Ayub Muthee M'igweta & 2 others v Orinda. (Civil Application 56 of 2014) [2022] KECA 739 (KLR) (29 July 2022) (Ruling)

Neutral citation: [2022] KECA 739 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION 56 OF 2014

HM OKWENGU, MSA MAKHANDIA & J MOHAMMED, JJA

JULY 29, 2022

BETWEEN

AYUB MUTHEE M'IGWETA ..... 1ST APPLICANT

FREDRICK MWITI M'IGWETA ..... 2ND APPLICANT

JAPHETH MURIITHI M'IGWETA ..... 3RD APPLICANT

AND

BILEY OLUOCH OKUN ORINDA. ..... RESPONDENT

(Being an application for leave to file an application to admit additional evidence and stay of proceedings relating to negotiationsinCivil Appeal No. 56 of 2014)

RULING

1. Before us is an undated notice of motion but lodged in court on 28th September 2016 seeking that we allow the applicants to:

> " file an application seeking to admit evidence that was excluded by the respondents (sic) and that we stay proceedings relating to the negotiations and allow the applicants to engage an advocate to file the application and act for them in the remaining proceedings and or negotiations."

2. The application is predicated on grounds stated on its face, the supporting affidavit of the 1st applicant and the applicants' written submissions.

3. The dispute leading to this application relates to the parcel of land known as Ntima/Igoki/4218 "the suit land". It was previously owned by the applicants. Samson Okun Orinda now deceased, who but has since been substituted by his son, the respondent herein, entered into a sale agreement with the applicants for the purchase of the suit land for the sum of Kshs.350,000/=. The deceased paid

a total of Kshs.261,000/=. He thereafter took possession of the suit land and commenced extensive developments thereon. Thereafter the deceased paid the sum of Kshs.101,000/=, thinking that it was the balance of the purchase price following complications in the transaction after the execution of the initial agreement of sale. He then demanded the applicants to execute the transfer in his favour. The applicants refused to do so and demanded the full balance of Kshs. 119,000/= with interest at 24% per annun as well as general damages for breach of contract.

4. The deceased thereafter moved to court seeking an order that the applicants do sign the transfer forms, failing which the Executive Officer of the Court to do so. The applicants shot back in their defence and counterclaim insisting that they would only sign the forms when the balance of the purchase price aforesaid is paid and also counterclaimed for the said balance.

5. In its judgment, the trial court dismissed the deceased's claim, holding that the contract had been frustrated, and ordered the deceased to hand over the suit land with vacant possession, to the applicants.

6. Aggrieved by the decision, the deceased successfully moved to this Court way of an appeal being, Civil Appeal Number 56 of 2014. In its judgment dated 28th October 2015, the Court held that there was a valid, binding and enforceable agreement between the parties and ordered specific performance. It also directed that the deceased do pay to the applicants the balance of the purchase price of Kshs.119, 000/=.

7. It is this judgment that is the foundation of the instant application. In a nutshell, the applicants' case is that the decision of this Court was greatly influenced by the finding that the applicants took no steps to file suit for the eviction of the deceased from the suit land or issue eviction notice thereof. However, there was such evidence in the form of a demand letter from their lawyers as well as a complaint filed with the police over the deceased's occupation of the suit land which was entered in the Occurrence Book (OB) on 14th January 1995. That evidence was excluded by the deceased when he prepared the record of appeal. That the judgment would have been different if the applicants had been allowed to adduce such evidence.

8. The application is opposed by the respondent by way of a replying affidavit sworn by one, Charles Oyoo Kanyangi, counsel for the respondent who deposes that the documents sought to be adduced are not new as claimed by the applicants since, they were tendered in evidence during the hearing in the trial court. For instance, the demand letter dated 14th January 1995 was produced as exhibit no. 1 whilst the note from the OCS, Meru Police Station of 15th July 2009 was marked as cok (a) & (b) in the proceedings. The respondent further submitted that, in any event, the whole file from the trial court was submitted to this Court and as such the documents referred to were in the file, and were considered by this Court before delivering its judgment.

9. It was submitted further that, the issues raised by the applicants were res judicata. That even after the judgment of this Court was delivered, the deceased still gave in to the applicants' demands and paid a further Kshs.1,087,000/= over and above the decretal sum awarded to them so as to bring the dispute to closure once and for all. Besides the above payments, the deceased went further and presented himself before the community's council of elders 'Njuri Ncheke' in a bid to have a final solution but the applicants who were equally present have not been able to get any satisfaction. As such and due to the applicants' reluctance to transfer the suit land after several avenues failed, the Deputy Registrar, of the High Court of Kenya at Meru executed the transfer of the suit land in favour of the respondent in line with the judgment and decree of this Court.

10. The application before us has been brought under the provisions of Article 159 and 164 of *the Constitution*, Section 3A of the *Appellate Jurisdiction Act*, Rules 40 and 41 of the Court of Appeal

Rules. However, we hasten to point out that none of the above provisions of the law support the prayers sought by the applicants. For instance, Article 159 of *the Constitution* deals with judicial authority and the guiding principles. The applicants are not saying that justice was not done to them irrespective of status, or that justice was delayed, or that alternative dispute resolution mechanisms were not employed, or lastly, that justice was administered based on procedural technicalities. On the other hand, Article 164 deals with the establishment and jurisdiction of the Court of Appeal. It is not being claimed that this Court acted in excess of jurisdiction or want of it. Section 3A of the *Appellate Jurisdiction Act* deals with the overriding objective of the Act. The applicants are not saying that in determining the appeal, this Court went contra the overriding objectives of the Act. Finally, Rules 40 and 41 of the Court of Appeal Rules deal with an application for certificate that a point of law of general public importance has arisen and the period within which to make such an application. This has totally no bearing on the application before us.

11. That aside, it does appear that the applicants are not even seeking leave to adduce additional evidence. What they are seeking is for us to permit them to file an application in which they are will be praying to be allowed to file additional evidence. In other words, they perhaps asking for enlargement of time. If that be case, we hasten to state that this is a jurisdiction exercised by a single judge of this Court and not a full bench. To that extent the application is misconceived on account of want of jurisdiction to entertain it. However, and as already stated, the cited provisions do not support the application. And even if we had the jurisdiction, we doubt whether we will have granted it bearing in mind that the appeal was heard on merit and a judgment delivered. How can additional evidence be adduced in a situation where the horse has already bolted? In other words we are functus officio. Even if we were to invoke Article 159 of *the Constitution*, it will not grant succor to the applicants, as the Article cannot impose jurisdiction where there is none or where it has been exhausted as the case here!

12. Be that as it may, the judgment of this Court was rendered on 28th October 2015 whilst this application was lodged on 28th September 2016, a year later short of one month. The applicants have not advanced any reason for the delay to enable us exercise our unfettered discretion in their favour.

13. Further, the conduct of the applicants' is not without blemish which again will militate against our exercise of the discretion in their favour, even if we had jurisdiction. It is not lost on us that, after judgment had been delivered, parties started to negotiate with a view to arriving at an amicable and final solution. The applicants demanded to be paid Kshs.1,087,000/= extra and the respondent willingly paid the same in order to have the matter concluded. This was on top of the Kshs.413,000/= they had been paid pursuant to the judgment and decree. After that, the parties appeared before the Njuri Ncheke Council of Elders for the final solution, since the applicants were still reluctant to effect the transfer of the suit land to the respondent even after receiving the additional money. This conduct cannot be condoned by a court of equity.

14. It is not contested that the Deputy Registrar, Meru High Court executed the transfer of the suit land in favour of the respondent in accordance with the court decree. The respondent therefore has the title documents in respect of the suit land. We must, at this juncture remind the applicants that litigation must at some point come to an end. This is where the applicants find themselves now.

15. Lastly, the documents sought to be introduced as further evidence by the applicants were indeed introduced in evidence as per the submissions of the counsel for the respondent that were not controverted by the applicants. In the premises, it will be a waste of valuable judicial time to allow such a prayer.

16. On the prayer for stay of proceedings, this Court has no jurisdiction over such, as the court became *functus officio* upon delivery of the judgment and whatever has happened post judgment and decree

cannot be stayed, stopped or otherwise dealt with in the manner suggested by the applicants. There are no further proceedings before this Court capable of being stayed. The negotiations after judgment and decree is a foreign field to this Court and we have no jurisdiction whatsoever to entertain it.

17. We find it strange that this Court is being called upon to allow a party to appoint an advocate to represent it in a matter before a mediator or negotiator and be allowed to file an application in this Court, when indeed this Court never gave such directions in its judgment. In any event these are matters happening post judgment and this Court has absolutely no jurisdiction to entertain the same.

18. In the end, we find the application lacking in merit and dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2022.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR