IN THE COURT OF APPEAL

AT NYERI

(Coram: Kneller, Hancox & Nyarangi JJA

CIVIL APPEAL NO. 80 OF 1985

Between

WANGECHI KIMITA.....APPELLANT

AND

WAKIBIRU MUTAHI.....RESPONDENT

(Appeal from the High Court at Nyeri, Patel J)

JUDGMENT

May 23, 1985, **Nyarangi JA** delivered the following Judgment.

This appeal arises out of a ruling of the High Court, Nyeri, (JS Patel, AG J, as he then was) dismissing the appellants' application for an order to review that court's order, made on June 21, 1983 by V V Patel, J, by the consent of the parties that the respondent as defendant do transfer 0.75 acres to each appellant from a parcel of land known as Aguthi/Gathaithi/228. The appellants sought an order that the material parcel of land comprising 4.5 acres be subdivided into three portions so that the respondent would have 1.6 acres and each of the appellants would get 1.45 acres. The main ground which was advanced by the appellants for the application for a review under order XLIV rule 1 of the Civil Procedure Rules was that the respondent had falsely sated to the court that the acreage was 3.1 acres because when the surveyor went to the land and surveyed it, the land was found to be of 4.5 acres. In other words, the appellants were urguing that notwithstanding the contractual nature effect of the consent order, nevertheless on the ground advanced by them the consent judgment should be set aside because the respondent misrepresented the acreage of the parcel of land: see *Flora N Wasike v Destimo Wamboko* Civil Appeal No 81 of 1984 where this court held by a majority that it was doubted if section 67(2) of the Civil Procedure Act is an absolute bar to an appeal against a consent order on grounds which would justify the setting aside of a contract entered into with knowledge of the material facts or on circumstances which would afford good ground for varying or rescinding a contract between the parties.

It is common ground on the pleadings that the appellants are widows of the deceased brothers of the respondent and that the land the subject matter of the appeal was registered in the name of the respondent after the consolidation of several portions of land which were owned by Wakibiru Mutahi, the deceased father of the respondent and his deceased brothers.

That is to say, the land being disputed is family land to which each male child, among others is entitled to a beneficial or legal share under Kikuyu customary law. There can, therefore, be no question of the respondent giving a share of the land to the appellants purely on the basis of his generosity or good heart

as was urged by Mr. Ghadially on behalf of the respondent. That view is emphasized by paragraph 5 of the plaint wherein the appellants alleged that the respondent held the land in trust for the whole family of Wakibiru Mutahi, an averment which the respondent denied in his amended statement of defence but which he subsequently abandoned in favour of the consent order.

The grounds of appeal which must be set out in full are:-

> **1. The learned trial judge erred in law in failing to find that a consent order may be set aside when a party to the consent order is ignorant of material facts.**
>
> **2. The trial judge further erred in fact and in law in stating that the affidavit does not show that it fails under order XLIV(i) of the Civil Procedure Act.**
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> **3. The trial judge erred in law and in fact in failing to find that the appellants had a good reason for setting aside the consent orders of June 21, 1985.**
>
> **4. The trial judge further erred in law and in fact in failing to appreciate the fact that both the appellants and the trial court were misled by the respondent as to the actual size of the land.**

The first appellant Wangechi Kimita referred the court to the grounds of appeal and added that the land should be shared equally. The other appellant adopted the remarks of the first appellant. For the respondent, Mr. Ghadially submitted that the consent judgment was not based on acreage, there being no mention of acreage in the plaint and in the proceedings, before VV Patel, J, that the appellants could do nothing about the consent order, that the appellants were not misled and that the appellants had exhibited lack of diligent search. Counsel thought that the appellant's were misled by the District Officer, Tetu, who on April 3, 1984, wrote to the senior resident magistrate's court Nyeri, asking for, a variation to the consent order so that the respondent's allocation would be 1.6 acres and that of each appellant 1.45 acres. With regard to the appellants' affidavit in support or the application for a review of the judgment, Mr. Ghadially contended that if the 3.1 acre parcel is shared equally, the appellants would not be any better off. Counsel supported the conclusion of the judge that the appellants' application did not come within order XLIV rule 1. In reply, the first appellant said that as soon as she and the other appellant became aware of the actual acreage of the parcel of land, they hurried to the High Court and filed an application for a review.

The principal issue is whether the respondent deliberately and falsely misrepresented the acreage of the land during the brief proceedings on June 21, 1983 when the consent order was made. There is no statement of the acreage of the land whose description is given in the proceedings.

The pleadings are strangely and unhelpfully silent about the acreage of the land. Surprisingly, VV Patel, J, did not ascertain the size of the land out of which he allocated 0.73 acres to each appellant. Clearly that was a basic factor and the failure to obtain the acreage by consent of the parties or through other proper ways, he caused considerable inconvenience. I would say that in no circumstances should a court make an order to allocate or apportion land whose acreage and location is not specifically stated, for the obvious reason that a description of land being litigated the acreage of which is omitted, for whatever reason, lacks an essential and crucial particular. An extract of the title, giving the approximate area of the land as 4.5 acres was obtained on February 6, 1984, just before March 3, 1984 when the appellants applied for a review. On February 7, 1984, the appellants told the respondent under oath in their affidavit in support of an application for review that the land was said to be 3.1 acres by the respondent, "which is not true". The appellants were referring to past proceedings concerning the case and on the balance of probabilities I would hold that the respondent must have misrepresented the acreage on or before June 21, 1983. It is a matter of relevance that the respondent did not in his replying affidavit specifically deny the sworn allegations of the appellants that he had given the acreage as 3.1. He had occupied the land or most of it. He gave the acreage as 3.1 so as, I think, to entice the appellants to accept an offer of 0.75 acres each. Of course, the whole land had to be surveyed before the appellants could have their allocations.

That was when the appellants became aware of the exact acreage of the land. It is of no use the respondent arguing that the appellants did not raise any objection to the survey and the subdivision because the appellants, returned to the court whose order gave them each 0.75 acres.

I would hold that in the circumstances, the appellants, widows of the deceased brothers of the appellant could reasonably accept that the respondent, who it would appear was the only living son of Wakibiru Mutahi (deceased), was telling the truth when he stated that the acreage was 3.1 acres. It is, I think, more likely than not that the appellants knew that they would have an opportunity to cross-check on the acreage of the land during the survey. For my part I would regard that as sufficient reason for not surveying the land before the order of consent was made. And, each was present during the survey when the appellants discovered the new and important matter that the acreage was 4.5 acres. That discovery on acreage on February 3, 1984 was supported by the extract of title which was obtained on February 6, 1984. The acts of the appellant in visiting the land to witness the surveying and establish once and for all the acreage of the land is sufficient reason analogous to the discovery of new and important matter. The words "for any other sufficient reason" have therefore to be construed *ejusdem generis* with the ground of discovery to which I have referred: see *Tanitalia Ltd v Mawa Handels Anstalt*, (1951) EA 215. In other words that the words, "for any other sufficient reason" in Order XLIV rule 1 are hence confined to a reason which would be regarded as akin to those specified immediately previously in the order: see *Ahmed Hassam Nivlji v Shirinbai Jadavji* (1963) EA 217, *Yusuf v Nokrach* (1971) EA 104. I see no reason why any other sufficient reason need be analogous with the other grounds in the order because clearly section 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words "for any other sufficient reason" need not be analogous with the other grounds specified in the order: see *Sadar Mohamed v Charan Singh* (1959) EA 793.

I see force in Mr. Ghadially's contention that the issue of acreage was neither canvassed nor stated nor decided by the High Court. This is not, I think, by any means a simple case. However, by alleging that the respondent misrepresented the fact of acreage, the appellants are not stating things contradictory to each other. I understand their complaint to be that there is no valid or reasonable ground upon which the respondent could have a share of the family land equivalent to six times what each of them would have. That argument is not to be disregarded. They were content to have one quarter of the whole land, leaving the other half to the respondent.

In all probability the respondent has looked after the land before and after it was registered in his name. In the circumstances, I have come to the conclusion that the just course here is to allow the appeal, set aside the order dismissing the application for a review and before the High Court, the appellants were entitled to a review of the consent order. In pursuance of section 3(2) of the Appellate Jurisdiction Act, cap 9, I would grant the same strict proof of the appellants' allegation of discovery of new matter having been attained, and I would order that the respondent shall have one half of the 4.5 acres of land and the appellants shall share equally the remaining portion. I would make no order as to costs.

Hancox JA. I have had the advantage of reading in draft the judgment of Nyarangi JA and I agree with it. When they filed their plaint on January 11, 1969, the two appellants referred to the piece of land at Aguthi/Gathaithi/228 as being held by the respondent on an implied trust for each of them but they made no mention of the size of the land in question.

No extract from the register was produced at that stage and there is no other reference in the pleadings or proceedings to the acreage before the consent order, which was recorded by VV Patel, J on June 21, 1983, awarding 0.75 of an acre to each of the two appellants.

Mr. Ghadially, on behalf of the respondent, sought to persuade us that the order meant that the two appellants should each get 0.75 of the acre in any event, regardless of the actual size of the plot in question. It was not discovered until after the survey by the District Surveyor on February 3, 1984 and the extract from the register was produced on February 6, 1984 that the land in fact comprised 4.5 acres. I agree with Nyarangi JA that the circumstances here are such that the appellants being intestate, it is probable that they did not know the true position until it was explained to them, for they filed their application for review only sixteen days after the extract from the register was issued. I also think there

are grounds for saying that the appellants were misled because of the disproportionate share each would get if the original consent order is maintained. If there were only three brothers, of whom the two appellants are widows, then it is unlikely that they could receive only one sixth each of the total area. I therefore agree that the order of review should have been, and should now be, granted, and with the order proposed by Nyarangi JA as to the share each party should now receive. I would add that I also agree with the reasoning of Nyarangi, JA that the third head under Order XLIV rule 1(1), enabling a party to apply for review, namely "or for any other sufficient reason" is not necessarily confined to the kind of reason stated in the two preceding heads in that Sub-rule, which do not in themselves form a genus or class of things with which the third, general, head, could be said to be analogous. For these reasons I would allow the appeal to the extent indicated by Nyarangi, JA, with no order as to costs.

Kneller JA. Nyarangi JA's judgment embraces the essential facts and the relevant law to be applied to them in this appeal, and, with respect, I am in agreement with the conclusions he has reached.

Hancox JA, also agrees so the orders proposed by Nyarangi JA, now become the orders of the court.

Dated and delivered at Nyeri this 23rd day of May, 1985.

A.A KNELLER

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JUDGE OF APPEAL

A.R.W HANCOX

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JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR