IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi,Cockar & Omolo JJ A)

CIVIL APPEAL NO. 55 OF 1986

BETWEEN

NGORORO.....APPELLANT

AND

NDUTHA & ANOTHER.....RESPONDENTS

(Appeal from the ruling of the High Court of Kenya at Nairobi of the Chief Justice the Honourable Mr Justice Simpson delivered on 9th August, 1985)

in

HCCC No 3350 of 1984)

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JUDGMENT

On 17th July, 1974, the appellant filed a suit in the High Court at Nakuru seeking the 1st respondent's eviction from plot No 16 Ndaragwa Settlement Scheme (hereafter referred to as the suit premises) of which the appellant was the registered owner. The 1st respondent in his written statement of defence and counter-claim prayed for a dismissal of the suit and a declaration that the appellant was a trustee for the 1st respondent for half of the suit premises. He had also prayed, presumably in the alternative, for, *inter alia*, a declaration of entitlement to half the value of the suit premises and compensation for improvements. The learned former Chief Justice, Simpson J as he then was, following a full hearing gave judgment on 25th May, 1979, in which he ordered that on receipt from the appellant of a sum of Kshs 1750/- the 1st respondent was to vacate the land occupied by him on the suit premises within 3 months with permission to reap any crops already planted and not harvested by the end of the said period.

In execution of the said judgment the 1st respondent and his family were evicted from the suit premises in early 1980 and in the course their homes were pulled down. At the request of the respondents the administration intervened, clearly unlawfully, and forcibly put the respondents back into possession of their half of the suit premises which apparently they had occupied since 1965.

On 25th November, 1981, the 1st respondent through an originating summons sought a declaration of ownership of the said half share in the suit premises through adverse possession. On 7th July, 1982, the originating summons was struck off as being *res judicata*. It also appears from a not very satisfactory record of appeal that proceedings to have the 1st respondent committed to civil jail for contempt were

instituted at some stage and in consequence he was ordered by the Court to vacate the suit premises by 30th November, 1982.

On 18th November, 1983, the 2nd respondent, who is the wife of the 1st respondent, made an application under section 80 of the Civil Procedure Act for a review of the said judgment dated 25th May, 1979, on the grounds that she had a direct interest in the suit premises because she had contributed Kshs 1000/- and the 1st respondent had contributed Kshs 750/- which had made up their share of Kshs 1750/- being half of the total purchase price of the plot. Simpson, J, now the Chief Justice, heard the application on 31st July, 1985, during which he also allowed the 2nd respondent to give evidence relating to the source of the money which she allegedly claimed to have contributed. His mind clearly being nagged by (to quote) "an apparent miscarriage of justice in a sensitive matter such as land which had been in occupation of the defendant (1st respondent) and the applicant (the 2nd respondent) for 14 years." Simpson, CJ, thought that there was a sufficient reason for reviewing the judgment, and he, therefore, granted a review and ordered a retrial.

This appeal against the order of Simpson, CJ, has 26 grounds but was argued mainly on three issues which were that:

1. The 2nd respondent had no l*ocus standi* in the suit

2. The inordinate delay in the filing of the application for review.

3. Absence of any sufficient grounds.

With regard to the question of the *locus standi* and the inordinate delay it was apparent that Mr Gaturu during his eloquent submissions on these two issues had completely overlooked the fact that on 31st July, 1984, Mr Mutungi also, who was then representing the appellant, had raised the matter of these two issues by way of preliminary objections before Masime, J, who was at that time hearing the application for review. Comprehensive submissions were made by both Mr Mutungi and Mr Arum for the 2nd respondent. Masime, J, rejected the preliminary objections based on these two issues. No appeal was ever filed against that ruling and as far as this Court is concerned the ruling is binding because this appeal is not against that ruling of Masime, J. That clearly must have been the reason also why, despite submissions having been made before him on these two issues,

Simpson, CJ, scrupulously avoided any mention about them in his ruling. We are bound by that ruling and we, therefore, reject all the grounds of appeal relating to these two issues. However, we would observe that under section 80 of the Civil Procedure Code, as we shall point out herein later, any person, though not a party to the suit, whose direct interest is being affected by the judgment therein is entitled to apply for a review. The 2nd respondent therefore has a *locus standi*. On the question of inordinate delay we have earlier given a history of events which tend to show that in 1980 when the 2nd respondent, who first came to learn of the suit, when she was being evicted in consequence of execution proceedings following the judgment on 25th May, 1979, not surprisingly sought immediate help from the administration whom the rural peasants generally consider to be the proper authority to deal with such matters. Thereafter on 25th November, 1981, an originating summons was filed and having received some respite by the court order granting them time to vacate by 30th November, 1982, the eventual filing of the review application a year later on 19th November, 1983, might not under such peculiar circumstances perhaps be considered as an inordinate delay.

In respect of the ground that there was no sufficient reason for granting the application for review Mr Gaturu's submissions were levelled mainly on the following two matters:

1. If there was a miscarriage of justice why was an appeal not filed?

2. Contradiction in the evidence of the 2nd respondent, which Simpson, CJ, had also noted, were on a very material issue.

With regard to non-filing of appeal the term used by Simpson, CJ, which we once again quote “an apparent miscarriage of justice” does not refer to the earlier trial before him in so far as it related to the rights of the 1st respondent. He clearly had in mind the interest of the 2nd respondent as distinct from that of the 1st respondent. She claimed to have contributed Kshs 1,000/- and yet had not been heard. With no evidence relating to her interest on record there was no foundation to form a basis for any appeal by her. The words “any person” and “for any sufficient reason” used in section 80 of the Civil Procedure Act clearly are meant to include a person who has a direct interest in a litigation or its result but has been deprived of a hearing as a party in relation to his interest. The question of why the 2nd respondent did not appeal, therefore, does not arise and we reject this submission.

With regard to the contradictions in the evidence of the 2nd respondent, Mr Gaturu laid a great stress on the fact that whereas the money was paid by the 1st respondent in 1965, the 2nd respondent had stated in her evidence that she had planted, harvested and sold the potatoes in 1966 and money obtained thereby was what she had given to the 1st respondent as her contribution. In view of this discrepancy which showed that the 2nd respondent could not have paid any money to the 1st respondent during 1965 when the transaction had taken place and the money was actually paid, Mr Gaturu strongly urged that the evidence of the 2nd respondent should have been rejected and the High Court should have declined to grant the application for review. It is to be observed that Simpson, CJ, had noted the contradiction but he found that her evidence had a ring of truth and that if the 2nd respondent had probably exaggerated he had believed that she had made a contribution. What clearly had persuaded the Chief Justice to feel that “an apparent miscarriage of justice” had occurred were the contribution he believed the 2nd respondent had made towards the purchase of the land, the fact that the land had been in her occupation for 14 years and that land was a sensitive matter. In our view the Chief Justice did not err in the exercise of his discretion in granting the application for review. We dismiss the appeal but make no order as to costs.

Dated and Delivered at Nairobi this 9th day of November 1994.

J.M.GACHUHI

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JUDGE OF APPEAL

A.M.COCKAR

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JUDGE OF APPEAL

R.S.C.OMOLO

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JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR