



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA  
AT ELDORET  
(CORAM: S. E. O. BOSIRE, E. M. GITHINJI & P. N. WAKI JJ)

CIVIL APPEAL 100 OF 2003

NYAKINYUA MUGUMO TREE WOMEN SOCIETY ..... APPELLANT

AND

NYAKINYUA MUGUMO TREE COMPANY LIMITED ..... RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Eldoret (Lady Justice Nambuye) dated 2<sup>nd</sup> April, 2002

in

H.C.C.C. NO. 98 OF 1987)

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JUDGMENT OF THE COURT

This is an appeal against the Ruling and Order of the superior court (Nambuye J.) made on 2<sup>nd</sup> April, 2001 wherein the superior court reviewed some orders made by Aganyanya J in the judgment dated 30<sup>th</sup> November, 1989.

On 3<sup>rd</sup> June, 1996, **Nyakinyua Mugumo Tree Women Society** (the society), the appellant herein, filed a suit against **Nyakinyua Mugumo Tree Company Limited** (the company), the respondent herein, for *inter alia*, a declaration that the society is entitled to possession and ownership of two parcels of land, namely, L.R. No. 1803 and L.R. No. 7393 situated in Trans – Nzoia District and an order that the company do surrender the title documents to the society. The society averred in the plaint, among other things, that, although the society bought the two parcels of land in 1978, the company was incorporated in 1980 without the knowledge and consent of the society after which the company trespassed on the two parcels of land. The company pleaded in the defence, *inter alia*, that the society and the company are one and the same thing; that their members and properties were not distinct; and that the society was incorporated into a limited liability company under the Companies Act on 20<sup>th</sup> February, 1980 with the agreement of the society. Evidence was given at the trial on behalf of the society that, the society was formed in 1972 and registered under the Societies Act; that in 1976, the members of the society who numbered 1,559 decided to buy Karara Farm (L.R. No. 1803) comprising about 2,250 acres from one Bridson; that the members contributed money and paid for the farm from 1979 to 1984; that in 1979 the members of the society also bought Sirende Farm L.R. No. 7393 – comprising of 200 acres from one Wanyonyi and paid for the farm in

cash; that members of the society have been settled on both farms (although some settlers are not members), that members of the society learnt of the incorporation in 1984 when elections were held and the original members of the society were ousted; and that the society does not recognize the members of the company as members of the society. The appeal record is not complete as it does not contain the entire trial proceedings. However, the judgment of the superior court shows that evidence was given on behalf of the company, among other things, that, in 1980 a meeting of members of the society resolved that the society be converted into a limited liability company to facilitate the sub-division of the farms and allocation of shares to the members; that the respondent company was indeed incorporated, that some payments for the Sirende Farm were made by the company; that some payment receipts issued to members bore the name of the society while some bore the name of the company; that after the formation of the company, Sirende farm and part of Karara farm (L.R. No. 1803) were sub-divided into 1½ acre parcels which were allocated to the members; that members with society receipts and company receipts are mixed in the two farms and that after the allocation of the land to members, neither the society nor the company owns the land.

The superior court in its judgment delivered on 30<sup>th</sup> November, 1989 made orders in the following terms:

***“(i) That all the members registered whether with the company or the society prior to 1984 are lawful members of either L.R. No. 1803 or L.R. No. 7393 depending on where they were allocated plots.***

***(ii) That this group of members should certify their membership or shareholding by producing their receipts and registering at the District Commissioner’s office Trans Nzoia.***

***(iii) That those members not yet allocated any plots on the two farms must be recent members and not original members as at 1984.***

***(iv) That if this group of people paid any money to any person purporting to be purchasing shares in any of the two farms, such money should be refunded to them as they are not bonafide shareholders therein”.***

The society being aggrieved by the decision of the superior court filed a Notice of Appeal on 8<sup>th</sup> December, 1989 and about three months later in March 1990, filed an application for stay of execution of the decree (sub-division of the two farms) pending the hearing of the intended appeal. However, the society did not lodge any appeal nor prosecute the application for stay of execution. On 3<sup>rd</sup> June, 1996, the company filed an application for review of the judgment of the superior court under **Order XLIV Civil Procedure Rules (CPR)**. The application was not prosecuted and on 3<sup>rd</sup> February, 2000 the company filed the application for leave to amend the review application. That application was struck out on 6<sup>th</sup> February, 2001 but the company was given leave to file a fresh application. As a consequence, the company filed a fresh application for review dated 7<sup>th</sup> February, 2001. The review application was brought under **Order XLIV rule 1 and 2 CPR and Sections 3 and 3A Civil Procedure Act**. The main order sought in the review application was a declaration that L.R. No. 1803 belongs to the company and not to the society.

The application was based on the ground that there is an error apparent on the face of the record in that, the judgment and the prayers sought in the suit are not in agreement. The application was supported by the affidavit of Muthoni Ng’ang’a, a director of the company who deposed, among other things, thus:

***“13. THAT the court ought to have dismissed the plaintiffs suit and proceed to find that the land belongs to the Defendant company and not to the plaintiff.***

**17. THAT ever since 30/11/1989, the District Commissioner Trans – Nzoia has not convened a meeting of the defendant company and society or either with a view to resolving the matter in terms of the judgment and apparently, no plans are underway at all.**

**18. THAT in the premises the order referring this dispute to the District commissioner be vacated and all matters left to the Defendant company to manage their properties and especially L.R. 1803.**

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**31. THAT the Respondents Agents and more specifically JAMES NDUNGU and NJENGA NJOROGE are causing the suit lands to be surveyed, sub-divided and sold to non – members”.**

The application for review was heard by a different Judge (Nambuye J) and dismissed on the merits on 2<sup>nd</sup> April, 2002. The learned Judge held, among other things, that, there was unreasonable delay in bringing the application which delay was not explained, that the company having pleaded in the defence that the society and the company are one and the same with same members and properties could not now claim that the properties belong to the company and that the company had not made a counter – claim in the suit for the order now sought in the review application.

Although the superior court dismissed the application for review on the merits, the learned Judge nevertheless considered the practicability of the implementation of orders (ii); (iii) and (iv) in the judgment of the superior court and found that the orders were incapable of enforcement observing that:

**“I want also to state that the review has been brought after undue delay. But on the merits of the facts before me, the orders mentioned were not granted in finality, they divested jurisdiction from the court and gave it to District Commissioner with no clause which made him accountable to the court and within specified period. I have no doubt this is the reason and/or the aspect which has created a situation whereby there are manipulations going on outside the court. It is only proper that the matters and the parties be brought back and be made subject of the jurisdiction of the court for purposes of giving effect to the judgment with a view to bringing litigation to an end and for ends of justice to be met”.**

The learned Judge then proceeded to set aside the three orders and substituted them with following orders:

**“For this reason I am inclined to review item (ii), (iii) and (iv) of the judgment and set aside and substitute thereto (sic) with the following orders.**

**(a) (ii) An order be and is hereby made and directed that the Deputy Registrar of this court do draw up a list of and compile a register of genuine original members and share holders of the two parcels of land Nos. L.R. 1803 and L.R. No. 7393 using receipts issued by either the society or the company prior to 1984. The details should include the following among others; full names, membership numbers if given, receipt number, date of payment and amount paid and to whom paid.**

**(b) Where the particular member has been allocated land then it has to be**

**indicated the size of the plot allocated, the plot number and on which parcel of land. Also the year allocated, by whom allocated, whether settled on the land or not.**

**(b) (iii) After compiling and complying with item (ii) above the Deputy Registrar will then draw up a list and compile a register of the members who joined the society and or the company after 1984, noting down the same details as at No. (ii) above.**

**(c) After complying with (a) (ii) and (b) (iii) above the matter will be placed before the court for mention for necessary further orders and directions in order to bring this litigation to an end.**

**(d) For purposes of reference and verification of the receipts presented to the Deputy Registrar, the Deputy Registrar of this court is hereby authorized and directed to retrieve all documents held by the District Commissioner, Trans Nzoia and/or his agent or nominee to that matter in relation to the subject matter herein and have the same securely locked in the strong room under his/her control.**

**(e) The Deputy Registrar is to complete the exercise within 45 days from the date of this ruling.**

**(f) There will be liberty to appeal.**

**(g) Each party to bear his/her own costs of this application.**

**(h) A copy of this ruling to be send to the Deputy Registrar for necessary action”.**

The several grounds of appeal can conveniently be condensed to four grounds, in essence; that there were no valid grounds warranting review orders; that the respondent was not entitled to review due to unreasonable delay in seeking review; that the Judge exceeded her jurisdiction by granting orders which were not sought and lastly that the Judge exceeded her jurisdiction by assuming the jurisdiction of an appellate court and overturning orders of a Judge of cognate jurisdiction.

In considering this appeal, it is important to appreciate the real issues which were in controversy between the society and the company; the gist of the judgment of the superior court (Aganyanya J) delivered on 30<sup>th</sup> November, 1989; the essence of the review application dated 7<sup>th</sup> February, 2001 and the gist of the ruling of Nambuye J dated 2<sup>nd</sup> April, 2002 on the review application.

It is clear from the plaint that the main relief sought by the society against the company in the suit was a declaration that the two parcels of land belong exclusively to the society and that the society was entitled to the title documents and physical possession.

The company in its defence averred, *inter alia*, that the society had converted itself into a limited liability company and that the society and the company are one and same thing with the same properties and members. The real issue in controversy was whether the two parcels of land belonged to the members of the society or the company.

The superior court (Aganyanya J) resolved that dispute and adjudged that all members whether registered with the company or the society prior to 1984 are lawful share – holders of the two pieces of land. The superior court made further orders including an order, in essence, that, the District Commissioner (D.C.) do verify and register the genuine members. The society was

apparently satisfied with the decision of the court and neither appealed against the decision nor filed a review application. The decision of the superior court largely conformed with the defence of the company that the members and properties of the society and the company were not distinct. Surprisingly, it is the company which filed the first review application dated 29<sup>th</sup> May, 1996 – over 7 years after the judgment of the superior court was delivered. As we have already observed the first review application was struck out by Nambuye J on 6<sup>th</sup> February, 2001. The learned Judge however gave leave to the company to file a fresh application, hence, the second review application the subject matter of this appeal.

By the review application, the company asked the court to reverse its previous decision and replace it with an order that L.R. No. 1803 belongs to the company and not to the society. As we stated above the application was considered and dismissed on the merits. In our view, the dismissal of the review application was correct. The company which brought the application for review was satisfied with the decision dismissing its own application and did not appeal. It is the society which has filed the present appeal which appeal is opposed by the company. It is noteworthy that the appeal is not against the order dismissing the company's review application on the merits but against the additional orders made by Nambuye J in attempt to bring the dispute to finality. This appeal is against those additional orders.

We have carefully considered the judgment and the decree of Aganyanya J dated 30<sup>th</sup> November, 1989 *vis a vis* the matters in controversy between the society and the company. We have similarly considered the orders of Nambuye J under appeal in juxtaposition to the orders of Aganyanya J.

In our view, the substantive decision of Aganyanya J that the registered members of the society and the company prior to 1984 were the lawful shareholders of the two parcels of land was in essence a preliminary decree because the Judge ordered the D.C. to ascertain the number of genuine members through receipts and register them. Indeed from the nature of the dispute only a preliminary decree could ensue and **Order XX Rule 17** of the *Civil Procedure Code* supports this view. It provides.

***“where a court passes a decree for partition of property or for separate possession of a share therein the court may, if the partition or separation cannot be conveniently made without further inquiry pass a preliminary decree declaring the rights of the parties interested and giving such further directions as may be required”.***

Thus, the superior court in effect gave a preliminary decree as to who in relation to the time of payment for shares qualified to be share holders of the two farms but ordered the D.C. to make further inquiries to identify the shareholders and make final entry in the register. By doing so, the superior court, as Nambuye J correctly observed, divested itself of the jurisdiction to give final judgment which could have conclusively determined the dispute.

It is apparent that Nambuye J neither altered the substantive decision of Aganyanya J as to who qualified to be a shareholder of the two farms nor changed the character of the other ancillary orders. For instance, the substance of two ancillary orders made by Aganyanya J that the genuine pre – 1984 members be ascertained and that the post – 1984 members who were not bona fide members be identified and compensated were not disturbed by Nambuye J. The only change is that Nambuye J removed the inquiry from the jurisdiction of the D.C. and appointed the Deputy Registrar of the court to undertake the exercise and report to court. The order was intended to restore jurisdiction to the court so that the court could ultimately after the completion of the inquiry pass a final decree.

On our part, having regard, primarily to the fact that the decision of Aganyanya J was a preliminary decree, we are satisfied that Nambuye J had jurisdiction to make the additional orders particularly the order removing the inquiry from the D.C. in preference to the Deputy

Registrar of the court. The orders that Nambuye J made were not substantive in the sense that they did not give any property rights to either party. They were in essence procedural. The application for review had invoked the inherent jurisdiction of the court under **section 3A** of the *Civil Procedure Rules*, amongst other provisions of the law. In our view, Nambuye J had jurisdiction even on her own motion to correct the procedural error apparent on the face of the record removing the unconcluded dispute from the jurisdiction of the court. A court controlled inquiry through the Deputy Registrar was more appropriate. Before the orders of Nambuye J, the D.C. had not embarked on the inquiry as ordered by Aganyanya J for over 10 years. The orders of Nambuye J would facilitate the sub-division of the two farms and the granting of title deeds to the genuine share – holders who have waited for the title documents for over 25 years.

For those reasons, we dismiss the appeal with no orders as to costs.

**Dated and delivered at Eldoret this 19<sup>th</sup> day of October, 2007.**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**