IN THE COURT OF APPEAL

AT ELDORET

(CORAM: WAKI, MWERA & KIAGE JJA.)

Civil Appeal No. 183 Of 2013

BETWEEN

STANLEY NG'ETHE KINYANJUI ……..…….....…… APPELLANT

AND

TONY KETTER .....…… 1ST RESPONDENT

SALIM SULEIMAN…….....…….....…… 2ND RESPONDENT

MAWJI PATEL ……..…….…….....….. 3RD RESPONDENT

INNOCENT MWAISIBA TOTO, THE DEPUTY

REGISTRAR HIGH COURT OF KENYA AT ELDORET…….....….. 4TH RESPONDENT

PAUL GICHERU OF GICHERU & COMPANYADVOCATES …… 5TH RESPONDENT

COMMISSIONER OF LANDS …….....…. 6TH RESPONDENT

(Being an appeal from ruling and order of the High Court of Kenya at Eldoret (J.R. Karanja, J.) dated 9th December, 2011

in

H.C.C.C. No. 140 OF 1999)

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JUDGMENT OF THE COURT

This appeal arises from a ruling and order of the High Court of Kenya at Eldoret (J.R. Karanja, J.) made on 9th December 2011 by which the sale by public auction, transfer of and resultant title to L.R. 7741/149/3 Kitisiru Estate Nairobi, were set aside following an application dated 17th June 2011 by the 2nd respondent, Salim Suleiman (Suleiman).

That sale had occurred on 30th October 2009 conducted by JOMUKI Enterprises, an auctioneering firm

engaged by the 3rd respondent Mawji Patel (Patel) in execution of a judgment and decree the latter had previously obtained in the same suit against Tony Ketter the first respondent (Ketter). The instructions to the auctioneer were given by Patel's advocate, Paul Gicheru (Gicheru), who is the 5th respondent herein. The successful bidder at that auction was the appellant Stanley Ngethe Kinyanjui (Kinyanjui) and a certificate of sale was duly signed by Innocent Maisiba Toyo, the High Court's Deputy Registrar at Eldoret (Toyo) who is the 4th respondent. This paved way for the issuance of a provisional title on 25th November 2009 by the Commissioner of Lands (The Commissioner) who is the 6th respondent herein.

The application giving rise to that ruling was a lengthy notice of motion filed by the law firm of Ochieng Onyango Kibet & Ohaga, Advocates. It was expressed as brought;

> ***"Under Articles 19, 20, 21, 22, 25, 40, 47, 50(1), 165(3) & 4, 259 and 260 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and the inherent powers of the Honourable Court."***

It sought no fewer than twenty-six prayers, nearly a score of which were for various declarations about the process and result of the public auction, while the rest were for the orders we have adverted to as granted by the learned judge. In granting those particular orders, the learned judge first overruled or dismissed as an abuse of the process of the court, all the prayers invoking constitutional provisions in a matter which was "*a purely a civil dispute between two or three individuals*." He relied on **KENYA BUS SERVICES LTD & OTHERS Vs. THE ATTORNEY GENERAL** [2005] 1 EA 111 in holding that "*constitutional applications would not be a substitute to private law remedies or a substitute to judicial control of administrative action*."

In entertaining and granting the rest of the prayers, however, the learned judge made this observation;

> ***"However, as noted hereinabove the applicable law in the present circumstances is Order 22 (formerly Order 21) of the Civil Procedure Rules. The provision has been referred and acknowledged by the applicant in his submissions but it is sad to note that it has not been invoked in this application and more so considering that the applicant's alleged "locus standi" in this matter seems to be anchored on the notice of objection to attachment issued under the former order 21 rules 53 (now, order 22 rule 51) of the Civil Procedure Rules."***

He proceeded to find that the non-invocation of the relevant provision notwithstanding, he could still deal with the matter under the overriding objective of the Civil Procedure Act as well as the court's inherent powers. He found as established that the sale and transfer of the property was improper as there was an order of stay of execution in place by reason of objection proceedings having been commenced by Suleiman and that there had been in place a caveat previously placed on the title which encumbered the property. He therefore set aside the entire sale and transfer process and ordered that the objection proceedings by Suleiman be heard and determined within three months.

Aggrieved by that ruling and order, Kinyanjui filed a notice of appeal against it in entirety and filed a record of appeal. The memorandum of appeal contains some fifteen grounds of appeal in which the learned judge is said to have erred by; upholding the competence of notice of motion absent an order of joinder of some of the respondents thereto, and the pendency of other applications under **Order 22** of the Civil Procedure Rules; treating the overriding objective as a *carte blanche* to cure the flouting of jurisdictional rules; granting Suleiman orders yet he neither had a prior title nor had paid 10% of the purchase price to Kinyanjui or the decretal sum to Patel as required by **Order 22 rule 74** of the Civil Process Rules; holding, without assertion or evidence, that an order of stay was served before the sale and that Kinyanjui ought not to have paid the purchase price; holding, without evidence, that Suleiman had sustained substantial injury by reason of alleged irregularities and fraud; holding that the sale was null and void *ab initio* on account of automatic order of stay yet the said order was issued on 2nd November 2009 after the sale on 30th October 2009, and for allegedly lacking a certificate of sale yet one was issued

on 9th November 2009; holding that a caveat lodged on 7th April 2008 precluded the sale yet there was a prohibitory order from court filed prior thereto; failing to hold that any claimed irregularities could only have occurred after 2nd November 2009 and could therefore not invalidate the sale on 30th October 2009; and by refusing to hear the respondents to the application before him on the issues he framed *suo motu* and not considering their submissions. Kinyanjui therefore prays that the learned judge's ruling and order be set aside and Suleiman's motion dated 17th June 2011 be dismissed with costs.

At the hearing of the appeal, Kinyanjui was represented by learned counsel Mr. **N.A. Havi** while **Mr. Bwire M.W.,** learned counsel, appeared for Suleiman. **Mr. Gicheru** learned counsel represented Mr. Patel as well as himself. **Mr. Ngumbi** was learned counsel appearing for Toyo and the Commissioner.

Rising to urge the appeal, Mr. Havi combined grounds 1 to 5 which attack the competency of the application to set aside the sale that was before the learned judge. He first referred to earlier directions of the High Court (Mwilu, J. as she then was) on 25th July 2010 to the effect that Kinyanjui could not be joined in the suit since execution of the decree in the suit had been completed. Building on that, counsel submitted that there are only two ways by which a person not previously a party can join in proceedings that had reached execution stage. The first was by way of objection proceedings under **Order 22 rule 51** of the Civil Procedure Rule 2010 which Suleiman had exercised by way of a chamber summons application dated 18th November 2009 under **Order 21 rules 56, 57 and 79** of the 1998 Civil Procedure Rules then in force. Those provisions obligated Suleiman to file his application within 10 days of being served with an intention to proceed with execution by Patel.

The second method would be under **rule 79** of the Civil Procedure Rules by a person whose interests are affected. Such person would be entitled to apply to set aside a sale on account of material irregularity or fraud.

Mr. Havi submitted that Suleiman's application by motion on notice "did not fit either of the two entry gates." He went on to contend that having failed to move the court appropriately, it was not open to Suleiman and the court to fall back on the overriding objective or the court' inherent jurisdiction to supply non-conformity with an elaborative procedure for redress that the rules provided. In entertaining the application as it stood, the learned judge erred, to Kinyanjui's prejudice.

Counsel continued that Suleiman should not have been granted the orders he sought because he failed to comply with the mandatory procedural steps by which to set aside the sale that was in accordance with order **22 rule 55**. He went on to point out that under the old **Order 21 rule 79**, a person challenging a sale could not succeed even if the sale were irregular unless he proved that he had suffered substantial loss. At any rate, any enquiries regarding the sale could only be conducted within objection proceedings properly so-called, which were still pending before the High Court, and not before by way of the application the learned judge heard and granted. Counsel cited in aid of those submissions this Court's decision in **MULIRO Vs. OCHIENG** [1987] KLR 549. He also cited the dicta of Nyamu J.A in **STEPHEN BORO GITIHA Vs. FAMILY FINANCE BUILDING SOCIETY & 3 OTHERS** [2009] e KLR, where the learned judge of appeal decried the filing and hearing of unnecessary interlocutory applications instead of adjudicating on the principal issues, in augmenting his argument that the learned judge should have heard the objection proceedings proper instead of entertaining the application by Suleiman. He lambasted Suleiman for flouting procedural rules and wondered why he waited until year 2011 to challenge the sale that occurred in 2009 and was already the subject of two pending applications, by the same Suleiman, which should have addressed the issues in totality. Counsel criticized the learned judge for applying the overriding objective as a panacea for Suleiman's failure to properly invoke the court's jurisdiction and to comply with the rules. He referred to the decision of Onyango Otieno J.A, in **MUSAMARINI LIMITED & OTHERS Vs. A.D.M. LTD & OTHERS,** MSA. Civil Appl. Nai. 171 of 2010 for the proposition that the overriding objective is not meant to sweep away or uproot the basic rules of engagement in a court of law. Those rules of engagement are designed to give the other side an opportunity to make appropriate response and in failing to follow the rules, Suleiman impermissibly denied Kinyanjui the opportunity to exercise the purchaser's safeguards under

Order 21 rules 56 and 79 of the Civil Procedure Rules.

Submitting on ground 6 of the memorandum of appeal, Mr. Havi contended that in so far as Suleiman had not deposited ten percent of the purchase price paid by Kinyanjui as required by

Order 22 rule 74, he lacked the *locus standi* to bring and be heard in the application that led to the ruling subject of this appeal.

Counsel next assailed the learned judge for holding that there was service of an order of stay of execution on 30th October 2009 upon Gicheru. He contended that the learned judge was patently in error in so holding first, because no averment to that effect was made in the grounds or in the affidavit in support of the application and, second, it was an undisputed fact that no order was issued on 30th October 2009, the same having been signed and issued on 2nd November 2009. The judge was wrong, counsel argued, to hold affirmatively that Gicheru may have been served before 10.00am, which was the time of the sale, when the notice of objection but without any order, was served on Gicheru, on his undisputed swearing, at 10.25 am of the material morning. Moreover, all of these issues dealt with by the learned judge were not part of Suleiman's case.

Mr. Havi posited further that under **Order 21 rule 56**, Suleiman was under an obligation to file the chamber summons to challenge the sale within 10 days of being notified by the decree holder (Patel) of his intention to proceed with execution but he filed it on 20th November 2009, a full six days out of time. By virtue of **rule 58**, such late failing meant that the challenge to the sale was deemed to have been waived and there was therefore no stay to stop or prohibit all the other steps that were undertaken to perfect the transfer of title from Ketter to Kinyanjui.

As regards the caveat, Mr. Havi submitted, under the rubric of grounds 8 to 14, that the same was lodged by Suleiman on 7th April 2008. The learned judge was wrong in failing to appreciate, in counsel's view, that the caveat was of no effect since the property was already charged to the court by a prior prohibiting order placed on the property on 22nd February 2008.

Counsel rested by urging us to set aside the orders of 9th December 2011.

Next came Mr. Gicheru and he declared his support for the appeal. On whether there was a stay order on 30th October 2009, he submitted that the firm of Anjarwalla & Khanna for Suleiman filed and served a notice of objection on Gicheru & Co. on the said 30th October 2009. Service was at 10.25. No order of the court was served alongside the said notice though the learned judge erroneously proceeded on the basis that such an order was served. That order did not issue until 2nd November 2009. Counsel pointed out that in an affidavit sworn on 18th November 2009 in support of the chamber summons application of the same date, that is the basis of objection proceedings, Suleiman swore at paragraph 6 as follows;

> ***"6. I am also informed by my advocates that the Auctioneers refused to accept service of the notice of objection and only accepted such service after the auction had taken place. I am further informed by my advocates that the consequent court order for stay of attachment and execution was extracted after the auction had taken place and was duly served on the decree holder's advocate on record and the auctioneers.***
>
> 7. ***I am advised by the said advocates and I verily believe that although the order for stay was extracted and served after the auction had taken place …."***

Mr. Gicheru then pointed out the patent mischief and embarrassment on the learned judge's order directing the parties to proceed and deal with the objection application to its final determination yet he had gone into the merits of that other application by making a determination on the question of service. The learned judge addressed these issues that were not before him but were at the heart of the chamber summons challenging the sale and Mr. Gicheru then posed:

What then is there to go back to hear? He emphasized that the setting aside of the sale gave Suleiman an undue advantage in that the sale was ordered by another judge of the High Court (Osiemo, J.) who, in permitting that sale by execution, ordered that titles to two other properties belonging to Ketter be released to him, which was duly complied with. He complained about the many frustrations and impediments that had been placed in the path of realizing the proceeds of the decree including an attempt by Ketter to defeat the decree by declaring bankruptcy. Counsel complained that long after Mwilu, J. (as she then was) had ruled on 21st July 2010 that execution was already complete so that Suleiman could not be joined therein belatedly, he was nonetheless allowed by the learned judge to file and urge an application the effect of the grant of which was to overturn those earlier findings and was directed belatedly at various persons who were never parties to the original suit.

Rising to oppose the appeal, Mr. Bwire first set out the undisputed chronology of events relevant to the application before the learned judge and this appeal, as follows;

> 30.10.09 – Suleiman filed a notice of objection. 2.11.09 – A stay order was issued out of the said notice. 4.11.09 – Patel filed a notice of intention to proceed. 9.11.09 – Toyo signed the certificate of sale. 25.11.09 – Toyo executed the transfer in favour of Kinyanjui 25.11.09 – Commissioner issued a provisional title 25.11.09 – Kinyanjui entered in the register as the proprietor.

Mr. Bwire then made the profound submission that once the notice of objection was filed on 30th October 2009, there came into being in law a stay of execution. When we asked him whether he had authority for that proposition, he candidly admitted to having none. He proceeded to argue that the property in immovable property that is sold at an auction does not pass at the fall of a hammer since, were that the case, then objection proceedings as contemplated under **Order 22** cannot avail the objector. He relied on this Court's decision of **NAGENDRA SAXENA Vs. MIWANI SUGAR MILLS LTD & 3 OTHERS,** Kisumu Civil Appeal No. 261 of 2008.

Counsel maintained that the objection proceedings were filed within time and went on to add that the subsequent motion filed on 27th June 2011, the subject of the learned judge's ruling and this appeal, was filed out of necessity. He submitted that as at the time Toyo was signing the certificate of sale and the transfer of title there was an order of stay in place and he could not properly have done so. Citing the English decision of **CLARKE & OTHERS Vs. CHADBURN & OTHERS** [1985] E.R 211, he submitted that the transfer of the title to Kinyanjui was done in willful disobedience of the court's order of stay and was not only contemptuous, illegal and invalid, but was wholly incapable of effecting any changes on the rights and liabilities of the parties hereto. He submitted that the learned judge ought to have made orders that would have taken the parties *"back to the place where the auction has occurred but the transfer has not been effected."*

In conclusion Mr. Bwire submitted that even though an earlier prohibitory order had been filed on the title prohibiting Ketter from transferring the property, that did not preclude Suleiman's filing of a caveat in April 2008. He contended that under **section 57** of the (now repealed Registrar of Titles Act, no transaction should have taken place without the lifting of the caveat with prior notice to Suleiman as the caveator, which did not occur. He urged us to leave the learned judge's ruling undisturbed.

Mr. Ngumbi on his part merely stated that he was in opposition to the appeal (a complete about-turn from the position he took at the High Court) and prayed that the appeal be dismissed.

Answering the contention that the execution process was proceeded with at too high a high speed, Mr. Havi in his reply stated in stark, if chilling terms, that execution is execution and is not a friendly affair. Rather it is done *"with the speed of an executioner's guillotine, not with a hammer,"* notwithstanding that the signature aspect of the execution herein was the sale by fall of a hammer. He maintained that the fall of the hammer in an auction completed the sale.

Mr. Havi finally countered the suggestion that the objection proceedings had been rendered nugatory, hence the resort to the application before the learned judge, by pointing out that Suleiman had the two ways by which he could challenge the sale under Order 22 and that it was, in particular, open to him to

have the same set aside under **rule 79** of Order 22 for being irregular or fraudulent. Not having availed himself of the proper provisions and jurisdiction, counsel concluded, Suleiman's application was incompetent and should have been struck out.

We have taken the trouble of setting out in some detail the case that was presented before the learned judge and before us consistently with our role as a first appellate court to re-evaluate, re-assess and analyze in a fresh and exhaustive manner, all the evidence on record before making our own inferences of fact and arriving at our own independent conclusions. See **SELLE & ANOR Vs. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS [1968] EA 123**; **PETERS Vs. SUNDAY POST LTD** [1958] EA 424.

Upon our consideration of this matter, the issues that appear to us determinative are first, whether there was in place a court order barring the sale and transfer of the subject property on 30th October 2009 and, second and related to it, whether such sale could be set aside on an application such as was before the learned judge.

Before we address those central issues, however, we find it necessary to state that from our perusal of the record, we see writ large the intractable efforts of an indefatigable pair in Keter and Suleiman to see that the decretal debt owed by Keter to Patel is never realized through the sale of the subject property.

The pair had made numerous applications of one kind or another for nearly a decade between the decree and the eventual sale of the property on 30th October 2009. Indeed, a mere month previously, on 29th September 2009, Osiemo, J. had disposed of an application dated 14th July 2009 brought by Ketter seeking stay of sale of the subject property and two others situated in Nandi South District in execution of the decree herein. Osiemo J. declined to order stay of sale but directed that the execution respecting Nandi South properties be set aside and the same be discharged. That application had been brought under the provisions of Order 21 **rules 63(1)** of the Civil Procedure Rules. The basis upon which Ketter had sought to stay the sale of the subject property was that he had allegedly sold it to Suleiman, a claim that Osiemo, J. dismissed as untenable as there was no evidence that the property had been sold or transferred to Suleiman.

There was no appeal against Osiemo, J.'s finding on that point. Nor was that the first or only pronouncement as to the proprietorship of the subject property. Earlier, 18th July 2006, Mutungi, J. had ruled in **Bankruptcy Cause No. 143 of 2003** filed by Ketter in respect of himself, that he had obtained receiving orders and orders for stay of execution of all legal process by non-disclosure of his affairs. He had in particular failed to disclose many assets he owned, with the judge stating; "*Top on the long list is L.R. No. 7741/149, at Kitisiru, Nairobi.*"

Returning to the issues we have identified, it is not in dispute that the subject property was sold by public auction on 30th October 2009. The time indicated for the sale was 10.00am. The buyer was Kinyanjui and the auctioneer issued a memorandum and a certificate of sale. After the sale, at 10.25am, a notice of objection by Suleiman and one Samwel Omukoko Opembe was served on Gicheru. He accepted it but noted the following on it;

> ***"Received under strong protest as the auction have (sic) already taken place and no court order."***

The court order was issued on 2nd November 2009 giving notice of stay of execution and commanding Gicheru & Co. Advocates and Jomuki Enterpirses "not to take any steps as regards the attached/proclaimed property if any in safe custody." It is therefore plain to see that as at the time the sale took place, not only had the notice of objection not been served, but, more critically, there was no order of stay in existence. We are unable to accept Mr. Bwire's contention that the notice of objection is effectively an order of stay. **Order 21 rule 54,** as it then read, was that;

> ***"Upon receipt of a valid notice [of objection] given under rule 53, the court shall order a stay of***

the execution proceedings and shall call upon the attaching creditor by notice in writing within 15 days or such other period as the said notice may prescribe to intimate to the court and the objector in writing whether he proposes to proceed with the attachment and execution thereunder wholly or in part."

Whereas the court was then obligated to issue on an order of stay, that did not hoist the notice of objection to the status of a court order. The court first had to be satisfied that the notice of objection was a valid notice and then issue the order of stay. In this case the order of stay was issued on 2nd November 2009, after the sale had occurred. *Ipso facto,* the sale itself was not in contravention of any court order and was therefore neither in contempt nor void as counsel for Suleiman appeared to suggest.

Following receipt of the notice of objection and later the order, and in compliance with rule 54, on 4th November 2009 Gicheru gave the following intimation to the court and to Suleiman;

"Upon receipt of the notice of stay of execution dated 2 nd November 2009 and the notice of objection to attachment attached thereto, the decree holder hereby intimates that the entire land parcel number L.R. No. 7741/149 was sold by public auction on 30th October 2009. The decree has therefore been executed and the attached goods (sic) sold."

Our understanding of that intimation is that while Patel was acting in compliance with the necessary consequence of receipt of a notice under **rule 53**, he was not expressing an intention to proceed with execution. Rather, he was reporting a *fait accompli*; telling the court and Suleiman that the event the order was intended to forestall had already occurred. The horse had bolted. It is highly doubtful therefore whether any useful purpose would be served by taking steps under the immediately succeeding rules that are predicated on a sale not having occurred by reason of a stay order.

Be that as it may, **rule 56** provided that an objector was required, within 10 days of receiving the decree holder's intimation of intention to proceed, to take proceedings to establish his claim. The proceedings would be by summons in chambers supported by affidavit in the same suit. Suleiman did file such application on 20th November 2009, being 16 days after receipt of the intimation. He was clearly out of time and, bearing in mind the provisions of **rule 58(1),** his application was by operation of law deemed to have been waived. Once such happened, "the attachment and consequential execution shall proceed." Suleiman's application therefore was, and remains a non-starter. At any rate, Suleiman had not prosecuted it and it was still pending as at the time the learned judge made his ruling and directed that the said application be disposed of within three months.

Under the **Order 21** architecture, there are provided alternative avenues by which the owner of property sold in execution or a person having interest in such property, could set such sale aside. Under **rule 78**, such person could apply upon making two pre conditional deposits into court;

a. ***for payment to the purchaser, a sum equal to ten percent of the purchase-money, and***

b. ***for payment to the decree-holder, the amount specified in the public notification of sale as that for the recovery of which the sale was ordered, less any amount which may since the date of such public notification of sale have been received by the decree-holder.***

The alternative path, and one cannot avail himself of both, (by virtue of Rule 78(2)) is by applying under **rule 79** to set aside the sale on the ground of a material irregularly or fraud in publishing or conducting it, thereby occasioning the applicant substantial injury.

It is clear from the record that Suleiman did not make any application under either rule 78 or 79 yet, in view of what we have stated about rule 56 and 57, the setting aside of sale provisions thereunder would have been the appropriate ones to be invoked since the sale had already occurred by the time the order of stay of execution was made and served. It is also common ground that the preconditions in rule 78 for deposit into court had not been met by Suleiman and, having found that the sale was proper without any

fraud or illegality having been alleged and/or proved, any chances of such an application succeeding, even had one been filed in time, and none was, would have been miniscule.

Given the rather straight forward provisions in **Order 21**, which later became Order 22 under the 2010, Rules, was it open to the learned judge to entertain an application to set aside the sale that was premised on a litany of constitutional provisions allegedly breached, on the oxygen principle and on the inherent jurisdiction? Most decidedly not.

> We have no doubt that the provisions on execution, sale and stay as contained in Order 21 (now 22) are so elaborate that they represent a complete code to address every conceivable scenario that might arise out of the process. They have in-built safeguards and conditions to ensure the protection of the interests of all persons concerned and they are couched in mandatory terms. The application by Suleiman dated 17th June 2011, other than being on the face of it belated, coming as it did some 20 months after the sale, was little more than an attempt to side-step and evade the clear procedures set out in the appropriate rules. Parties cannot be allowed, by attempting to constitutionalize simple, every-day processes and events, to defeat the procedural scheme of things set up by the rules. It is not lost to us that the application was made when it was quite apparent that Suleiman was unlikely to succeed under the relevant applicable rules.

While fully cognizant of the court 's primary duty to do justice untrammeled by procedural technicalities, we are also aware that litigation is a game with clear rules of engagement. It is not open to parties to pursue and for courts to allow, a path of circumventing the rules that are imposed to aid in the attainment of justice. The (oxygen principle) cannot save applications that are incompetent. In **REMJI DEVJI VEKARIA Vs. JOSEPH OYULA** Eldoret Civil Appeal (Application) No. 154 of 2010, this Court stated, and it bears repeating;

"To invoke the provisions of section 3A and 3B would result in a serious precedent being set

which will mean utter confusion in the court corridors as there will no longer be any reasons

for following the rules of court …."

Also worthy of affirmation are the sentiments of this Court in **CITY CHEMIST (NBI)**

& ANOR Vs. ORIENTAL COMMERCIAL BANK Civil Application No. Nai 302 of 2008;

> ***"That, however, is not to say that the new thinking uproots well-established principles or precedents in the exercise of discretion of the court which is a judicial process devoid of whim and caprice. On the contrary the amendments enrich those principles and embolden the court to be guided by a broad sense of justice and fairness as it applies those principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application."***
>
> (Our emphasis).

It is unfortunate that the learned judge rather peremptorily dismissed the valid objections that had been raised against Suleiman's application. He ought not to have heard it. He certainly should not have granted it. It was the latest of a multiplicity of applications made by Suleiman in an unrelating but ultimately futile attempt to forestall finality in this old matter that was filed at the High Court more than a quarter of a century ago and has consumed an inordinate amount of judicial time. That a judgment and decree given in 2002 remains in a state of doubt as to the finality of its execution, is not particularly complimentary of our judicial processes. Litigation must come to an end. M.K. Ibrahim , J. (as he then was) was right on point when he refused to grant stay of execution and told Ketter this on 12th May 2009;

"I think that this really is the end of the road in the High Court for this case. Everything else is to take its natural and legal course."

The matter did not rest there as subsequent applications at the High Court show. But there is a time to let go.

This appeal succeeds. The ruling and order of the High Court made are 9th December 2011 is set aside in entirety. The notice of motion by Suleiman (the 2nd respondent) dated 17th June 2011 is dismissed with costs.

The costs of this appeal shall be borne by the 2nd respondent.

Dated and delivered at Nairobi this 24th day of April, 2015.

P.N. WAKI

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JUDGE OF APPEAL

J.W. MWERA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR