Shunkur v Rigogo Chonjo Company Limited & 3 others (Being Sued as the Chairman, Treasurer and Secretary of Chepnyaliliet Self Help Group Respectively) (Civil Application 13 of 2020) [2023] KECA 917 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KECA 917 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION 13 OF 2020

FA OCHIENG, LA ACHODE & WK KORIR, JJA

JULY 28, 2023

BETWEEN

DAVID KAPOLONTOI SHUNKUR ..... APPLICANT

AND

RIGOGO CHONJO COMPANY LIMITED ..... 1ST RESPONDENT

JOSEPH KITUR ..... 2ND RESPONDENT

JOSPHAT NGETICH ..... 3RD RESPONDENT

SAMUEL KIPLANGAT ..... 4TH RESPONDENT

BEING SUED AS THE CHAIRMAN, TREASURER AND SECRETARY OF CHEPNYALILIET SELF HELP GROUP RESPECTIVELY

(An application to recall the wrongfully extracted decree from the Judgment of the Court of Appeal at Nakuru (Nambuye, Sichale & Kantai, JJ. A.) dated 27th March, 2019 in Civil Appeal No. 223 of 2014)

RULING

1. By a Notice of Motion dated February 10, 2020 pursuant to Article 159(2)(d) of the *Constitution*, Rules 1(2), 35(2) and 42 of the Court of Appeal Rules and Section 3A of the *Appellate Jurisdiction Act*, the applicant has moved this Court seeking orders that: the court be pleased to recall the wrongfully extracted decree issued by the Deputy Registrar on May 27, 2019 in respect of Nakuru CACA No 223 of 2014 with a view of issuing the appropriate one; and that the costs of the application be provided for.

2. The application is premised on the grounds that: on March 27, 2019 judgment was entered in favour of the applicant with costs; being dissatisfied with the decision, the respondents on March 29, 2019 lodged a Notice of Appeal to the Supreme Court; on May 27, 2019 the respondents extracted a

decree that was at variance with the decision of the court; the decree indicates that judgment was in favour of the respondents; the respondents have since presented the incorrect decree to the Land Registrar, Narok who has since cancelled the applicant's title to land parcel No LR No Narok/Cismara/ Ololunga/ 134, hereinafter "the suit land" and re-registered it in the names of the 1st respondent; the 1st respondent was not an appellant in the dismissed appeal; the decree was craftily drafted with a view of having the 1st respondent transfer the suit land to the other respondents; and that, if the decree is not recalled and/or corrected to reflect the judgment of the court, the applicant will be greatly prejudiced as he will lose title to the suit land.

3. The application was supported by the applicant's affidavit, in which he reiterated the grounds on the face of the application.

4. In his further affidavit, the applicant stated that: he was issued with a certificate of title to the suit land on January 28, 2015 pursuant to the judgment in Kericho HCCC No 9 of 1993; aggrieved by the decision, the respondents lodged an appeal which was subsequently dismissed with costs. The respondents have since fraudulently extracted a decree in their favour; even though the draft decree was not served upon the applicant's counsel for approval as provided for in the law. The incorrect decree has been used to register the suit land in favour of the 1st respondent, depriving the applicant title to the suit land. Despite being served with the application, by courier, on July 5, 2020 the respondents have failed to file their replying affidavit, and therefore the averments in his affidavit remain uncontroverted.

5. There was no response to the application by the respondents.

6. When the application came up for hearing, counsel relied on their respective written submissions.

7. The applicant submitted that the respondents' deliberately excluded his counsel from the process of approval of the decree, in contravention of the mandatory requirements of Section 34(2)(a) & (b) of the *Appellate Jurisdiction Act*. Counsel contended that, judgment having delivered in favour of the applicant, it was upon his counsel to draft the decree and not the respondents. Counsel argued that since the affidavit in support of the application had not been controverted, the issues raised therein should be treated as having been admitted. Citing the case of *South Nyanza Sugar Co Ltd v Silvan Ketch* [2010] eKLR counsel noted that this court held that the decree in the record of appeal was invalid, having been extracted without approval or notice of settlement.

8. Counsel further submitted that the judgment was delivered in a lucid manner and with exceptional clarity, and the respondents' counsel was not qualified to elevate the obiter dictum to the ratio decidendi. Counsel maintained that, the decree having been obtained in deceit, the same ought to be recalled.

9. Relying on the decision in *Joseph Murangi & another v Beatrice Kainda Kaibiria*, Civil Appeal No 175 of 1996, counsel submitted that submissions cannot be a substitute for evidence, and that the court ought to disregard any submissions which were couched as evidence.

10. The 2nd, 3rd and 4th respondents submitted that the decree had been extracted and executed accordingly, and the present application was an exercise in futility. They denied the existence of an appeal before the Supreme Court, challenging the decision of the Court of Appeal. Counsel stated that the Land Registrar had taken action on authority conferred by statute. Counsel submitted that the applicant had voluntarily forfeited his right for review or appeal, which were the means available to challenge the impugned judgment.

11. Counsel further submitted that the application was res judicata and the applicant must be stopped from any attempts to reopen a closed case. He stated that the question of the legality of title and the

existing caveat had been determined by the court. Finally, the respondents maintained that the decree was correct.

12. We have carefully considered the application, affidavits in support, submissions by counsel, the authorities cited and the law. The issues for determination are; whether submissions are a sufficient response to an application; whether a party against whom judgment has been delivered can extract a decree; and whether this court can order the recall of a decree in view of the circumstances of the present case.

13. The respondents having failed to file a replying affidavit or grounds of opposition, are deemed to have accepted the accuracy of the facts deponed to by the applicant. The question then is, whether the written submissions by the respondents was a proper response to the application.

14. In the persuasive case of *Peter O. Nyakundi & 68 others vs Principal Secreary, State Department of Planning, Ministry of Devolution and Planning & Another* [2016] eKLR the court stated thus:

> "As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (See Mereka & Co. Advocates vs UNESCO Co. Ltd [2015] eKLR, Prof Olaka Onyango & 10 Others vs Hon. Attorney General Constitution Petition No 8 of 2014 and Eliud Nyauma Omwoyo & 2 others –vs- Kenyatta University). The Respondents have failed to refute specifically the allegations in the Petitioner's sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post- election violence."

15. The Supreme Court in the case of *Gideon Sitelu Konchellah vs Julius Lekakeny Ole Sunkuli & 2 Others* [2018] eKLR held that:

> "A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect. Curiously, we further note that even the said Written Submissions are not dated, though this possibly might not have been fatal had the foundational document, the Replying Affidavit, been in order. From a perusal of the Written Submissions, it is clear to us that they are substantially based and relies on the undated and unsworn Replying Affidavit. Also, there are no Grounds of Objection raising any specific points of law of any preliminary or jurisdictional nature. The upshot is that as the 2nd and 3rd Respondents had categorically stated that they do not oppose the application, the Court will be excused for therefore deeming the application as being unopposed entirely."

16. In the instant application, the applicant has stated certain facts under oath in his supporting and further affidavits. These facts were not controverted by the respondents through either a replying affidavit, grounds of opposition or preliminary objection. It follows therefore, that the application is deemed as being unopposed. The next question then is, whether the facts as stated by the applicant are sufficient to merit the application.

17. Rule 36 of the *Court of Appeal Rule, 2022* provides;

> "(1) Where a decision of the Court is given in a criminal application or appeal, the order shall be drawn up by the Registrar who in drawing up the order, shall not be required to consult the parties or the parties' advocates.
>
> 2. Where a decision of the court is given in a civil application or appeal –
>
> a. any party may, within fourteen days from the date of judgment or ruling, prepare a draft of the order and submit it for the approval of the other parties;
>
> b. the party to whom the draft has been submitted shall approve the same within seven days from the date of receipt of the draft order under paragraph (a);
>
> c. if all parties approve the draft, the order shall, unless the presiding judge otherwise directs, be in accordance with it;
>
> d. if the parties do not agree on the form of the order, or if there is non-compliance with paragraphs (a) and (b), the form of the order shall be determined by the Registrar in accordance with the decision of the Court;
>
> Provided that if the parties are dissatisfied with the decision of the Registrar, the issue shall be settled by a single Judge after giving all the parties an opportunity of being heard and the decision of Judge shall be final; and
>
> e. where an application was certified urgent under rule 49, any party may, with notice to all the parties, request the Registrar to issue the order arising from a Ruling on the application, on priority basis and the Registrar may, where satisfied, prescribe a shorter period for compliance with the provisions of paragraphs (a) and (b).
>
> The order extracted under rule 36 shall be issued from the Registry or sub-registry in the place where the application or appeal was heard."

18. A plain reading of the judgment in Nakuru CACA No 223 of 2014 shows that the respondents' appeal was without merit, and was therefore dismissed. The effect of said judgment was that, the judgment of the trial court, which was in favour of the applicant was upheld. It follows therefore that, if the parties were not able to agree on which party was substantially successful, they should have been guided by the provisions of Rule 36.

19. Although, any of the parties was at liberty to prepare the draft decree, the fact that the decree was not submitted to the applicant for approval in line with the provisions of Rule 36(2)(a) rendered the procedure for extracting the said decree defective. In this matter, the respondents have failed to rebut the averment by the applicant that they had extracted the decree without the approval of the applicant.

20. In order to ensure the efficacy of the decree or order being extracted from a decision of the court, parties must ensure compliance with the procedure laid down by Rule 36 of the *Court of Appeal Rules.*

21. The said procedure gives each of the parties an opportunity to comment on the draft order or decree, and when parties fail to agree, the learned Registrar would determine the terms of the order.

22. In the event that the parties or any of them is dissatisfied with the decision of the Registrar, the issue would be settled by a single Judge after giving all the parties an opportunity of being heard.

23. As the laid down procedure was not strictly adhered to, and in particular the fact that there was failure to submit the draft decree to counsel for the applicant for approval, we hereby recall the decree and direct the parties to generate a fresh decree in compliance with the established procedure.

24. The application is merited and the same is allowed with costs to the applicant.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF JULY, 2023.

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR