REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 108 of 1997

1. KISIANG'ANI TULIENGE

2. ALFRED MAJIMBO TULIENGE

3. STANGU TULIENGE …………………………………………..PLAINTIFFS

VERSUS

1. PAUL WAFULA

2. DICKSON TOM WANJALA

3. KENYA COMMERCIAL RANK……………………………. DEFENDANTS

RULING

The plaintiffs who are applicants to this application sued the defendants/respondents in this matter vide a plaint filed on 28.7.97 seeking among others a declaration that the first defendant was a trustee of the parcel of land known as Ndivisi/Muchi 2010.On behalf of the plaintiffs, an order directing the second defendant to register the parcel of land in question in favour of the plaintiffs and an order restraining the 3rd defendant from selling, disposing or in any other way dealing with the said parcel of land with a prayer for costs.

The current respondents who are defendants defended the suit, The matter proceeded to hearing and both parties with their witnesses were heard. My brother judge wrote a brief and compact judgment dismissing the plaintiffs claim with costs- on the following grounds.

(1) Evidence adduced particularly by PW4 who claimed to be father in law to the 1st defendant indicated that the 1st defendant was not the deceased's brother. He Pw4 stated that the plaintiffs and 1st defendant are from Bamukoya clan while he himself is from the Bayumbu clan and yet he claimed to be a cousin of the deceased. One would expect a cousin to come from the same clan.

(2) He did not understand why it took so long for the plaintiffs to file this suit even though a trespass case upon this land was filed against them in 1982: by the second defendant.

(3) At the time the deceased died at least two of the plaintiffs were of a mature age with their mother still alive and yet the deceased could not see it fit to leave his property in their hands other than pick on an outsider in the name of the first defendant to look after his land. This is highly inconceivable

(4) The evidence shows that the 2nd defendant had this land transferred from Wanjala Sitati to him directly which tends to lend credence to the first defendants evidence that in fact he had bought only a

portion of this land much earlier from Wanjala Sitati but before that portion was transferred to him it was then transferred to the second defendant,

(5) It also surprised the court that although the deceased was only a worker for the first defendant and that the two were not related as alleged by the first defendant yet when the deceased died in 1977 the first defendant went and buried him on this piece of land. It was also said that even when the deceased's wife died she too was buried on this disputed land.

(6) That as the evidence goes the plaintiff's must have known the truth of this matter and this is why they took no action even though their father died in 1977 to retrieve this land from the first defendant.

(7) That even when they were charged in the criminal case they did not appeal which indicates they must have known that the land was not theirs or their fathers.

The judgment is dated 29.7.92. Five years later on 23.9.97 the plaintiffs filed this application under order 44 rule 1 of the CPR 1985 revised rules seeking orders that the judgment delivered on 27th day of July 1992 be revised and set aside as:

(1) There is an error apparent on the face of the record.

(2) There is some other sufficient reason.

(3) There is a new and important evidence which after exercise of due diligence was not within the knowledge of the applicants and so could not be produced by then.

Costs be provided for and the court do grant any other relief that it may deem fit to grant.

The grounds in support are set out in the supporting affidavits, annextures and oral submissions in court and the main points relied upon are that:

(1) When the learned trial judge ruled that there was no relationship- between the applicant/plaintiffs and the first defendant/respondent he overlooked the evidence of the complainant who is the second defendant/respondent in the criminal case proceedings.

(2) That the proceedings in the criminal case formed an intergral part of the proceedings herein and in fact the basis of the judges dismissal of the suit and have to be considered together and when so considered, together they show that there was a relationship between the plaintiffs and the 1st defendant/respondent.

(3) That records held in the lands registry shows that land parcel no.Ndivisi/Muchi 999 was to be transferred as a whole to Paul Wafula Sakong at a consideration of 2,250.00 which fact tends to agree with the contention of the applicants that their father gave the 1st respondent Ksh.2,250.00 to go and buy land for them

(4) That if the land was purchased as a whole in 1973 and consent given as a whole then why was it subdivided into two portions of 5 acres each to create parcel numbers 2011 and 2010 and this is evidence that the second defendant respondent did not buy the whole land of Ndivisi/ Muchi/999 as one entity.

(5) Further evidence is that from the lands registry which shows that registration for plot no.2010 was presented on 2,7680 and entered as No.18/1980 while registration for parcel no.2011 was presented on 5.6.80 and entered as no.15/1980. There is no explanation as to why the parcel was subdivided into two if it had been purchased as one. This tends to confirm the evidence of the 2nd defendant in the criminal case to the effect that he purchased 2011 but did not purchase 2010 because the applicants were still living on that land. All these factors considered as a whole negate the finding that there was no relationship and there was no trust. This is an error as the learned trial judge should have looked at the proceedings both in the criminal case and the civil case conjunctively and not separately and when so looked at they show that there is; an error apparent on the face of the record.

(6) That the application for review was presented late because immediately after judgment the applicants instructed counsel to pursue an appeal who did not do so and on realizing this they hired another counsel in Nairobi who was prevented by reasons of ill health not to pursue the matter. They hired a 3rd lawyer who declined to take the brief because of the expenses involved and when the brief was handed to the current lawyer and he went through the records, proceedings in both the criminal and civil case and records at the lands Registry is when he came to the conclusion that this is a matter for review hence this application. The applicants have not thus sat on their rights and have been trying to vindicate them and this court would deal with the matter with a view to dispensing justice however belatedly.

(7) Indeed applicants have come to court after a long time but they have explained why they took long to come to court for review. That the avenue to appeal having been closed to them the only avenue for a remedy to them was one for review and this should not be denied then.

The defendant/respondents on the other hand have opposed the application on the basis of the grounds of opposition filed, supporting affidavits, annextures and oral submissions in court and the main points relied on are:

(1) That this court has no jurisdiction because the plaintiffs opted to appeal and there is nothing to show that they don't intend to appeal and they should be advised to pursue the appeal in the court of appeal. They have presented this application as- a mere afterthought.

(2) The applicants are guilty of laches- as the judgment was delivered in 1992 when they are coming here 5 years later and this court should not assist them as they have slept on their rights and the application offends order 44 rule 1 which says that such application should be presented without undue delay.

(3) The reasons for the delay cannot be accepted because there is no affidavit from AGN Kamau advocates to show that they were never instructed to appeal, there is conflicting reasons as to why Mrs Sitati did not proceed she says it was because of ill health while the client says- that it was because of conflict of interest while Khakula says- it was long after the time allowed for appeal had elapsed.

4 That review cannot lie as there is no error apparent on the face of the record or new evidence which was not within the knowledge of the applicants which as been disclosed as the learned trial judge found that the applicants were not bothered to know how the land was - bought by the 1st defendant/respondent and registered in the 2nd defendants name because they knew that the land was not theirs and nowhere in their evidence did they raise the issue of consideration of 2,250.00

(5) That the evidence presented to the court was clear and that is why? the court ruled that the land belonged to the 1st defendant and not the father of the applicants and it follows that the learned trial judge arrived at the correct decision.

(6) That when the applicants went to court they must have been prepared and gathered all the important evidence and cannot come and say they have discovered new evidence. The court has to go by the evidence on record and when evaluated it is clear that there is no error which is obvious and self evident on the face of the record in order to warrant a review. They allege ignorance of those fact and the court should not assist them

(7) The transactions complained of went before the land control board and passed without any objection from the applicants who if they had any rights then they would have gone to the board to object

(8) That the proceedings and judgment in the criminal case are not binding on the high court and the learned trial judge was not obligated to refer to the same.

In reply to the respondents submission counsel for the applicants reiterated that the properly deponed affidavits carry weight as opposed to any contradiction by the 3rd party

(2) That the records- show that the consideration of Ksh.2,250.00 was to transfer the whole of Ndivisi Muchi/999 to Paul Wafula Sakong while those in respect of 2011 and 2010 show the consideration as Ksh. 3,000.00 and 1,000.00 and the transfer was not to Tom Sitati.

(3) That the 1st defendant and the 2nd defendant knew that the land was not theirs and that is why they did not file a case to evict the plaintiffs from the land. They know the truth and that is why *they* did not evict them.

