



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI

(CORAM: BOSIRE, ONYANGO OTIENO & VISRAM JJ.A)

CIVIL APPEAL NO. 306 OF 2005

BETWEEN

FREDRICK WACHIRA

NDEGWA.....APPELLANT

AND

1. IGNATIUS NDEGWA NDANJERU – PROPOSED SUBSTITUTE OF RICARDA WANJIKU
NDANJERU

(NOW DCD)RESPONDENT/
PLAINTIFF

2. BEAUTAH KANYORA

MUTHUIRESPONDENT

(Appeals from the ruling and order of the High Court of Kenya (Khamoni J.) dated 16th May 2005
in

NYERI H.C.C.MISC. APPL. NO. 119/99

JUDGMENT OF THE COURT

This matter has had a long and chequered history which has defied the doctrine of finality of litigation. The original parties to the litigation died, and the current dispute is between **Frederick Wachira Ndegwa**, the legal representative and son of the late Ndegwa Wachira, who was the defendant in Nyeri SRM’ s Court, **Civil Case No. 157/79**, which has also been described as Nyeri SRM **Civil Case No. 157 of 1980**. The Plaintiff in that suit was **Ricarda Wanjiku Ndanjeru**, (deceased). In her amended plaint in that suit she averred that she was the widow of Ndanjeru Wachira, who died sometime in 1961. He was the brother of Ndegwa Wachira.

The above suit concerned land known as **Tetu/Unjira/172**, which was registered in the name of Ndegwa Wachira. Ricarda averred in her amended plaint that the above piece of land was the product of the consolidation of several fragmented parcels of land some of which were owned by her deceased husband and others by Ndegwa Wachira. For some reason the above property was registered in the name of the

defendant to the exclusion of the plaintiff's late husband. The Plaintiff's claim was for an order subdividing the land into two so that one of those sub-divisions would be registered in her name on behalf of her deceased husband, alleging that the defendant was holding that portion on his behalf. As expected the defendant denied the existence of a trust.

The suit was not heard by the court. Instead the court, we believe with the consent of the parties, referred it to arbitration under **O.XLV** of the Civil Procedure Rules. The panel of elders to whom the matter was referred filed their award in which they ruled in favour of the plaintiff. The defendant was aggrieved and he unsuccessfully applied to set aside the award (dated 5th November, 1980). An appeal against the decision was dismissed as by the date the appeal was filed judgment in terms of the award had been entered, and an application for its review had been dismissed. On appeal to this Court (**Civil Appeal No. 44 of 1984**) the Court found that the judgment was entered prematurely as the 30 days provided under **O.XLV** rule 16 had not expired. The court, by a majority held that the judgment was a nullity and therefore vacated it. The effect of that decision was that the defendant who was the appellant was allowed 30 days within which to apply to set aside the arbitration award against him if he so wished, which he did.

The trial magistrate was not satisfied that the defendant had made out a case for her exercise of judicial discretion in favour of the defendant. She accordingly, dismissed that application, which thereby triggered another appeal to the High Court, to wit **Civil Appeal No. 2 of 1994**. That appeal was summarily dismissed by Ang'awa J. on 4th October, 1994, pursuant to the provisions of **section 79 B**, of the Civil Procedure Act. No appeal was preferred against that dismissal, but it would appear the defendant, somehow moved the superior court for an order revoking the sub-division of the suit property. That application was heard by Osiemo J. who held that because the defendant did not appeal against the summary rejection of his appeal by Ang'awa J. the suit had been finalized. He set aside some orders which had been made in favour of the defendant subsequent to the summary rejection of his appeal. It meant therefore that Land Parcel No. **Tetu/Unjiru/172**, ceased to exist. It should be pointed out that while High Court **Civil Appeal No.2 of 1994** was pending, the defendant died and his son, the appellant herein was substituted.

Osiemo J's decision was the subject matter of another appeal to this Court, to wit **Civil Appeal No. 149 of 1996**. It transpired that when that appeal came up for hearing parcel No. **Tetu/Unjiru/891** had been sold and title transferred to Beautah Kanyora Muthui, the 2nd respondent in the appeal before us.

This Court noted that as at the date Ang'awa J. summarily dismissed High Court **Civil Appeal No. 2 of 1994**, the appellant thereof had died. The court did not however, think that it would interfere with the land as doing so would have adversely affected the 2nd respondent herein without affording him a hearing.

Faced with that predicament, the court dismissed the appeal. One would have thought that the matter would rest with that dismissal. Not so. Frederick Wachira Ndegwa, the appellant, decided to start his own suit to wit Nyeri High **Court Civil Case No.300 of 1996**. He named Richarda Wanjiku Ndanjeru and the 2nd respondent herein as first and 2nd defendants respectively. He prayed, *inter alia*, for:

- (a) A declaration that the 2nd defendant is registered as owner of parcel No. Tetu/Unjiru/891 in trust for him
- (b) An order that the 2nd defendant transfer the land to him.
- (c) Alternatively, that he transfers the land back to the 1st defendant.

Filed with that suit, was an application for injunction to restrain the 2nd respondent herein from transferring or alienating, mortgaging, erecting any structures thereon, or planting any trees or permanent plants thereon or in any way changing the character of parcel No. **Tetu/Unjiru/891**, pending determination of that suit. The application was placed before Osiemo J. who, in a ruling dated 18th November 1996, rendered himself, as material, thus:

“The respondent submitted that the suit was first filed in SRM's court **Civil Case No. 157 of 1979** in

which the plaintiff... was the defendant and the subjectmatter was land parcel No. **Tetu/Unjiru/172**. The land has since been sub-divided into **Tetu /Unjiru/891** and **Tetu Unjiru/892**. The applicant's appeal to the High Court, **Civil Appeal No. 2 of 1994** was dismissed. His appeal to the Court of Appeal Civil Appeal No. 149 of 1996 was also dismissed. The applicant concedes this is the position. That being the case and the applicant's case having been decided by the highest court of the land, the suit is **res judicata** and the applicant cannot be allowed to revive the same in any other court whatsoever... the whole suit are (sic) struck out with costs to the respondent/defendant. Order accordingly."

That suit was thus brought to an abrupt end. The appellant was aggrieved by the ruling. He filed a notice of appeal, and upon application under **rule 5(2)(b)** of the Court of Appeal Rules, he was granted an order, we believe of injunction by this Court on 24th January 1997. It would appear no appeal was filed. If it was filed, the record of appeal before us does not include any document or documents relating to it.

In the meantime Richarda Wanjiku Ndanjeru, died. An application under **O.23 rules 1, 2 and 5** was made by the appellant for substitution of one Ignatius Ndegwa Ndanjeru in her place. The wording of the main prayer in the application read thus:

"IGNATIUS NDEGWA NDANJERU be hereby made substitute of his deceased mother RICHARDA WANJIKU NDANJERU in matters touching on her unheard SRMCC 157/79 under which applicants right section 75(1) Constitution is violated in her uttering the null and void Arbitration and in her overruling order of Court of Appeal dated 5th November 1987 made in applicants Civil Appeal No. 44 of 1984 judgment (1982-88) 1 KAR 1062 and in her admitting my HCCC 300/96 filed under section 75(2) Constitution in otherwise by defaulting defence."

The application was by Chamber Summons and is dated 15th December 2004. That application followed an earlier application by the appellant which is more or less to the same effect, dated 29th November 2004. The latter application was expressed to be brought under **O.41 rule 1** of the Civil Procedure Act, **section 84(2)** of the Constitution and section 2 of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya. Other than a prayer for costs, there are two substantive prayers:"

"(1) That this Hon. court be pleased to review its ruling reached on 1-11-2004 in applicant's application dated 15-10-2004 and applicants application dated 3-3- 1999 proceeds to hearing under section 84(2) (a) of the Constitution and section 2 Cap 2 Interpretation General Provisions Act.

