REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 86 OF 2012

JANE ANYONA OMUTSANI.....PLAINTIFF

VERSUS

NASIBI AORE.....DEFENDANT

RULING

1. The Notice of Motion dated **17th July, 2018** and filed in court on **24/7/2018** has been brought by the defendant/applicant. The applicant seeks the orders that the court be pleased to review, vary and or set aside the judgment delivered by **Hon. Justice E. Obaga** on **27th June, 2013** in favour of the plaintiff/respondent and that the directions be made in respect of the Originating Summons filed herein and in **Kitale HCC No. 67 of 2011 (O.S)**. He also asks for costs be provided for.

2. The Notice of Motion is based on the grounds that the plaintiff/respondent instituted proceedings by way of Originating Summons dated **21st May, 2012** seeking for determination of, inter alia;

> **(i) Whether the properties listed hereunder were acquired jointly or not during the subsistence of the marriage, these include:-**
>
> > **(a) Kitale Municipality Block 19/BIDII/32 measuring 2.276Ha**
> >
> > **(b) Kitale Municipality Block 17/BIDII/149 measuring 21/44 Ha.**
> >
> > **(c) A quarter an acre of ancestral land at Ebusikhale Luanda**
> >
> > **(d) A full developed plot on LR No. 209/970/9 at Nairobi**
> >
> > **(e) West Bunyore/Bunyore/2008**
>
> **(ii) Whether the defendant/respondent should be restrained from drawing or otherwise dealing with Bank Account 600-000/168 at Housing Finance Limited which holds net proceeds from the sale of the fully developed Plot No. 209/470/9 (I think she meant 209/970/9) in Nairobi County in the sum of Kshs.12,600,000/= and any other account that holds the net proceeds of the sale.**

3. The grounds for the application are that the judge failed to take directions before proceedings with the case; that the judge directed parties to file submissions without hearing evidence from the parties proceeded to make a final determination which affected proprietary rights of the parties and more particulars the defendant/applicant; that the Judge made an error of applying 50:50 apportionment without hearing the parties conclusively thus acting in breach of ***Article 40, 45, 47 and 159 of the Constitution***; that the Judge gave a date for a ruling to both parties but unilaterally altered the same to be a judgment; that the plaintiff/respondent has denied the defendant access to all properties in issue based on the orders granted by the court and that the applicant has been unwell thus being unable to file application for review.

4. In her reply to the application, the plaintiff/respondent filed a replying affidavit dated **11/10/2018.** She stated that a Notice of Appeal was filed by the defendant on **8/7/2013**; that certified copies of the proceedings were sought and stay of execution of the judgement was sought and allowed on **29/1/2014** maintaining the status quo; that the status quo has been maintained to date yet no record of appeal has been served on the plaintiff; that the defendant having lodged the Notice of Appeal under **Rule 75** of the **Court of Appeal Rules** he is deemed to have preferred an appeal; that this court is *functus officio;* that there is no error or mistake apparent on the face of the record and even if there were such, the existence of an appeal bars this court from rectifying the same; that directions were given on **20/3/2013** when the parties agreed to rely on the affidavits on the record and file written submissions; that the five year delay is inordinate and inexcusable; that ***Kitale***

HCC No. 67 of 2011 (OS) was not consolidated with the instant suit and therefore **prayer No. 3** of the application lacks merit and finally that the defendant should prosecute his appeal instead of urging this application.

5. The defendant filed his submissions on **21/9/2018.** I have perused through the court record and found no submissions filed on behalf of the plaintiff.

6. In his submissions the defendant relied on ***Civil Appeal No. 39 of 2014 Mukeshi Manchad Shah -vs- Priat Shah & Another 2015 eKLR, Appeal 267 of 2011 RMM -vs- BAM 2015 eKLR*** and ***Robert K. Koech -vs- William Kipkorir Mutai 2018 eKLR*** and ***Republic -vs- Anti Counterfeit Agency & 2 Others Ex-parte Surgipharm Limited 2014 eKLR*** and finally ***Civil Appeal 120 of 2014 PNN -vs- ZWN 2017 eKLR.***

Determination

Issues for determination

7. The issues for determination in this application are as follows:

(a) Should the application fail for the reason that a notice of appeal was filed by the applicant?

(b) Has there been unreasonable delay?

(c) Did the judge err in proceeding with the hearing of the suit without having given directions and by way of submissions in a matter in which the substantive rights of the parties were in issue?

(d) What orders should issue.

(a) Should the application fail for the reason that a Notice of Appeal was filed by the applicant?

8. In respect of this point, the applicant states in his further submissions that a notice of appeal is not an appeal and cites **rule 82(2)**, **83** and **84** of the **Court Of Appeal Rules**.

9. In the case of **Noradhco Kenya Limited vs Lorio Michele 1998 eKLR** the court stated as follows:

> **"I agree that the remedy of review is open only when the applicant having a right of appeal has not already preferred an appeal or when no appeal is allowed by law from the order or decree pronounced by the court. But the short point in question here is: Can the lodging of the notice of appeal be tantamount to preferring an appeal itself? The filing of a notice of appeal in my humble view cannot deprive a party of his right under O.44 r. 1 of the Civil Procedure Rules to apply for review and the notice of appeal cannot be tantamount to preferring an appeal.**
>
> **In HARYANTO VS. ED & F. Man (Sugar) Ltd Civil Appeal No. 122 of 1992 The Court of Appeal comprising of Judges of Appeal Gicheru, Kwach and Cockar (as he then was) held:**
>
> > **"(1) There was jurisdiction to entertain an application for review, notwithstanding the filing of a notice of appeal under the court of Appeal Rules and**
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> **(2) for an appeal to be deemed to have been preferred for the purpose of review, there must be an appeal instituted in compliance with rule 81(1) of the Court of appeal Rules."**
>
> **Again in MOTEL SCHWEITZER VS. THOMAS EDWARD CUNNINGHAM and another (1955) 22 EACA 252 it was held that:**
>
> > **A notice of appeal is notice of intention to exercise a right of appeal and that**
> >
> > **An appeal is not instituted in the Court of appeal until the record of appeal is lodged in its Registry, fees are paid and security lodged as provided in rule 58 of the Court of Appeal Rules."**
> >
> > **I am therefore unable to agree with Mr. Ndubi that as the applicant had lodged a notice of appeal which was pending when it applied to the superior court for review of the summary judgment, the superior court did not have jurisdiction to entertain the said application and that there was therefore very little chance of the applicant having a successful appeal from the order refusing the application which did not lie in law"**.

10. It has been admitted by the respondent that though the Notice of Appeal was filed, the applicant did not follow up the Notice of Appeal with a substantive appeal.

11. In view of the decision cited above the application should not therefore fail purely on account of the fact that a Notice of Appeal was filed.

(b) Has the application been presented after an unreasonable and unexplained delay?

12. The impugned decision was made on 27/6/2013. The application was filed on 24/7/2018 a period of about 5 years. For the length of the delay to be considered unreasonable the contents of the supporting affidavit have to be considered.

13. The applicant avers that he suffered from a serious heart attack leading to admission in hospital and close follow up upon discharge, and that he is yet to recover fully from the attack; that his advocate Mr. Wanyonyi had joined the public service and ceased running the firm of Millimo Muthomi; that a Mr. Bundi of the latter firm handled the matter; that he was never called to testify despite assurance that he would be informed of the hearing date; that he went to the advocate's firm in 2016 upon recovering his memory and was informed that the matter had been since concluded since the firm had withdrawn from acting after losing touch with him; that the application dated 24/4/2015 to cease acting for him was granted without service upon him; that he then traced his earlier advocate who told him to avail the file; that he only obtained the file from Millimo Muthomi advocates in 2017 and soon thereafter learned that judgment had been read; that a notice of change of advocate was filed by Millimo Muthomi Advocates without notification to the applicant; that Millimo Muthomi Advocates never wrote to the applicant for instructions hence their withdrawal from the matter in 2015 for alleged lack of instructions was irregular; that a counsel from Walter Wanyonyi asked him to allow her time to understand the file but later he learned that she had left the firm; that meanwhile a request had been made to the Deputy Registrar vide a letter dated 23/10/2017 for the court file to be traced; that on 13/3/2018 he was informed on phone that the court file had been located; that his erstwhile advocate informed him that he would rejoin the firm in May and that he should wait for a while. Thereafter the application was filed.

14. I have examined the copies of medical records exhibited in the applicant's replying affidavit. They date from the year 2011 to 2012. The judgment herein was delivered in 2013. No medical records from the year 2013 are exhibited. However the applicant states at paragraph 12 that he regained his memory in **2016** three years later and visited his advocate's office where he was informed that this matter had been concluded. Save for a general statement by the respondent that there is no sufficient reason for reviewing the decision of the court, there is no contention that the applicant has not been well. Even in the absence of medical records, this mortal coil, as Shakespeare would call it, may suffer diverse illnesses and I am inclined to believe that the applicant's illness took toll on him to the extent that he was unable to follow up on his case. The rest of the delay from the year **2016** onwards is adequately explained by the affidavit, that is the delay in getting his file record and the delay in locating of the court file.

(c) Did the judge err in proceeding with the hearing of the suit without having given directions and by way of submissions in a matter in which the substantive rights of the parties were in issue?

15. The applicant refers to ***Order 37 rule 1*** and ***12 of the Civil Procedure Rules and rules 16 and 18***. He submits that though submissions were filed by the parties the court needed reference to the same and the authorities filed therewith. He further submits that, in the authorities placed before this court the courts considered the evidenced of the parties before making a decision. In a nutshell the applicant is stating that oral evidence was never taken in the matter before judgment was delivered.

16. The allegation by the applicant that the judge never gave directions on the hearing of the originating summons is controverted by the respondent who asserts that directions were given on **20/3/2013**.

17. The record for **20/3/2013** shows that Mr. Ngumbi holding brief for Mr. Bundi for the applicant herein stated to court that Mr. Bundi would like to put in submissions. Which was not opposed by Mr. Nyakibia for the plaintiff. The court ordered the parties to file submissions and scheduled the matter for a mention on 17/4/2013, on which date Mr. Kaosa holding brief for Mr. Bundi stated that the respondent (the applicant herein) had filed submissions and Mr. Appollo holding brief for Mr. Nyakibia asked for two weeks to file submissions on behalf of the plaintiff. On 24/4/2013 Mr. Nyakibia confirmed to court that both parties had filed submissions and the court directed that a ruling would be issued on 16/5/2013. On the latter date the ruling was said to be not ready and was rescheduled for **6/6/2013** on which date a judgment was read instead. The applicant has taken issue with this but I tend to think that in this regard, he is merely clutching at straws as the judgment is the decision that was reasonably expected from their submissions and it matters not that the court referred to it as a ruling on several occasions before it was delivered.

18. I think the record is clear that the parties agreed all along that the matter would be tried by way of written submissions, the suggestion having been made by Mr. Bundi who was acting for the applicant herein. The applicant can not be heard to go against the record and state that there were no directions given, because Mr. Bundi even followed up his suggestion and the concurring order of court with the filing of submissions before even the other party had filed hers and also before the judgment.

19. I do not therefore agree that there were no directions given since the directions were actually made upon the choice of the parties. Does it matter that those directions differ from what is envisaged by **Order 37 rule 16**?

20. The applicant refers the court to the case of **Robert K. Koech Vs William Kipkorir Mutai 2018 eKLR** and **Republic vs Anti-Counterfeit Agency & 2 others Ex Parte Surgipharm Ltd 2014 eKLR.**

21. His submission is that in the former decision (Robert K Koech case), in which a review was sought on the ground that directions were not taken, the court agreed that there was an error on the face of the record in that in a matter commenced by Originating Summons directions are key and a necessary step in the proceedings.

22. In that case the court stated as follows:

> **"Order 37 Rule 16 of the Civil Procedure Rules provides as follows:**
>
> **"The Registrar shall within thirty days of filing of the Originating Summons and with notice to the parties, list it for directions before a judge in chambers".**

Order 37 Rule 18 states:

"At the time of directions if the parties do not agree to the correctness and sufficiency of the facts set for the in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties".

Rule 19(1):

"Where on an Originating Summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the proceedings had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to or to apply for particulars of those affidavits.

(2) Where the Court makes an order under sub-rule (1), Order 11 shall apply

(3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint."

A keen reading of the above provisions leads me to the conclusion that directions are a key and necessary step in proceedings commenced by way of Originating Summons and cannot be wished away. Directions serve to guide the parties on how to ensure they bring out the real issues in controversy and to ensure that the necessary material and evidence is placed before the court to enable it make a sound and informed decision. Indeed, in my judgment, I did note or raise the court's frustration in determining a matter where the Respondent had proceeded to file submissions on the substantive suit before directions were taken".

23. In the instant case the parties were also aware of the order regarding submissions and none of them alerted the court of the need for directions strictly in accordance with **Order 37.**

24. In my view also, directions were a necessary step in the proceeding of this nature and this ground has merit.

(d) What Orders should issue?

25. In the final analysis I find that the applicant's application has merit. I grant it in terms of **prayer No. 1** to the extent that the judgment of this court delivered on **27/6/2013** is hereby set aside.

26. The suit shall be brought up together with **Kitale HCC No. 67 of 2011 (OS)** on the **14th February 2019** for the purpose of issuing directions as to hearing of the two suits.

Dated, signed and delivered at Kitale on this **29th** day of **January, 2019.**

MWANGI NJOROGE

JUDGE

29/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyonyi for Applicant

Mr. Bisonga for the Respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

29/01/2019