(4) That the learned trial judge was- wrong in observing that the applicants should have appealed against the decision in the criminal case when the same was in their favour as they had been acquitted and they could not appeal in their favour. It is the 2nd defendant who lost and that is the person who should have appealed if aggrieved.

(5) That it is only this court which will remedy the situation by granting review and reopening the matter for further and important evidence to be adduced. That the defendants will not suffer any prejudice as they have never lived-on the suit land,

In order to succeed the applicants have to bring themselves within the ambit of the provisions governing granting of review Order 44 Rule 1 states inter alia that review lies in favour of a party who from 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

When the above principle is applied to the facts, of this application I find that a party aggrieved of a court order or judgement has two options either to appeal or to seek review. If he chooses the right to appeal then he has to exercise it within the prescribed period. The stand of the respondents is that since the applicants had initiated the process of appeal then they should not come and seek review. They should pursue that process to its logical conclusion The applicants: concede to have set the same in motion but say that they cannot pursue it because that process has been frustrated because of the reasons outlined and that they have sound grounds for seeking review. I have perused the record and find that there is a notice of appeal dated 11.8.92 filed by the then advocate appearing for the applicants.The Deputy Registrar of this court forwarded the said notice to the court of appeal on 20.8.92. Although there was a request that receipt of the same be acknowledged it was not acknowledged receipt. There is a letter dated 10.8 .92 from Messers A.G.N.Kamau Advocates who were then on record for the applicants seeking certified copies of proceedings for purposes. Of appeal. The Registry replied that letter vid*e* this courts letter dated 24.8.92 asking for copying charges of Ksh.420/ Apparently this letter was not sent out but there is a note on it to the effect that copying charges were paid for but there is no date indicated when these were paid for. There is further noting on the copy of that letter that the proceedings were handed to one Meshack of A.G.N.Kamau advocates but the date on which those proceedings were handed over is not indicated The copies of the proceedings on the court file were certified but there is no date on which they were certified

All these factors go to show that indeed the applicants, allegations that they instructed their counsel then on record to lodge an appeal is true. As correctly submitted by the respondents counsel there is no deponement from those advocates to show as to why the appeal was not processed. The applicants explanation as derived from their deponements is that they assume their advocate had processed the same and when they realised he had not done so is when they approach another counsel to process the same and indeed drafted papers but was taken ill and she refered them to another counsel who upon perusal of the record found that time for appeal had elapsed and declined to accept the brief due to the expenses involved. When they approached their current advocate is when he advised them to seek review From the foregoing: it is clear that in law even if notice of appeal was duly filed and received by the court of appeal once the period allowed for filing of appeal lapsed the notice of appeal become of no consequence and so there is no appeal pending capable of being pursued.

It is correct as submitted by the respondents counsel that applicants can still seek leave to appeal out of

time.

The applicants counsel submits that this was an option open to them but from his appraisal of the record and newly discovered evidence it is review which is the appropriate remedy to be sought

The key question now is whether review is available to the applicants the ingredients are already set out and 2ndly it must be sought without unreasonable delay. Counsel for the respondents has argued that the applicants have sat on their rights for five years and are guilty of laches: and so they should not be granted review. The rule requires that such an application should be presented without unreasonable delay

The rule does not define what amounts to reasonable or unreasonable delay this court is alive to the generally applicable principle that where no specific period is stipulated the contemplated action must be taken within a reasonable time. What amounts to a reasonable time is a matter of good common sense. Indeed each case depends on its own circumstances. In the circumstances of this case any ordinary person looking at it would say that a period of 5 years is too long and it qualifies to be called an unreasonable period of delay. The next question to be paused is whether having found so is sufficient to deny a relief sought in doing so the court has to consider whether despite the delay none the less there are genuine grounds which warrant the granting of the relief sough bearing in mind the fact that this is a court of law- and justice and section 3A of the CPA enjoins this court to do justice to both parties on their merits, as opposed to points of technicality. The very fact that the rules do not fix a fixed period beyond which review cannot lie it means that the court has a discretion to hear the matter and rule on it where there are genuine reasons for doing so.

In the premises I find that the application is properly before this court and it can be ruled on merit

Having ruled so I now come to determine whether there are genuine reasons to warrant review the reasons are already outlined and having analized the same I am of the opinion that review lies on the following reasons

(1) The learned trial judge rejected the plea for trusteeship of the land because ha found as a fact that there was no relationship between the applicants and the first defendant but he failed to state whether in law a trustee must be always a. person related to the beneficiary. In view of the evidence that the father or applicants had worked for 1st defendant was there that this evidence is contradicted by the documents exhibited because:

(1) Transfer was made to the 1st defendant by the original owner for the whole land.

(2) There was no transfer and its consent exhibited from the original owner to the 2nd defendant.

(3) No explanation has- been given as to why the parcel was split into two and then purport to transfer to one person as the court was not told as to why the 2nd defendant could have thought it fit to split his- land into two.

(4) The criminal proceedings related to only one parcel of land namely 2011 and not 2010. The trial court did not address its mind as to why the 2nd defendant who alleges to have purchased the whole parcel only claimed trespass on one-: parcel and not the other.

(5) The defences of the 2nd defendant did not counterclaim for the whole parcel of land and seek eviction orders against the applicants

(6) The extract of title of parcel no.2010 shows that after subdivision it was transferred to the original owner and not the 2nd defendant,

All these factors go to show that not all relevant evidence in the form of facts and documents wars placed before the learned trial judge in order to enable him rule judiciously on the matter. I do appreciate the fact

that litigation must come to an end and the fact that the beneficiary, of the judgment has not enjoyed its fruits. However the key-consideration here is. not the convenience or inconvenience of the parties but whether on the facts justice was done to both parties In the circumstances of this case and in view, of the fact that not all evidence was adduced before the court I am of the opinion that justice was not done to both parties, a possibility that he trusted him and entrusted him with care of the land on behalf of deceaseds family in view of the fact that the deceased and his wife died and were buried on this land without any objection from the 1st defendant. The learned judge made an observation on this but failed to rule a-

(2) There was an agreement of sale of land from one Makenzi Wasike who was not called to testify and no reason was given as to why he was not called to testify. It was not also stated in evidence the parcel number of this piece of land neither did the court establish whether it exists, or does not exist. This was raised in the evidence of the defence to show that applicants purchased a different parcel of land and not the disputed one

(3) The learned trial judge laid great emphasis on the factthat applicants- did not appeal against the decision on thecriminal proceedings because they knew that the land was not theirs. Applicants had been charged with the offence of trespass; in that court and were acquitted of the same and there was no need to appeal against that acquittal It is the stand of the applicants that had the learned trial judge applied his reasoning and appreciation of the conclusion in the criminal case he could have arrived at a different reasoning.

(4) A perusal of the annextures and the exhibits produced show that what was exhibited at the trial were 'an application for transfer and consent for transfer from the original owner to the first defendant. It was alleged that the second defendant bought half of the land and the 1st deft another but when the 1st deft failed to pay the full purchase price the offer went to the 2nd defendant who purchased both parcels of land from the original defendant,. The learned trial judge failed to appreciate I do appreciate that the courts role on review is not to sit on an appeal over its own decision I have borne that in mind and that is- why I have not drawn conclusions but I have just raised questions and pointed out points for determination which were not ruled on by this court and were crucial to the case, therefore find that review lies to the applicants and this courts- judgment dated 29.7.92 be and is hereby reviewed and set aside.

(2) The matter be and is ordered to be heard denovo and new evidence adduced before another judge of competent jurisdiction.

(3) Since the parties and the suit land are within the jurisdiction of Bungoma high court the proceedings are ordered to be typed compiled and the file transferred to the learned judge in Bungoma for him to fix it for hearing and final determination and disposal according to law.

(4) Mention before the Bungoma Resident Judge on day of--------- 1998.

(5) Costs of the application to the applicant

Dated at Eldoret this. 20th day of July 1998. R.NAMBUYE

JUDGE
20.7.95

R. NAMBUYE JUDGE