



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPLI 264 OF 2007

NISHITH YOGENDRA PATELAPPLICANT

(the legal representative of the deceased YOGENDRA PURSHOTTAM PATEL)

AND

PASCALE MIREILLE BAKSH (*nee Patel*) 1ST RESPONDENT

NILESH PRAHLADBHAI PATEL 2ND RESPONDENT

(Application for stay of execution of the decree/judgment of the High Court of Kenya at Nairobi

(Githinji, J.A) on 13th March, 2006 pending the hearing and final determination of the Civil Appeal No. 189 of 2007

RULING OF THE COURT

There is a glaring abuse of the court process in this matter which this Court will not countenance and consequently, we must strike out the notice of motion before us. We shall explain shortly but, first, an overview of the substance of the matter.

The tussle is between three brothers over ownership of three properties in Nairobi namely: **LR. No. 37/243/2**, a residential property in Nairobi West, and **LR Nos. 4508/2** and **4884/2** (now LR. 12442 and 12826, respectively) both of which are more popularly known as **Kigwa Farm**, an agricultural property measuring approximately 200 acres. It is common ground that all those properties are registered in the names of the three brothers as tenants in common in equal shares. Two of the brothers however died and were lawfully represented by their personal representatives before the dispute boiled over in 1995; that is to say, **Professor Rajnikant Purshottam Patel** (Raj) who died in Canada in 1983, and **Prahladbhai Purshottam Patel** (Prahlad) who died in the United Kingdom in 1991. Raj is represented by his daughter **Pascale Mireille Baksh** (Pascale), and Prahlad by his son **Nilesh Prahladbhai Patel** (Nilesh). **Yogendra Purshottam Patel** (Yogi) died on 12th February, 2006, one month before the judgment of the superior court.

In February, 1995, Yogi went to court and filed suit (subsequently amended and re-amended) against Pascale, Nilesh and his mother **Chanchalbhen Purshottam Patel** (Chanchal) asserting that he was the sole owner of the three properties, having bought the Nairobi West property in 1955 and the Kigwa Farm

in 1962/63. It was only on the advice of their mother, Chanchal, that the other two brothers were registered as co-owners of the property but only as trustees or Benamidars. He is the one who took possession of the properties and particularly invested heavily in the Kigwa Farm for many years, until the personal representatives of his brothers' estate started laying false claims thereon. He sought a declaration that he was the sole proprietor of the properties and his brothers were mere trustees or Benamidars. He also sought orders for transfer of the properties into his name and a permanent injunction to restrain all three defendants and their agents from any dealings with the property.

Pascale and Nilesh vehemently denied any unlawful claims and asserted that their deceased fathers were rightful co-owners of the three properties and not mere trustees. They sought dismissal of the suit and counterclaimed full accounts on the profits and income accrued from the properties and proportionate shares thereof for each of the estates together with interest thereon. Pascale also counterclaimed an order for sale of the properties and proportionate distribution of the proceeds.

The matter fell for hearing and determination before Githinji J (as he then was) and it took a considerable period of time, between 2001 and 2004. Indeed, by the time the judgment was delivered on 13th March, 2006, Githinji, J. had been promoted to the Court of Appeal but proceeded to finalise the matter under **section 64 (4)** of the Constitution. In his lengthy judgment running into 65 typed pages, the learned Judge considered all the factual and legal issues raised in the suit on both sides, and rejected the contentions of Yogi. He held that the three properties and the developments made and being thereon were held in common by the three brothers and the estates of the two deceased brothers were each entitled to 1/3 share of the property. The counterclaims by Pascale and Nilesh were also allowed as prayed with costs save for a qualification of Pascale's prayer for sale of the three properties and distribution of the proceeds. The ensuing decree issued forth on 5th June, 2006 for the following orders:

"1. That the plaintiff's suit be and is hereby dismissed.

2. That the plaintiff do pay to the defendants their costs of the suit to be taxed and certified by the Taxing Master of this Court.

3. That there will be no order as to the costs of the application for appointment of receivers which have (sic) been overtaken by events.

4. The first defendant's counter-claim allowed to the extent: -

(i) That it is declared that the estate of Rajnikant Purshottam Patel is entitled to the income and proceeds accruing out of the partnership of Kigwa Estate (being L.R. Nos. 12826 and 12442) and the Nairobi West property (being L.R. No. 37/243/2) since the date of the deceased's death.

(ii) An order for accounts since 1991.

(iii) An order that plaintiff do pay any sum found due to the estate of R.P. Patel upon the taking of the account.

(iv) An order that the first defendant has liberty to sell 1/3 undivided share of L.R. Nos. 12826 and 12442 and L.R. Nos. 37/243/2 first to both or one of the co-owners as first priority and if that fails to any close family member and if that fails then to any interested person on terms and conditions mutually agreed.

(v) Liberty to apply in respect of Order No. iv above.

(vi) That the plaintiff do pay to the first defendant the costs of the counter-claim to be taxed and certified by the Taxing Master of this Court.

5. That second defendant's counter-claim is allowed as follows: -

- (i) That it is declared that the estate of Prahladbhai Purshottam Patel is entitled to the income and or proceeds accruing from Land Reference Number 37/243/2 (Nairobi West) and Land Reference Numbers 12826 and 12442 (Kigwa Farm).
- (ii) An account of the income accruing to the property and to the estate of Prahladbhai Purshottam Patel in particular since 1991.
- (iii) An order that the plaintiff do pay any sum found due to the estate of Prahladbhai Purshottam Patel upon the taking of the account.
- (iv) That the plaintiff do pay to the second defendant the costs of the counter-claim to be taxed and certified by the Taxing Master of this Court. ”

Yogi was subsequently replaced by his son as the personal representative, **Nishith Yogendra Patel** (Nishith). He was dissatisfied with that judgment and he timeously filed a notice of appeal. The appeal itself was subsequently filed on 28th August, 2007 putting forward a massive 112 grounds of appeal. Two months after the filing of the appeal, and 1 ½ years after the judgment, Nishith came before this Court on 26th October, 2007 and filed a notice of motion under **rule 5 (2) (b)** of this Court’s rules seeking the following order:

“1. The execution of the Decree/Orders granted by Hon. Mr. Githinji Justice of Appeal, on 13th March, 2006 be stayed pending the hearing and final determination of the Civil Appeal No. 189 of 2007 filed on 28th August, 2007 in the Court of Appeal by the applicant/appellant.”

That is the motion that came before us for hearing on 10th June, 2009. Learned counsel on record for the applicant, Mr. M.G. Sharma, was led by senior counsel, Mr. Kwach, who fully argued the application. In responding to the application however, Mr. Kiragu Kimani, learned counsel for both respondents disclosed that there was a similar application filed in April, 2006 which was pending before the superior court seeking the same order for stay of execution. He referred us to an order made by the superior court on 21st June, 2006 adjourning the hearing of the application and in the meantime maintaining the *status quo* until the application was heard. Mr. Sharma readily conceded that there was such an application and that it has not been determined. Nishit himself in his affidavit in support sworn on 25th October, 2007, deponed that indeed there was such an application, thus:

“21. That I made an application dated 4th April, 2006 and filed on 5th April, 2006 in the High Court Civil Case No. 617 of 1995 seeking the stay of execution of the Decree and the Orders granted by the Honourable Mr. Justice Githinji, Justice of Appeal, on 13th March, 2006.

22. That an order was made on this 21st day of June, 2006 by Honourable Mr. Justice of Appeal Githinji to preserve the present *status quo* pending the hearing of the application for stay of execution either in this Court or in the Court of Appeal. A copy of it is annexed hereto at page 157 to 158 of the exhibit.

23. That the hearing of the said application dated 4th April, 2006 in H.C.C.C. No.617 of 1995 has not been concluded.”

On that admission, we are of the view that the application before us is an abuse of the court process, as stated earlier, by pursuing the same remedies in parallel courts which are competent to deal with the application. Such conduct must be deprecated and discouraged. It is for that reason that we order that the notice of motion dated 25th October, 2007 be and is hereby struck out.

As there is a similar application before the superior court which may be prejudiced, we make no pronouncement on the possible merits of the application even if we were to consider it. The costs of the struck out motion shall be paid by the applicant.

Dated and delivered at Nairobi this 10th day of July, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR