



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.36 OF 2019

ZENITH REALTORS LIMITED.....PLAINTIFF /RESPONDENT

VERSUS

NGENDA LOCATION RANCHING CO. LTD.....1ST DEFENDANT /APPLICANT

STIMA INVESTMENT COOPERATIVE SOCIETY.....2ND DEFENDANT /RESPONDENT

RULING.

1. The Notice of Motion by the applicant dated 24th March 2020 prays for the following reliefs;

a. That the 1st defendant be granted leave to produce a copy of the judgement delivered by Honourable Kalo on 14th April 2020 in CMCC 999 of 2016 (Harry Gakinya verses Ngenda location ranching co. ltd and Keengwe & co advocates)

b. That upon prayer 2 above being granted the copy of the typed proceedings and judgement be admitted on record as part of the 1st defendants list of bundle of documents for purposes of trial.

c. That the hearing of the main suit to proceed with the defence hearing.

2. The application is supported by the sworn affidavit of **Joseph Wahogo Karari** the chairman of the applicant's company dated the same date as well as the grounds on the face thereof.

3. The applicants deponed that there was another matter namely **Nakuru CMCC No. 999 of 2016** where judgement against the applicant was delivered on 14th April 2020. The applicant was ordered to pay a sum of Kshs.11 million to the plaintiff Hari Gakinya.

4. The above judgement is necessary to be introduced to these proceedings as it was to do with the sale and the purchase of the same property in this proceedings.

5. The respondent vide the replying affidavit of **Githui John** Advocate sworn on **26th October 2020** has opposed the said application on the grounds that the same is meant to delay the determination of this case considering that the plaintiff had already testified and finalised its case. That when the matter came up for pre-trial the applicant failed to disclose to the court that there was a matter pending at the lower court between it and the said law firm.

6. That reopening the case afresh shall prejudice the respondent since it had closed its case after cross examining the witnesses based on the available evidence. In any case the applicant has since filed an appeal against that decision and thus cannot be relied upon.

7. When the matter came up for directions the court directed the parties to file written submissions which they have done. Essentially each of them have taken the position obtaining in their rival affidavits. The court has also perused the cited legal authorities.

8. It is clear that the lower court matter had to do with the commission fees which the plaintiff thereon Hari Gakinya advocate was entitled from the applicants after selling the parcel of land. The plaint dated **5th September 2016** states as much. The court after full trial found in favour of the said counsel. The amount awarded was Kshs. 11 million.

9. In the instant case the issue also has to do with the commission fees by the plaintiff which amounts to Kshs.47 million or thereabouts.

10. If that is the case, this court finds that the judgement by the lower court to the extent that it has to do with the applicant, the parcel of land and commission fees payable shall be a necessary component or evidence in this matter. The argument that it has been introduced later in the day is of course valid. However, looking at the circumstances obtaining the same could not have been part of the evidence as it was delivered after the directions had been taken and after the plaintiff had testified.

11. The judgement of the court being a legally binding document could in my view be introduced at any time as long as it does not prejudice any of the parties. Although the respondent argued that the same was pending an appeal, there was nothing to show that it had been overturned and even so, whatever the applicant desires to use it for as its evidence shall be subjected to the usual cross examination by the parties. In this case the court finds that it shall be in the interest of both parties and perhaps the court to allow it to be used herein.

12. The respondent shall have the opportunity to cross examine over the same and by extension recall or call any of its witnesses to speak into it. This is a limited window of opportunity which should not be used to open up the case afresh. Luckily the applicant had not offered any evidence.

13. This position is buttressed by the provisions of **Article 159 of the Constitution** which was well quoted by the parties as well as **Section 1A and 1B of the Civil Procedure Act** anticipated such scenario. Had the lower court matter been determined before taking out directions then I would have considered otherwise. For now, this court does not see any prejudice that shall be suffered by the respondents.

14. In the premises the application is hereby allowed as follows;

- a. The applicant is hereby granted leave to introduce the proceedings and judgement in Nakuru CMCC No 999 of 2016 as part of its list of bundles of documents for purpose of trial herein. The same should be filed and served within 14 days from the date herein.**
- b. The respondents shall be at liberty 14 days after service to introduce or file any evidence or statements to rebut the same.**
- c. The respondents shall be at liberty to recall any party or call any evidence whether oral or otherwise to rebut the same if need be.**
- d. The respondents shall have the costs of this application.**

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 29TH DAY OF JULY 2021.

H K CHEMITEL.

JUDGE