



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 1224 Of 2016**

**(FORMERLY HCC NO. 345 OF 1994)**

**MAGAMA ONDICHO.....PLAINTIFF**

**VERSUS**

**PETERSON OKEMWA.....DEFENDANT**

**R U L I N G**

1. This suit was filed on 13<sup>th</sup> June 1994. The plaintiff's claim was that the defendant had fraudulently caused the transfer of land parcel **Manga Settlement Scheme/213** from the plaintiff's name to his name. It was the plaintiff's assertion that the defendant was a trespasser on the land and he sought orders of injunction and eviction against the defendant.

2. The defendant filed a defence on 1<sup>st</sup> August 1994 and contended that he had occupied the suit land from 1964 with consent of the plaintiff and that the plaintiff had voluntarily caused the land to be transferred to the defendant. The defendant contended that he was the one who paid the loan to the Settlement Fund Trustees and that the plaintiff in fact presented himself before the Land Control Board at Nyansiongo and executed the necessary documents in favour of the defendant. The defendant prayed for the dismissal of the plaintiff's suit and counter claimed for orders that the plaintiff do transfer the title of the suit property to the defendant failing which the deputy registrar of the court to be authorized to sign any necessary documents in place of the plaintiff. The defendant also claimed for damages.

3. On 24<sup>th</sup> July 1996 with the consent of the parties, Mbaluto J. referred the dispute to the Land Disputes Tribunal Nyansiongo who heard the dispute and filed an award on 23<sup>rd</sup> August 1996. The plaintiff filed an application to set aside the award on 28<sup>th</sup> October 1996 but although the record shows that this application was listed for hearing on diverse dates, there is no indication that the same was ever heard and disposed off on the various dates it was scheduled for hearing. The same was not heard and no reasons were given.

4. While the application to set aside the award was pending, the defendant vide an application dated 20<sup>th</sup> March 2001 filed in court on 28<sup>th</sup> March 2001 sought the following orders:

**(a) Judgment be entered as per the award filed on 23<sup>rd</sup> August, 1996 and read to the parties on 24<sup>th</sup> September, 1996.**

**(b) Costs of the application to be provided for.**

In support of the application the defendant deponed that the plaintiff had failed to prosecute the application to set aside the award.

5. The defendant's application dated 20<sup>th</sup> March 2001 was on 30<sup>th</sup> September 2003 fixed for hearing on 1<sup>st</sup> December 2003. The record shows that the firm of Koina Onyancha & Co. Advocates were served with a hearing notice for the defendant's application on the same dated (30<sup>th</sup> September 2003) as per the affidavit of service sworn by Shem Omwere Magara advocate on 1<sup>st</sup> December 2003 and filed on the same date. There was no appearance for the plaintiff on 1<sup>st</sup> December 2003 and on the request of the defendant/applicant the court allowed the defendant's application dated 20<sup>th</sup> March 2001 as prayed. The effect of the grant of the defendant's application is that judgment in the suit was entered in terms of the arbitration award filed in court. The application by the plaintiff seeking to set aside the award earlier having not been prosecuted is deemed to have been abandoned and/or overtaken by events. The plaintiff had not opposed the defendant's application dated 20<sup>th</sup> March 2001 and neither did he seek to set aside the resultant judgment following the allowance of the defendant's application by the court.

6. The tribunal as per the award filed herein made the following observations/findings:-

**“The defendant has produced all relevant documents showing how he repaid the loan and finally transfer of the plot to him**

**by the Land Control Board. This court has seen copies of the above cited documents. This court has also taken into consideration of the duration of the defendants stay on this land. Obviously, this alone shows that the plaintiff had deliberately refused to take the plot when it was given to him in 1963. In view of this, this court is convinced that the defendant had acquired the land in dispute lawfully.”**

The tribunal’s award was that the defendant remain on the land and the transfer effected to the defendant to remain as valid. The defendant was directed to pay the plaintiff a sum of kshs. 40,000/= as a sign of good will. Once the award was adopted as judgment on 1<sup>st</sup> December 2003 effectively the award became the judgment of the court and unless the same was set aside, reviewed and/or varied the same remains as the judgment in the present suit.

7. The record does not show there was any setting aside of the judgment and/or any variation of the same. Indeed the record shows consequent to the entry of judgment, the costs were taxed in favour of the defendant in the sum of kshs.20,000/= on 20<sup>th</sup> July 2004. There was therefore no suit pending that could be fixed for hearing as happened herein and the hearing that proceeded before R. Lagat Korir, J. on 16<sup>th</sup> May 2012 was of no consequence and was a nullity as there was no pending case to be heard. The suit had been disposed of by way of arbitration and the award resulting from the arbitration had been adopted as the judgment of the court. The proceedings after the entry of judgment that did not relate to enforcement of the judgment were conducted on the misapprehension that there was a pending suit. There was no pending suit as from 1<sup>st</sup> December 2003 when judgment was entered in terms of the award.

8. It is a matter of regret that there was no focus on having the matter finalized in terms of the award such that the court got immersed into none issues with the result that too much judicial time has been spent on a matter that was long finalized. The parties may in the circumstances wish to revert to the award with a view of giving effect to the same. Otherwise as this matter stands, there is nothing pending and the court has no further locus to continue handling the same. The plaintiff on the basis of the record has been pressing for hearing of the case, yet the case was heard and finalized before the arbitration panel and the award was infact sanctioned as the judgment of the court nearly 15 years ago.

9. The plaintiff has only himself to blame as he never pursued his application to set aside the award and when judgment was entered he never challenged it. Litigation somehow has to come to an end and if there were any missteps in the process, the parties have to live with the consequences. It is my determination and direction that the court is *functus officio* in so far as the suit herein is concerned as the suit was concluded. The file is accordingly hereby marked as closed with no orders as to costs.

10. It is so ordered.

**RULING DATED, SIGNED and DELIVERED at KISII this 20<sup>TH</sup> DAY of DECEMBER 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Mongare for Maangi for the plaintiff

Ms. Moguche for Bosire for the defendant

Ruth Court assistant

**J. M. MUTUNGI**

**JUDGE**