(2) That IGNATIUS NDEGWA NDANJERU be hereby made substitute of DCD plaintiff in SRMCC 157/79 in application dated 3-3- 1999."

The application dated 15th October 2004 was dismissed by Khamoni J. apparently because it was **res judicata**, and on 16th May 2005, the same Judge dismissed the application dated 29th November, 2004 on the ground that it was misconceived. It is against this latter decision that this appeal relates to.

In dismissing the appellant's application dated 29th November, 2004 Khamoni J. rendered himself as follows:

"RULING

From what has been brought to my attention during the hearing of the Applicant's Notice of Motion dated 29.11.2004 bearing in mind that the application for review has not been brought under the relevant provisions of the law and that therefore no relevant ground for review have been relied upon, I hold that this Notice of Motion is misconceived and the same is dismissed with no orders as to costs."

In his submissions before us the appellant lamented that the learned Judge altered the nature of his application. He said that his application was not for an order of judicial review but under **section 84** of the old Constitution. His rights under **section 75** of that Constitution, he said, had been violated. He conceded that the issue had earlier been the subject matter of his **Civil Appeal No. 15 of 1997 (C.A.,)** also **Civil**

Appeal No. 149 of 1996 (C.A) and Civil Appeal No. 44 of 1984 (C.A)

We earlier set out the background facts to this appeal. The appellant believes mistakenly though, that when this Court allowed **Civil Appeal No. 44 of 1984**, it meant that the trial court was to start the case **de novo**. Nay. The decision meant that the trial court was commanded to allow the unsuccessful party in the arbitration an opportunity to challenge the arbitration award which had been filed. Under the relevant rules, that party had 30 days within which to challenge the arbitration award, which she did not do. It meant that the successful party had the right which he exercised, to move the court for judgment in terms of the award. That was the law, and it is not being alleged that it was not followed. If the appellant or the person he now represents failed to move the court to set aside the arbitration, if there was a basis for it, he should not blame any other person, except himself, for that lapse. It is on the basis of a judgment entered pursuant to the elders award that the suit land was sold to the 2nd respondent, and as he rightly submitted before us, he was a purchaser of the suit land for value. It has not been alleged that he was not an innocent purchaser for value.

The appellant submitted that the judgment of this Court in its **Civil Appeal No. 44 of 1984** should be honoured. We have gone through the record of appeal. We are satisfied that it was honoured. Its benefit was spent when the first judgment of the trial court in terms of the arbitration award was set aside. The decision which gave rise to High Court **Civil Appeal No. 2 of 1994**, is still in place, and as stated earlier, the appellant, having not challenged it through an appeal, or review, whatever mistakes if any, it might have had, cannot properly be corrected in this appeal.

Looked at from the foregoing perspective it would not have mattered whether the appellant’s application dated 29th November, 2004 was treated as a Constitutional or judicial review application. Besides, looked at on the face of it, the first prayer was for an order of review of the ruling made on 1st November 2004 in a Civil Application dated 15th October 2004, and additionally a request to hear an application, dated 3rd March 1999 **“Under Section 84(2) of the Constitution.”** Considering the manner in which the applicant worded his application, it left Khamoni J. with no alternative but to dismiss the application as he did.

We sympathize with the appellant because he must have been misled not to challenge the second judgment which was entered in terms of the arbitration award. Instead of doing that he filed a fresh suit, to wit **Civil Case No. 300 of 1996**, which to our minds concerned a matter which was prima facie **res judicata** or if not it was doomed to fail in view of what we have stated above.

For the foregoing reasons, this appeal fails and it is accordingly, dismissed with costs.

Dated and delivered at Nyeri this 8th day of July 2011.

S.E.O. BOSIRE

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR

