judgments, decree, or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."***

The issue before the trial court cannot be described as clerical or arithmetical or even as an error arising from accidental slip or omission. It was a substantive matter that went to the root of the dispute. The respondent had specifically sued the appellant in respect of parcel of land No.339 Mawingo. That is not the same as NYANDARUA/MAWINGO 440. No nexus was drawn between the two parcels.

Order 20 Rule 3 of the Civil Procedure Rules provides further that:

"***(3) A judgment once signed shall not afterwards be altered or added to save as provided by Section 99 of the Act or on review."***

In other words unless the amendment sought related to clerical or arithmetical errors or errors rising from accidental slip or omission, the court cannot amend a judgment/order once signed. The only way out of such a situation is to seek a review under Order 44 of the Civil Procedure Rules.

Thirdly the decree extracted was at variance with the judgment contrary to the provisions of Order 20 Rule 6 of the Civil Procedure Rules.

For these reasons I came to the conclusion that the learned magistrate erred in entertaining an application for amendment when he was *functus officio*. The appeal is allowed, the order of the court for the excision of five (5) acres of land from NYANDARUA/MAWINGO/440 is set aside.

The cost of this appeal is awarded to the appellant.

DATED and DELIVERED at NAKURU this 2nd October, 2009.

W. OUKO

JUDGE