REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 70 of 1988

MWANGI M'ABUANGA..... PLAINTIFF (RESPONDENT)

versus

FESTUS MURIUNGI..... DEFENDANT (APPLICANT)

RULING:

This is an application for orders that the court "be pleased to review the orders dated 1st July, 1991 appointing the decree-holder as the legal representative of the deceased/plaintiff for the reason that there is an error of law apparent on the face of record and the error has adversely affected the applicant/defendant," Or, in the alternative, that the court "be pleased to review the order dated 18th April, 1994 committing the defendant to civil jail for the reason that there is an error of law apparent on the face of record," and that the costs of this application be provided for.

The application is supported by the affidavit sworn by Nahashon Karuti,advocate for the applicant and another affidavit of Festus Muriungi, the applicanthimself. In a twenty-seven paragraph affidavit, the applicant made oath and statedas follows:

"1. That I am the applicant herein and the Defendant in this case and therefore competent to swear this affidavit.

2. That prior to the death of the plaintiff I and the plaintiffhad amicably settled the plaintiff's claim against myself out ofcourt which amicable settlement was however not recorded as the plaintiff died soon after reaching such settlement.

3. That I have seen and perused the affidavit of the decree holder one Stephen Kaungu which was in support of the application by decree holder for the appointment of himself as the legal representative.

4. That the affidavit mentioned in proceeding paragraph refrains from bringing up the facts and circumstances of the plaintiff's death and the marital status of the plaintiff at the time of his death and whether the plaintiff was survived by any wife or issue or descendants.

5. That I know that the plaintiff was survived by his wife Rose Mukonjira and has descendants.

6. That the basis of the settlement as mentioned in paragraph 2 above was that the plaintiff and myself had found after the judgement in this case that the plaintiff and myself were distant relatives who were bound by certain customs traditions and taboos which forbid such relatives to relentlessly pursue one another for a claim arising out of unwillful conduct of, the party claimed against especially if that party is not freely and willingly ready or has not the means to settle the claim.

7. That the custom in distant relationships mentioned in paragraph

6 above are known throughout the people belonging to the Ameru tribe and known as "Giciaro" and is commonly accepted as a good guiding and virtuous custom.

8. That I had and still have no means whatsoever of settling theplaintiff's claim against myself hence the settlement as mentioned in paragraph 6 above

9. That the land rover KXD 371 which was sold in part settlement of the plaintiff's claim after his death was my only means of earning a living and I know that the proceeds of the sale never reached the surviving spouse or the children of the deceased.

10. That the settlement between myself and the plaintiff before his death was to the effect that the plaintiff had decided to relinquish his whole claim against myself absolutely.

11. That prior to his death the plaintiff intimated to myself that he had communicated his decision as per and on such settlement and his wish to his wife and descendants.

12. That the current decree holder is an outsider to such immediate family of the deceased plaintiff as born out in his own affidavit mentioned above.

13. That I know that the current decree holder had wrongfully obtainedthe National Identity Card of the plaintiff, and had claimed thatthe plaintiff had died long before the plaintiff had actually died in an attempt to be appointed the legal representative of the plaintiff before the plaintiff had actually died.

14. That the plaintiff then had to come to the court and show the court that he, the plaintiff was not dead as had been claimed by the current decree holder.

15. That I have been informed by my advocate on record and I verily believe the same to be true that the proper legal representative of a deceased person is the surviving spouse and or issue.

16. That I have also been informed by my advocate on record and I verilybelieve the same to be true that the proper legal representative isone who has been granted the letters of administration of the estateof the deceased person.

17. That I know that the wife of the deceased plaintiff has survivedhim and that there are children of the deceased plaintiff who are of age.

18. That I know that the decree holder has not been granted theletter of administration of the estate of -the deceased.

19. That the spouse of the deceased plaintiff has intimated to me thatthe current decree holder did by use of force on the person of suchspouse and by threat of further force administer an illegal oath on theunwilling spouse and further did perform an oathing ritual on theperson of such spouse binding her at the risk of harm and death to herself not to take any part in any proceedings in this case and that in performance of the ritual the decree holder did force such surviving spouse to drink some traditional oathing wine and circled the person of her with some sacred leaves known as "Maroo" which ritual and oathing is generally believed to cause harm if broken.

19A.That I believe that the oathing and the performance of the ritual were intended to instil' fear and apprehension on the surviving spouse of the deceased plaintiff.

20. That I have also been informed by the surviving spouse of the plaintiff that the Decree holder has threatened the life of such spouse of the deceased plaintiff with the aim of preventing the spouse from participating in any of the proceedings in this case.

21. That I know that the current decree holder has by physical attacks on the spouse of the deceased plaintiff forced her out of her matrimonial home.

22. That I have been informed by my advocate on record and verily believe the same to be true that such acts as are mentioned in paragraph 20 herein above are criminal acts.

23. Further that I have been informed by my advocate on record and I verily believe the same to. be true that no one can be allowed to benefit from such criminal acts.

24. That I believe that the Honourable court has the means and the reasons to compel the attendance of the surviving spouse and or the current decree holder to testify in these proceedings.

25. That I believe,that the surviving spouse of the deceased plaintiffwould carry out the settlement reached between myself and the deceased plaintiff as she is fully aware of the settlement and she has informed me that she accepts such settlement.

26. That I make this affidavit in support of my application for the review of the order dated 1.7.91 appointing the current decree holder as the legal representative of the deceased plaintiff and of the order dated 18.4.94 committing myself to civil jail.

The application further says that it is also supported by the affidavit sworn by Nahashon Karuti"; it does not state the date when that affidavit was sworn.. In arguing the application Mr. Karuti said that he relies on his "own affidavit sworn on 25th May, 1994". When I checked the court record I found two affidavits sworn by him on the same day, one is an eight-paragraph one, and the other runs into twenty paragraphs. I have considered both of them. They are as follows:

"1. That I am an Advocate in conduct of this matter duly instructed by the Judgement-Debtor/Defendant and authorised to swear this affidavit.

2. That I know that the order for the arrest of the Applicant/Judgement-Debtor was made on 18/4/94 and the same has not been set aside or varied. • '

3. That subsequently the warrant of arrest of the applicant was issued by the Honourable Deputy Registrar and that the same is still in force.

4. That I know that the Decree Holder was an appointed Legal Representative of the deceased/plaintiff in this suit.

5. That the application seeks to review the court's Order appointing the Decree Holder as such legal Representative.

6. That the review has high chances of success.

7. That what is deponed herein is true to the best of my knowledge, information and belief.

8. That I make this affidavit in support of the application for Stay pending such review." That is one. The other one is this:

" 1. That I am an Advocate in conduct of this matter on behalf of the Applicant/Defendant and authorised to swear this affidavit.

2. That I have seen and perused the affidavit dated 28.9.90 made by the Decree-Holder which affidavit was in support of the application for the appointment of the Decree holder as the legal representative.

3. That I have also seen and perused the Chamber summons in application for the appointment of the Decree Holder as the legal representative.

4. That I have also perused the order appointing the Decree Holder as such representative of the deceased plaintiff.

5. That as per the said affidavit of the Decree-Holder the plaintiff died on 24th December, 1989.

6. That the application for the appointment of the Decree-Holder as the Legal Representative was filed in Court on 14.5.91 more than one year after the death of the plaintiff.

7.That such application is not dated.

8. That the Order appointing the Decree-Holder as legal Representative was made on 1.7.91 more than one year after the death of the plaintiff.

9. That no application for enlargement of time for the application was made.

10. THAT by the date of the application for the appointment of the Decree-holder and by the date of the order of such appointment the suit against the defendant judgment debtor has abated.

11. THAT the said affidavit of the decree-holder supporting the application for the appointment of himself as the legal representative is silent on the most essential and material facts concerning the deceased plaintiff with regard to the plaintiff's marital status before and at the time of his death and on the circumstances leading to and his death, which essential and material facts would have gone to show the decree-holder is the proper legal representative of the deceased plaintiff or not.

12. THAT as stated in the proceedings paragraph, the defects in the affidavit leave an incurable lacuna in that the facts which the deponents of the same was required by law and as such a matter of course to prove should not have been assumed.

13. THAT further the same affidavit is so manifestly defective in that the affidavit does not show on which date it was sworn?

14. THAT the defects in the application as pointed in paragraph 7 herein above and the defects and ommissions in the affidavit as aforementioned want to affect the merit of the application for the appointment of the decree-holder as the legal representative and the same should not have been granted.

15. THAT the judgment-debtor was not present nor represented in the hearing of the application for appointment of the decree-holder as the legal representative and the hearing therefore proceeded contrary to the rules of natural justice.

16. THAT I have perused the proceedings dated 11.4.94 for the committment of the defendant to civil jail.

17. THAT I have also perused the "subsequent order committing the defendant to civil jail dated 18.4.91.

18. THAT in the proceedings and in the order mentioned in paragraph 16 and 17 above, it is not recorded as required in the order 21 r.35

(2) that the honourable court was satisfied, and no reasons were recorded to show that the facts and or situations prerequisite to the order of imprisonment of the judgment/debtor had occurred or were remotely probable. .

19. THAT I make this affidavit in support of the application for thereview of the orders firstly, appointing the decree-holder as thelegal representative of the deceased/plaintiff and of commital of the defendant/judgment debtor to civil jail.

20. THAT all what is deponed herein is true to the best of my knowledge,information and belief."

At the hearing of the application Mr. Karuti himself argued the application. He went through all these paragraphs, reading them to the court one by one until he finished them, adding nothing else and explaining none.

This application was opposed. Messrs Mbae Mwarania for the respondent, filed five grounds of opposition. They were short. This is how he set them out:

"1. The applications lack factual and legal basis.

2. The applications lacks merit and are calculated to obstract and delay due to process of court in execution of a lawful decree.

3. The applicant lacks clean Hands.

4. The Order sought are untenable in Law.

5. The affidavit by the applicant sworn on 2nd June 1994 is Hearsay and depones on matters that are extraneous and irrelevant for this suit".

For these reasons the respondent asked the court to dismiss the application

I have listened to the viva voce presentations of the arguments for and against the application. As I considered them, I viewed the arguments on both sides in the light of all factual things from the beginning to this day. According to things on the record before me, the case was filed in May 1988. On 13th March, 1989 judgment was passed against the defendant (applicant in this application). By a decree dated 23rd May, 1989 it was ordered and decreed that the defendant (applicant) was to pay various sums including costs taxed on 23rd May, 1989, with interest.

An application for execution of the decree was made in May,1989. Certain goods of the present applicant were attached, but on 19th June, 1989, by the consent of the parties my immediate predecessor at this station, Oguk, Ag. J (as he then was) recorded a consent that there would be a stay of sale of the applicant's attached goods pending the hearing of an application dated 14th June, 1989 which was to be heard on 22nd June, 1989... By that application i.e. the application dated 14th June, 1989, the applicant sought orders that there be a stay of execution and restitution of the property seized under a warrant of execution issued on 25th May, 1987; and, very important to note, that "the defendant/applicant be given time to follow his insurers to satisfy the judgment herein." (Emphasis is mine).

Apparently nothing happened following the consent order, in the sense that once he got a stay of execution, the applicant forgot about following "his insurers to satisfy the judgment". So, by a letter dated October 24, 1989, Messrs Mbae Mwarania & Co. advocates for the decree-holder asked the court to re-issue a warrant of attachment to execute the decree. The warrant issued. Cows were attached. One M'Amanja M'Imanyara objected to the attachment, saying the cows belonged to him and not to the present applicant (judgment debtor).

On 21st September, 1990, a senior resident magistrate, ruled that the cows belonged to the father of the judgment debtor, who was not a party, and • so ordered that they be "restituted" to the objector.

In the course of things, the decree-holder died. By an application coming ex-parte on 1st July, 1991, before my aforementioned immediate predecessor at Meru, Oguk, J, drawn by Messrs Mbae Mwarania & Co advocates for the deceased decree-holder, an order was sought that Stephen Kaungu M'Mibuari, be appointed the legal representative of the deceased decree-holder, Mwangi M'Abuanga. Mr. Justice Oguk heard that application, allowed it, and' appointed Stephen Kaungu M'Mibuari, as legal representative for the purposes of proceeding with steps to recover the judgment debt on behalf of the estate of the deceased decree-holder. Stephen Kaungu M'Mibuari was a brother to the deceased, as the court was informed by Mr. Mwarania who appeared on the application before Oguk, J on 1st July, 1991.

In support of the application for an order of appointment of legal representative, Stephen Kaungu M'Mibuari who was to be appointed, swore an affidavit saying that he was the applicant; that the deceased judgment-creditor was his brother; that the said judgment creditor had obtained the judgment on 13th March, 1989, and had died on 24th December, 1989 before the decree in the case had been satisfied.

Following the said appointment a notice to show cause why execution should not issue was given sometime in July, 1991, and was scheduled for hearing on 27th September, 1991. On that day Mr. D. J. Mbaya and Mr. Mbae Mwarania appeared before a deputy registrar, when for a reason not recorded, the deputy registrar Mary Mugo stood the notice over generally.

Nothing was recorded until 21st February, 1994 when a notice to show cause why execution should not issue was listed for hearing on 11th April this year. On that date the matter was brought up before a senior deputy registrar, M. N. Gicheru. On that day, Mr. Mithega, in an apparent attempt to show cause against execution, resisted the notice by arguing a number of points.

He argued that the legal representative of the deceased decree-holder was not the right person to take "the proceeds of the decree," the wife of the deceased being alive, and she ought to be the legal representative of the estate of the deceased. The parties are relatives; it was agreed that the decree in this case would not be executed, and a consent was to be recorded. The widow of the deceased was to come to the court to say what Mr. Mithega was saying. It was not the deceased's wish to execute the decree because of the tension it would cause in the family. Said Mr. Mithega, "My client has not arrived because of heavy rain in Mutwati".

Mr. Mwarania replied. He argued that the widow had no business in this case; there was a decree of the court, and it was fallacious to say that the legal representative was not entitled to the decree. He asserted, "what I know is that Mr. Mithega's client is conniving with others to defeat the cause of justice in this case." So he prayed that a warrant be issued for the committal of the judgment-debtor to civil jail.

Upon this prayer, Mr. Mithega had another chance to speak. He said that legal representation ought to be resolved first; that there were good reasons why committal to civil jail should not be resorted to; that it was not clear who should take the decretal amount. And, said Mr. Mithega, and this is important, "the defendant has not refused to pay". He added that there should be no payment between the deceased and the judgment debtor. "The parties come from Nyambene. There is something called gichiaro which affects them. I pray for another date for mention for the legal wife to appear and clarify the matters in court".

For four days Mr. Gicheru, the deputy registrar, considered the matter, after which he gave his ruling on the notice to show cause why the decree should not be executed by committing the judgment-debtor to civil jail for failing to satisfy the decree. He found that no cause had been shown why the judgment-debtor should not be committed to civil jail. Said the deputy registrar, "The issue of legal representation of the estate of the deceased was settled long ago on 1st July, 1991 when the court appointed Stephen Kaungu MB Mibuari the legal representative of the deceased in this matter.

The decretal amount should therefore be paid to the legal representative of the deceased Stephen Kaungu." Not having found good cause why the judgment-debtor should not be committed to civil jail for failure to satisfy the decree, the deputy registrar ordered that the judgment-debtor be committed to civil jail unless he paid the decretal amount in full. He authorised the issuance of a warrant of arrest.

That ruling seems to have served as a stimulus to, and precipitated, the instant application. Taking a cue from the deputy registrar's reference to the consent order of 1st July, 1991, in his ruling, the applicant (judgment-debtor) came panting with this application. It was like he was hearing of Oguk, .J's" order of 1st July, 1991 for the first time in his lifetime. He had thrown out his previous advocates. He employed Nahashon Karuti.

He leaves Mr. Gicheru's order still blazing in red flames. He neither asks Mr. Gicheru to review his own order (if there are any legal reasons for doing so), nor appeals against it. So, it is left intact. With

Gicheru's order still on record and enforceable, he asks this court in the instant application, for an order to review the older order of July 1, 1991 which had remained all these years unassailed.

Armed with a fool's hind side wisdom, the applicant in an apparent catch at the straw stroke, now fervently points out that the application was filed more than one year after the death of the decree-holder, by which time "the suit against the defendant" had abated. He forgets that the suit having been heard and determined as at the time of the decree-holder's death, there was no pending suit to abate. As at the date of the decree-holder's death there was no suit; there was a judgment - an unsatisfied judgment - passed and obtained in a determined suit. What was pending were execution proceedings in a judgment in a concluded suit. It was a decree still not satisfied. A decree and a suit are two different things. A decree does not abate in circumstances in which a suit will abate. It is a different thing altogether.

But even if the judgment or decree were to be misunderstood to be synonymous with a suit, the fact that the date's of the death of the decree-holder and of the application for appointment of legal representative were before the judge when he made the order of appointment means that he made the order conscious of the dates and still proceeded to do so presumably in exercise of the power to enlarge time within which to appoint, without expressly" and explicitly writing down an order of time enlargement before appointment. If there was no power at all for enlarging time, different considerations would apply; but he had such a power; he needed not write down that he was exercising the power; he was entitled to act within such power and to exercise it without being asked to do so and without expressly writing on record that he was exercising such and such a power. There is always a presumption of a judge acting correctly and within the law unless and until the presumption is displaced by a clear demonstration of error. It is for the present applicant to show that the judge had no power and acted dehors the law.

Moreover, for me, a court of concurrent jurisdiction, to assume pretended powers to say that my brother Oguk, J, was in error to appoint a legal representative allegedly out of time" is to pretend to be an appellate authority over him, albeit feigning and professing falsely to be exercising review powers... I have no such pretended powers.

On alleged silence on the most essential and material facts concerning the deceased... with regard to the plaintiff's marital status", I say this. This is not an application by a widow or other competitor to representation. Nobody is saying he should be the one to represent the estate of the deceased decree-holder. The application is brought by a judgment-debtor whom the record set out above herein portrays as one hell-bent on avoiding to satisfy the decree. He is using this application as another plank in the path of justice to stem execution.

This nonsense about alleged criminal acts allegedly committed by the decree-holder's legal representative against the widow cannot be of any substance in the mind of any right-thinking person, let alone a legal mind. There are competent ways, outside swearing affidavits, of dealing with a person engaged in criminal wrongs. Those ways have not been employed and no reason is given why competent authorities for detection and prevention of crime have not been apprised of the alleged crimes. A court cannot on mere affidavit affix criminality upon an innocent Kenyan who has not been proved guilty of any crime. Certainly not in proceedings such as these.

In a rather muddled state of mind, those preparing the present application have asked, as an alternative relief, for a review of the magistrate's order for committal to civil jail by way of executing the decree. Such a prayer to this court can only be made by one who had never read the provisions for a review. Review is a judicial reconsideration, a second or further view or examination of the same subject for purposes of correction of one's own error by the same judge or magistrate (as the case may be), though ex necessitate there may be cases in which a review might take place before another and different judge or magistrate of the same jurisdiction; and as a verb, it means to re-examine judicially. In the instant application I am not the same magistrate who made the order of April 18, 1994. It was not *my* order. The magistrate who made it is still there, less than one hundred metres from this court, still in the service, ready, available and accessible to be asked to review his own order if that course is considered by the applicant's advisers to be appropriate. To come to me in this manner is to confuse review procedure with appeal process, the two courses being utterly as different as sand and sugar. Appeal is the removal of a

cause from a lower tea higher court for the purpose of testing the soundness of the decision of the lower court, the process being equivalent to alleging that the decree or order is wrong and that the reasons which led to it are as stated in the judgment or ruling insufficient. It is a hearing before another tribunal, to determine what decree or order the court below ought to have made. The scope of an application for review is much more restricted than that of an appeal, it being circumscribed by the definitive limits fixed by the language of Order 44.

A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for Patent error. It does not permit a court to elaborately go into evidence, whether viva voce or by affidavit, to discover the error. To do so is to sit in appeal. The object of review is not to provide a further opportunity and to enable a judge to write a second judgment because the first was wrong.

Section. 80 of the Civil Procedure Act, and Order 44 of the Civil Procedure Rules permit applications for review, but exact very strict conditions so as to prevent litigants lying on their cars when they ought to be diligent',: and applicants must portray themselves as not having been negligent in the matter. In this case the applicant slept on his oars for far too long, since 1991 till this year, 1994. No explanation is given for the long slumber.

The court refuses to delay execution at this stage, and no reason is shown to be good enough to justify denying the decree-holder from realising the fruits of the decree. For these reasons, the application is dismissed with costs. Orders accordingly.

Signed and dated by me at Meru this 23rd day of June, 1994.

R. KULOBA,

JUDGE.

23.6.1994: