IN THE COURT OF APPEAL

AT NYERI

(CORAM:KOOME, MWILU & OTIENO - ODEK, JJ.A.)

CIVIL APPEAL NO. 43 OF 2012

BETWEEN

FRANKLINE KITHINJI MURITHII ……..…APPELLANT

AND

LOYFORD RIUNGU MURITHII ….…… 1ST RESPONDENT

MURITHI MURITHI ……..... 2ND RESPONDENT

FREDRICK MBAE MURITHII ……..…… 3RD RESPONDENT

PHARIS NYAGA MURITHI ……...…… 4TH RESPONDENT

JASPER GITONGA MURITHI …….....…… 5TH RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Meru

(Hon. Makau, J.) dated 19th December, 2011

in

High Court Constitutional Application No. 21 of 2011

JUDGMENT OF THE COURT

1. The appellant is a brother to all the respondents. The dispute between the parties arises out of the estate of their deceased father, Murithi Mugambi, in relation to various land parcels :

a. ***Mwimbi/Murugi 1475 (0.97 Ha)***

b. ***Mwimbi/Murugi 1476 (0.97 Ha)***

c. ***Mwimbi/Murugi 1478 (0.97 Ha) and***

d. ***Mwimbi/Murugi 1470 (0.405 Ha).***

2. Grant of Letters of Administration Intasted to the estate of the deceased who is the father of all the

parties was given to the 4th respondent herein. Their deceased father was survived by three widows, 15 sons and 12 daughters. One of the sons, Reuben Kiraithe is now deceased and is survived by a widow named Margaret Cirindi Reuben.

3. In this appeal, a dispute relates to ***Land Parcel Mwimbi/Murugi 1478***. The critical issue in this appeal is the right of access to the said parcel by the widow of the late Reuben Kiraithe, the continued physical presence of the appellant on the said parcel and the treatment meted on the appellant by the respondents in relation to the disputed parcel.

4. On 4th November, 2011, the parties hereto filed consent before the Court of ***Appeal in Civil Appeal No. 77 of 2006,*** and the said consent reads as hereunder:

> *1.* ***The respondent Pharis Nyaga Murithi remains the sole administrator of the estate of the deceased Jonathan M'Murithi.***
>
> ***2. Parcel no. Mwimbi/Murugi 1478 to be sub-divided according to the grant orders so that Pharis Nyaga Murithi gets his share.***
>
> ***3. The balance of Parcel No. Mwimbi/Murugi 1478 to be given to Lyford Riungu Murithi as trustee for the grand children of the 2nd and 3rd wives of the deceased namely Eunice Igoji and late Joyce Muiro respectively.***
>
> ***4. That we are all in agreement that the respondent move to the superior court to rectify the grant so as to replace the name of Reuben Kiraithe (deceased) with that of his wife Margaret Cirindi Reuben.***
>
> ***5 …….***
>
> ***6. That we are all in agreement that all existing boundaries of Land Parcel No. Mwimbi/Murugi 1478 be picked that the part currently occupied by Pharis Nyaga be registered in his name as per the provisions of the grant and the grant be amended so that the balance of this land parcel will be held in trust by Loyford Riungu Murithi for preservation of the graveyard, for use by any estranged daughter of the deceased and for use by the grand children chosen by the appellants.***
>
> ***7 ……..***
>
> ***8 …….....***

5. From the terms of the consent filed in court, paragraphs 2, 3, 4 and 6 are relevant to this appeal. Of significance is that under the terms of the consent, the appellant was not granted exclusive use, possession and title to ***Land Parcel Mwimbi/Murugi 1478***. Of relevance to this appeal is that the Court of Appeal in a judgment dated 17th May, 2012, delivered in ***Nyeri Civil Appeal No. 77 of 2006,*** ordered that the estate of the deceased be distributed according to the consent filed in court on 4th November, 2011.

6. The genesis of the Constitutional Application lodged by the appellant and the subject of this appeal arise from the fact that the appellant is in physical occupation of ***Land Parcel No. Mwimbi/Murugi 1478*** and he resides in the house standing thereon which house belonged to their deceased mother. It is the respondents' contention that the appellant should vacate the house and get out of the ***Land Parcel No. Mwimbi/Murugi 1478*** since this land was reserved for widows and any estranged daughters of their deceased father. It is the respondents' contention that the widow of the late Reuben Kiraithe should be allowed to move into the house standing on ***Land Parcel No. Mwimbi/Murugi 1478.***

7. To assert his rights, the appellant filed a Notice of Motion dated 4th April, 2011, before the High

Court citing infringement of his constitutional fundamental rights and freedoms by the respondents. In the Motion, the appellant's case is that the respondents have resorted to damage his soul and body and to subject him to psychological torture and violation of his right to freedom and security, and being treated in a cruel, inhuman and degrading manner. The appellant asserts that the respondents disconnected water to the house and he suffered anguish and was denied his social right to clean and safe water. The appellant asserts that he is entitled to compensation from the respondents. Before the High Court, the appellant sought an order to restrain the respondents from meddling or interfering with the supply of water to the house he was living in. The appellant contends that he has a right to an equal share of his late mother's property in ***Land Parcel Mwimbi/Murugi 1478,*** and he demands that the said parcel be surveyed and sub-divided so that his portion should include the house in which he is now living. The appellant further asserts that he moved into their mother's house after she passed on and he has undertaken repairs thereon to the tune of Ksh. 250,395/= as at June, 2012, and he shall not vacate the house unless he is refunded the sums expended in repairing and maintaining the house.

8. Upon hearing the Notice of Motion as filed by the appellant, the High Court ***(Makau, J.)*** by a ruling dated 19th December, 2011, held that the dispute between the parties arises out of the claim to the estate of their deceased father and the parties should pursue the Succession Cause then pending before the Court of Appeal to its final conclusion. The learned Judge held that the respondents had not breached or denied or violated or infringed any of the appellant's Fundamental Rights. The Judge restrained the respondents from interfering with the appellant's water meter and supply of water. Each party was ordered to bear his costs. Prior to the hearing of the instant appeal, this Court differently constituted, in a judgment dated 17th May, 2012, delivered in ***Nyeri Civil Appeal No. 77 of 2006,*** as already stated herein-above, ordered that the estate of the deceased be distributed according to the consent filed in Court on 4th November, 2011.

9. Aggrieved by the High Court finding that the respondents had not breached his fundamental rights, the appellant lodged this appeal. He cites three grounds of appeal as follows:

> ***"(i) the learned judge erred in regard to denial, infringement, violation or threat to the appellant's fundamental constitutional rights and freedoms as secured by Articles 29 (c) (d/f); 40 (1); 47 (1); 27 (1)(2) & (5); 28, 31 (a)(b)(c), 32 (1) &4 of the Constitution.***
>
> ii. ***the learned judge made wrong exercise of his use of discretion in jurisdiction under Article 165(6) and (7) of the Constitution and wrongly exercised his discretion by using wrong principles on costs.***
>
> ***(iii) the learned judge ignored the exhibits and annextures filed and submissions made by the appellant"***.

10. The appellant by his memorandum of appeal dated 13th February, 2012, is seeking the following orders and reliefs from this Court:

> ***"(i) the respondents be convicted and punished for disobeying the court order given on 19th February, 2011.***
>
> ii. ***a conservatory order to ensure that the damaged wall of the house is repaired at the respondent's costs and the house and its compound appro.700 sq.metres is kept in habitable condition and the environment is kept clean and health.***
>
> iii. ***there be a re-appraisal of the evidence including all the evidence filed on 11 July, 2011 in the form of additional exhibits, highlights and submissions and inferences of facts be drawn.***
>
> iv. ***The ruling be varied for contravening Article 25 (a) of the Constitution and the ruling be further varied to ensure that all reliefs sough, including a conservatory order (new), declaration of rights, injunction and compensation is granted.***

v. ***The appeal be allowed and costs of the appeal together with costs in the High Court and the doctors fees and costs in Chuka Court and expenses on land dispute resolution committee at Nairobi be awarded to the appellant".***

11. At the hearing of this appeal, the parties were unrepresented, they appeared in person and made oral submissions.

12. The appellant reiterated the matter comprising his grounds of appeal and gave a historical background to what he alleged was psychological torture by the respondents. He submitted that he was entitled to live in the house of their deceased mother and that he requires that all expenses he has incurred in the repair and maintenance of the house be refunded. The appellant admitted that water has been reconnected to the house. He castigated the respondents for persistently stating that he had a mental problem and that he should be referred to a psychiatrist for treatment. The appellant submitted that he is still suffering from psychological torture due to the respondent's persistent reference to him as a mental case. That by disconnecting water to the house where he was living, the respondents' subjected him to degrading treatment and denied him his right to clean water and a healthy environment. He submitted that the respondents' conduct of insisting that he vacates their mother's house amounts to infringement of his fundamental right to own and acquire property. He submitted that the learned judge erred in failing to appreciate that the respondents had infringed his constitutional right to be free from torture, cruel, inhuman and degrading treatment as well as his right to a clean and healthy environment. He submitted that the learned judge erred in not referring to his submissions and the exhibits that were attached to the affidavit in support of his Constitutional Application for a declaration that his fundamental rights have been infringed.

13. The respondents in opposing the appeal made joint oral submissions through Murithi Murithi, the 2nd respondent. The respondents submitted that the dispute with the appellant relates to sub-division and inheritance of the estate of their late father. It was submitted that the appellant insists on occupying ***Land Parcel Mwimbi/Murugi 1478*** yet under the consent filed in Court, this parcel is to be held in trust for any estranged daughter of their deceased father. In addition, the parcel of land is to be held in trust for grandchildren of their deceased father. The respondents submitted that the appellant has been objecting to the widow of their late brother Reuben Kiraithe entering the parcel and occupying their mother's house. It was submitted that the appellant was not entitled to exclusive occupation and possession ***Land Parcel Mwimbi/Murugi 1478*** and the house thereon. It was the respondents' submission that all they have been agitating for, is to sub-divide the estate of their deceased father in accordance with the terms of the approved grant and in fulfillment of the consent and judgment dated 17th May, 2012, delivered by this Court in ***Nyeri Civil Appeal No. 77 of 2006.*** The respondents denied harassing the appellant and submitted that the widow of their deceased brother Reuben Kiraithe, is entitled to ***Land Parcel Mwimbi/Murugi 1478*** as a representative of the house of Reuben. The respondents submitted that the appellant by refusing to vacate their mother's house which is on ***Land Parcel Mwimbi/Murugi 1478,*** he was denying the widow of Reuben her right to occupy the house. The respondents submitted further that all sons of their deceased father got their respective portions of land and Reuben through his widow is entitled to ***Land Parcel Mwimbi/Murugi 1478***. The respondents urged this Court to dismiss the appeal and order that the judgment delivered in ***Nyeri Civil Appeal No. 77 of 2006*** be enforced and executed.

14. We have considered the oral and written submissions by the appellant and respondents. We have also analyzed the High Court Ruling and examined the Record of Appeal and the cited Articles of the Constitution. This is a first appeal and it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in ***Selle -vs- Associated Motor Boat Co. [1968] EA 123,*** thus:

> "***An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take***

account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).

15. There are three issues for consideration and determination in this appeal. First, can this court grant the orders and relief sought by the appellant as stated in his memorandum of appeal? Second, did the learned Judge of the High Court err in finding that the fundamental rights of the appellant were not infringed by the respondents? Third, what final orders should this Court issue?

16. The appellant seek various orders and reliefs from this Court. It is important at the outset to state that this is an appellate court with appellate jurisdiction. The Court has no original jurisdiction in civil, criminal and in constitutional matters. A glance at most of the orders sought by the appellant indicates that the orders can at best be granted by a court with original jurisdiction in the first instance and if a party is aggrieved, then this Court as an appellate Court will have jurisdiction to consider the matter.

17. The appellant seeks an order that the respondents be convicted and punished for disobeying a Court order given on 19th February, 2011. This appeal is not a contempt proceedings. There are laid down procedures in which to institute contempt proceedings against a party who has disobeyed a court order. In the instant case, this Court is sitting as an appellate Court to hear an appeal arising from a Constitutional Application by way of Notice of Motion. The order dated 19th February, 2011, that the appellant is seeking orders for conviction and punishment of the respondents is not the subject of the present appellate proceedings. We are of the considered view that this specific order for conviction and punishment as sought by the appellant cannot be granted, misconceived as we find it.

18. The other relief sought by the appellant is a conservatory order to ensure that the damaged wall of the house is repaired at the respondents' costs and the house and its compound approximately 700 sq.metres be kept in habitable condition and the environment be kept clean and healthy. We have considered this relief as prayed for by the appellant. As we have stated, the subject matter of this appeal is the Ruling by the High Court dated 19th December, 2011. The Notice of Motion dated 4th April, 2011 that gave rise to the aforesaid Ruling did not seek conservatory orders in relation to the damaged wall. The trial judge correctly did not address the issue of repair of the damaged wall. It is our considered view that the conservatory order as sought by the appellant could not issue at the High Court and this Court cannot grant the same as it was not the subject matter of the proceedings before the trial court.

19. The appellant has further sought orders that the doctor's fees and costs in ***Chuka Principal Magistrate Court Case No. P.M.C.C. No. 27 of 2010*** and expenses on land dispute resolution committee at Nairobi be awarded to him. We are cognizant of the findings in the case of ***Transworld Safaris (K) Ltd. – v- Ratemo, (2008) KLR 339***, where this Court citing the case of ***Odd Jobs – v- Mubia, (197) EA 746*** observed that a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates and on which a decision is necessary in order to determine the dispute between the parties. We have considered the appellant's prayer for costs to be awarded in relation to the ***Chuka Court Case No. P.M.C.C. No. 27 of 2010***. We reiterate that the costs in the ***Chuka P.M.C.C. No. 27 of 2010*** case was not the subject matter of proceedings before the High Court. The High Court in the present case was not sitting on appeal from a judgment or ruling delivered in the Chuka case nor hearing an appeal or matter from the land dispute resolution committee.In ***Chokolinyo -vs- Attorney General of Trinidad and Tobago (1981) 1 ALL ER 244,*** which cited with approval the decision in the case of ***Maharaj -v- Attorney General of Trinidad and Tobago (No. 2) [1978] ALL ER 670 at 679*** the Court stated that:

"…..no human right or fundamental freedom…… is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error."

20. Guided by the above cited cases of ***Chokolinyo and Maharaj*** as persuasive authorities, we find that

the trial judge did not err in not granting costs in ***Chuka P.M.C.C. No. 27 of 2010*** to the appellant. We similarly decline to grant the relief and orders sought for costs in relation to the Chuka case and costs for the land dispute resolution. If the appellant is to obtain costs in the Chuka case, the proper forum is to obtain such an order in the Chuka case itself or to appeal against the decision in the case.

21. The appellant beseeches this Court for re-appraisal of the evidence including all the evidence filed on 11th July, 2011, in the form of additional exhibits, highlights and submissions and inferences of facts to be drawn. This being an appellate court, we are duty bound to re-appraise and re-evaluate the evidence on record and all exhibits, highlights and submissions made before the High Court. As was stated in the case of ***Selle -vs- Associated Motor Boat Co***. ***[1968] EA 123***, (supra) this Court must reconsider the evidence, evaluate it itself and draw its own conclusions. We hereby undertake to discharge this duty.

22. As regards the other orders and reliefs sought by the appellant in his memorandum of appeal *to wit*: that the ruling be varied for contravening ***Article 25 (a)*** of the ***Constitution*** and the ruling be further varied to ensure that all reliefs sought, including a conservatory order (new), declaration of rights, injunction and compensation be granted; it is our considered view that our re-evaluation of the evidence on record shall determine the orders that this court shall make.

23. We now turn to re-evaluate and re-appraise the evidence on record and the submissions and exhibits made by the parties before the High Court and consider whether the learned judge erred in finding that the fundamental rights of the appellant were not infringed by the respondents?

24. The gravamen of the appellant's case is that his constitutional rights and freedoms were violated and the learned judge of the High Court erred in failing to hold so. It is the appellant's case that the exhibits and annextures tendered before the High Court were proof that he was tortured and subjected to inhuman and degrading treatment. The learned judge in dismissing the appellant's claim stated that having gone through the appellant's affidavit and documents, he did not find any incident in which the appellant's rights or fundamental freedoms were denied, violated or infringed by the respondents. The trial judge held that there was no evidence on record to support the appellant's claim of not being treated equal before the law or of being discriminated either directly or indirectly. On the numerous cases filed at Chuka such as ***P.M.C.C. No. 27 of 2010,*** the trial judge stated:

> ***"This Court's position is that by having such cases, and which cases were filed by the applicant, the court do (sic) not see any breach or denial or violation or infringement or threat of the applicant's right or fundamental freedom in the Bill of Rights".***

25. In relation to the contention that the appellant should vacate their late mother's house, the High Court held that the applicant's right to own or acquire property had not been violated. The learned judge expressed himself as follows:

> ***"The applicant as one of the beneficiaries to the estate of Murithi Mugambi agreed with the respondents to share LR. Mwimbi/Murugi/1476 equally as per FK7A. That as per confirmed grant FK5, the applicant got his share. In the Green Card marked FK8, he is registered as proprietor of 0.6 acres. I have not found that the applicant's right either individually or in association with others to acquire and own property has been violated"***.

26. A salient feature in the grounds of appeal is the contention by the appellant that the trial judge did not refer to his submissions, exhibits and annextures. We have considered the appellant's contention that the trial judge did not consider his submissions, exhibits and annextures. We find this ground of appeal has no merit. The Ruling of the trial court clearly shows that the appellant's annextures, FK1, FK2, FK3A, FK5, FK7A and FK8 were considered and the honourable judge relied on the same in arriving at his decision. For instance, the trial judge expressed himself stating that the appellant's claim is that on 26th January, 2011, he became member No. 3001 as per annextures FK3A issued by Murugi Mugumango Water Society. Based on this submission, the trial judge found that the Society had infringed the appellant's fundamental rights and issued orders restraining the Society from disconnecting the appellant's water supply.

27. We now re-appraise and re-evaluate the evidence on record in support of the appellant's allegation of torture, inhuman and degrading treatment as the basis for his constitutional application. In the case of ***Republic -v- Minister For Home Affairs and Others ex parte Sitamze, Nairobi HCCC NO, 1652 OF 2004 (2008) 2 EA 323*** Justice Nyamu, stated as follows with regard to torture:

> ***"Torture means 'infliction of intense pain to the body or mind; to punish, to extract a confession or information or to obtain sadistic pleasure. It means infliction of physically founded suffering or the threat to immediately inflict it, where such infliction or threat is intended to elicit or such infliction is incidental to means adopted to illicit, matter of intelligence or forensic proof and the motive is one of military, civic or ecclesiastical interest. It is a deliberate inhuman treatment causing very serious and cruel suffering'. "Inhuman treatment" is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity."***

28. As clearly stated, torture is not restricted to physical injury; it extends to mental, emotional and psychological aspects of the well being of an individual. In the case of ***Szocik vs. England and Wales (Attorney General), 1480 2012 BCSC The Supreme Court of British Columbia at Paragraph 63*** it was held that:

> ***"The notion of physical integrity remains at the same time flexible and capable of catching a broad range of interferences with the integrity of the person and the consequences flowing from them. It is not restricted to narrow situations where blood was drawn or bruises appeared on the body. As nervous shock caused by a very rough police operation was held to be a case of "prejudice corporel" as well as the physical pain and suffering caused by a physical interference with the person, torture leaving no marks on the body would be covered by the definition."***

29. In the instant case, the appellant's allegation of torture is premised on annextures FK1 and FK2 whose contents are as follows:

> ***"Annexture FK1 is a letter dated 24th February, 2011, addressed to the District Commissioner Maara District. In the letter, the appellant alleges creation of disturbance by Miriti Jonathan and he alleges that the said Miriti has been coming home drunk and disorderly between 23/1/2011 and 23/2/2011. That the said Miriti creates disturbance by abusing the appellant and his wife and challenging him to come out so that he may kill him like a dog. That Miriti's main complaint is that the appellant is responsible for the disconnection of the communal water supply. That the said Miriti is under instructions to create disturbance from Murithi Murithi and that the administrator of their late father's estate Pharis Nyaga is not just and fair to all the dependants. Annexture FK2 is a letter dated 18th January 2010 from the appellant to the OCS Ntumu Police Station or Chogoria Police Post. In this letter, the appellant makes a complaint against Lydia Kabutia and Phares Nyaga Murithii. In the letter, the appellant states that he shares a common boundary in land parcel Murugi/1475 with Phares Nyaga and that the said Phares has planted trees very close to the boundary whose branches are spreading over his land. That the said Phares Nyaga and Lydia Kabutia trespassed on his land on 16th January 2010 by chasing away contractors from the Kenya Power & Lighting Company who had gone to erect a power line running parallel to the boundary of their parcels of land".***

30. As was posited by Okwengu, J. (as she then was) in ***Harun Thungu Wakaba v The Hon. Attorney General, [2010] eKLR*** , we now pose the question whether the various acts to which the appellant has deposed in annextures FK1 and FK2 qualify to be torture, cruel, inhuman or degrading treatment. On the facts stated in annextures FK1 and FK2, the trial judge stated that he found no evidence that the appellant was subjected to torture in any manner whether physical or psychological or having been subjected to cruel or degrading treatment.

31. On our part, we have critically examined the contents of annextures FK1 and FK2. In the case of ***Suresh vs. Canada (Minister of Citizenship and Immigration 2002 SCC 1***, It was stated:

"Torture is defined in Article 1 of the United Nations Convention Against Torture as including the unlawful use of psychological or physical techniques to intentionally inflict severe pain and suffering on another, when such pain or suffering is inflicted by or with the consent of public officials."

32. From annextures FK1 and FK2, the appellant made complaints to the Police and there is no evidence on record to indicate that the veracity of the complaints was established. There is no evidence on record to illustrate that there was psychological or physical abuse of the appellant by the respondent. There is no evidence on record that intense pain or punishment was meted to the appellant by the respondent. Inhuman treatment is defined to include physical or mental cruelty so severe that it endangers life or health. There is no evidence on record that the respondents have endangered the life or health of the appellant. As regards disconnection of water supply, the evidence shows that the disconnection was done by Ms Murugi Mugumango Water Society who is not party to this suit. If the respondents trespassed on the appellant's portion or parcel of land, there is a clear remedy in an action for trespass. A single incident of trespass to land is neither proof of torture nor proof of cruel or inhuman treatment.

33. Having re-appraised the submissions by the parties and the evidence on record and examined the applicable law; taking into account that the dispute between the parties hereto relates to inheritance of the estate of their deceased father; considering that there is no evidence of physical abuse of the appellant by the respondents; noting that the trial judge made an order restraining the respondents from interfering with the appellant's water meter; noting that except for mere allegations, there is no evidence on record to prove persistent psychological or emotional torture; taking judicial notice that this Court in the judgment delivered in *Nyeri Civil Appeal No. 77 of 2006* between the parties hereto made specific orders relating to the succession cause between the parties, we find and hold that torture, inhuman, cruel or degrading treatment has not been proved by the appellant. We hold that the trial judge did not err in finding that there was no breach of the appellant's fundamental rights and freedom from torture, cruel, inhuman and degrading treatment. In totality, we find that this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nyeri this 5th day of February, 2014.

MARTHA KOOME

JUDGE OF APPEAL

PHILOMENA MWILU

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR