



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR, J.J.A)

CIVIL APPLICATION NO. NAI 200 OF 2011

BETWEEN

MANASSE SABARA OTWERE.....1ST APPLICANT

ZABLON ODARI OTWERE..... 2ND APPLICANT

JOASH KIVONI OTWERE..... 3RD APPLICANT

AND

REBECCA NYAMUSI MOSE..... RESPONDENT

(An Application for extension of time to file and serve Notice and Record of Appeal from the Ruling of the High Court of Kenya at Kisii (Makhandia, J.) dated 4th May, 2011

in

H.C.MISC. APPLICATION NO. 37 OF 2008)

RULING OF THE COURT

1. This is a reference under **Rule 55** of the Court of Appeal Rules from the decision of a single Judge to the full court.
2. It is now trite law that the full court cannot upset the decision of a single Judge unless it is demonstrated that the single Judge failed to take into account any relevant factor – **Express (K) Limited v. Manju Patel [2000] eKLR**- or the exercise of his discretion in the matter was plainly wrong - **Murai v. Wainaina (No.4) [1982] KLR 38**. Did the single Judge in this case err in any of these stated principles? Before we answer this question, we should consider the other criterion taken into account in such references which is whether or not the applicant's intended appeal is arguable. To determine this issue, it is imperative to state a brief factual background of this matter.
3. The piece of land known as **Title No. Kamagambo/Kanyimach/82** (the suit land) was originally owned by the late **Justo Otwer Sabara** who was the father of the applicants. In Kisii **HCCC**

- No. 13 of 1987**, Manase Sabara Otwere, the first applicant herein had sued his late father but from the record before us, it is not clear for what relief. What is clear, however, is that a consent order was recorded in that case awarding three acres of the suit land to the 1st applicant.
4. Apparently before the three acres could be excised out of the suit land and transferred to the 1st Applicant, the entire suit land was on 7th May 1988 sold to the late Joseph Orina Onchieku in execution of a court order issued by the Senior Resident Magistrate's Court Homa Bay in **Land Case No. 153 of 1979. (Otwere Mitishamba Company Ltd v. Philip Mboya Ogwen)**. Following that sale, the suit land was transferred to and registered in the name of the late Joseph Orina Onchieku.
 5. Upon the death of the late Joseph Orina Onchieku, his widow, Rebecca Nyamusi Mose, who is the respondent in the present application (the respondent), obtained letters of administration in respect of her late husband's estate and got the suit land transferred to her by transmission.
 6. When the late Justo Otwere Sabara, the original owner of the suit land, died on 23rd September 2004, the 1st applicant sought to bury his remains on the suit land. That triggered the filing of **Rongo RMCC No. 95 of 2004** by the respondent in which she sought to restrain that burial.
 7. In view of the consent order that had been recorded in Kisii HCCC No. 13 of 1987 granting three acres of the suit land to the 1st applicant the respondent, perhaps out of sympathy, agreed to transfer three acres of the suit land to the 1st respondent. A consent was recorded in the said **Rongo RMCC No. 95 of 2004** to that effect and the remains of the late Justo Otwere Sabara were interred apparently on the three acres portion that the respondent had agreed to excise and transfer to the 1st applicant.
 8. That act of sympathy was to be the respondent's undoing. Soon after the burial of the late Justo Otwere Sabara on the suit land, the three applicants in the present application commenced proceedings before Migori District Land Disputes Tribunal (the Tribunal) in which they claimed the ownership of the entire suit land. After hearing the dispute, the Tribunal awarded the entire suit land to the applicants. That award was on 2nd October, 2007 adopted as a decree of the court in **Migori Land Dispute Case No. 38 of 2007**. Following the applicant's application in that land case, the Executive officer of Rongo SRM's Court executed a transfer of the suit land to the applicants and the same was registered in the name of "**Justo Otwere Sabara Family.**"
 9. Aggrieved by that action, the respondent filed a Judicial Review application – **Kisii Misc. Civil Application No. 37 of 2008** – and sought orders of certiorari to quash the said Tribunal award and the consequent orders and action thereon and prohibition to prohibit the applicants from implementing the order of 2nd October 2007 adopting the Tribunal award as a court decree.
 10. Musinga, J. (as he then was) heard that Judicial Review Application and granted it on the grounds that the Tribunal had no jurisdiction to determine, as it purported to do, a claim of land ownership or title to land and that the applicants, having not obtained a grant of letters of administration to the estate of their later father, the late Justo Otwere Sabara, had no *locus standi* in the matter. The learned Judge therefore quashed the Tribunal award, the order of the Migori Senior Resident Magistrate's Court in **Land Case No. 38 of 2007** which adopted the award as a decree of the court, and set aside the transfer of the suit land to the Justo Otwere Sabara Family thus restoring the suit land to the respondent save for the three acres which the respondent had agreed to transfer to the 1st applicant which he directed to be done.
 11. Justice Musinga made the said decision on 30th April 2009. But as the land still remained registered in the name of Justo Otwere Sabara Family, the respondent filed another application on 2nd September 2009 which Justice Musinga granted on 28th September 2010 and specifically directed the District Land Registrar to forthwith cancel the registration of Justo Otwere Sabara

Family as the owner of the suit land and restore it to the respondent.

12. One would have thought that the decision would finally settle the matter but that was not to be. On 29th June 2009, the applicant filed another application in which he sought to review Justice Musinga's said order of 30th April 2009, on the ground that there was a mistake or error on the face of the record. He claimed that the mistake or error on the face of the record was that during the judicial review application, the court was never given full disclosure of the 15 cases in which various orders touching on the suit land had been made.
13. After hearing that review application, Makhandia, J. (as he then was) dismissed it on 4th May 2011 holding that the court had no jurisdiction to review an order made in judicial review proceedings. At any rate, the learned Judge further observed, with a bit of due diligence, that the applicants could easily have placed before court during judicial review proceeding information on the 15 cases if it would help.
14. On 16th May 2011, the applicants filed a notice of appeal evincing their intention to challenge Justice Makhandia's said ruling. They, however, failed to serve that notice of appeal upon the respondent.
15. On 29th July 2011, they filed an application before this Court seeking leave to serve the notice of appeal and file the record of appeal out of time. That application came up for hearing in chambers before Waki, JA on 22nd November, 2011. On being called out, neither the applicants nor their lawyer were in court. Consequently, Justice Waki dismissed that application under **Rule 56(1)** of the Court of Appeal for non-attendance of the applicant.
16. On 31st January 2012 the applicants filed another application to restore their earlier application for hearing inter-partes. Kantai, JA heard that application on 19th December 2013. In a reserved ruling delivered on 13th February 2014, the learned Judge dismissed the application on the ground that when Waki, JA dismissed the applicants' said earlier application for non-attendance, the applicants were informed of that dismissal on the same day, that is on 22nd November 2011. Under **Rule 56(4)** of the Court of Appeal Rules, the applicants were supposed to apply within 30 days of that date to restore their earlier application but they applied on 1st February 2011, about 70 days later.
17. The Honourable Justice Kantai, JA found no justification for that inordinate delay and dismissed that application. As earlier stated, the applicants have now come back to this Court with a reference from the said decision by Justice Kantai, JA to the full Court.
18. From the history of this matter as narrated above, it is obvious that the applicants and some of the heirs of the late Justo Otwere Sabara still entertain the hope of regaining back the suit land. In our view that is not feasible at all. The suit land was sold to the respondents' late husband in an auction held on 7th May 1988 in execution of a court order made in Homa Bay Land Case No. 153 of 1979. There was neither appeal from that order nor an application to challenge that sale. It is instructive to note that the person who should have appealed against that order or challenged the sale was the late Justo Otwere Sabara who lived for about 16 years after that sale but he did not.
19. We concur with the Hon. Justice Makhandia that public policy demands that litigation must come to an end. In other words there should be no endless litigation on any matter.
20. Besides our concurrence with the Hon. Justice Kantai, JA that the applicants failed to satisfactorily explain their delay to apply to reinstate their application that had been dismissed by the Hon. Justice Waki, JA for non-attendance, as we have endeavored to demonstrate, granting this application will be an exercise in futility. The suit land, in which they had no legal interest, was disposed off during the lifetime of its registered owner, their late father, Justo Otwere Sabara.

The applicants should be content that at least their late father's grave will not be disturbed courtesy of the magnanimity of the respondent in giving 3 acres of the suit land to the 1st applicant.

21. For these reasons, we find no merit in this application and we accordingly dismiss it with costs.

DATED and delivered at Kisumu this 18th Day of June, 2015

D.K. MARAGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR