REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 246 OF 2014

PETERSON MURAGE KINYUA…….……..……………PETITIONER

VERSUS

JANE WANGITHI MURAGE…………………………RESPONDENT

RULING

On 13th August 2014 the applicant herein filed this petition seeking the following orders:-

a. ***A declaration that the interlocutory judgment entered in favour of the respondent in Nyeri High Court Civil Case No. 10 of 2005 is in violation of the petitioner's Constitutional rights and that the same and any orders made pursuant therefrom are un-Constitutional.***
b. ***A declaration that the respondent being the registered proprietor of title number INOI/KARIKO/2268 is not entitled to a refund in respect of the purchase price paid to the petitioner or any amount at all.***
c. ***That pending final hearing and determination of this petition inter partes, a conservatory order do issue staying the warrants of arrest issued in ACC 5 of 2005 against the petitioner.***
d. ***Any other relief or order that this Honourable Court may deem fit to grant.***

The basis of this petition which was drawn and filed by the firm of **S.N. THUKU & ASSOCIATES ADVOCATES** was that the petitioner had sold land parcel No. **INOI/KARIKO/2268** to the respondent and a title deed issued to her but she nevertheless conspired to have him charged for fraud in **Kerugoya Senior Resident Magistrate's Court Criminal Case No. 890 of 2002** but he was acquitted. The respondent then instituted **Nyeri High Court Civil Case No. 5 of 2010** for recovery of the purchase price and although he was not served with summons in that suit, interlocutory judgment was entered against him and eventually a judgment was delivered ordering him to refund the purchase price yet the property remains in the respondent's names. The respondent now seeks to execute that judgment which would be unjust, un-Constitutional and an affront to his rights as enshrined in the Constitution.

That petition was resisted and in her replying affidavit dated 9th September 2014, the respondent pleaded, inter alia, that the registration of her name as proprietor of land parcel No. INOI/KARIKO/2268 was cancelled on 24th August 2005 vide an order issued in **Nyeri High Court Civil Suit No. 121 of 2004** and so she filed **Nyeri High Court Civil Suit No. 10 of 2005** seeking refund of the purchase price paid to the petitioner. She obtained judgment against the petitioner who despite being served failed to attend Court and a warrant for his arrest was issued unless he pays the sum of Ksh. 848,000. The petitioner cannot therefore claim that his Constitutional rights are being infringed when he has failed to perform what he should perform. In any case, the petitioner has a right to appeal against that judgment or seek a review of the same.

That petition was accompanied by a Chamber Summons application of the same date seeking a stay of execution of warrants of arrest issued in Nyeri High Court Civil Case No. 5 of 2005 against the petitioner. That application was placed before **Ong'udi J.** on 27th August 2014 who certified it urgent and directed that it be served for inter-parte hearing on 11th September 2014. The Judge meanwhile ordered that status quo concerning the warrant of arrest to remain. When that application came up for hearing inter-parte before me on 22nd April 2015, Mr. Magee advocate for the respondent informed the Court that service had been effected upon the firm of **S.N. Thuku & Associates Advocates** for the petitioner and since both the advocate and the petitioner were absent, he sought the dismissal of that application. Having confirmed service and in the absence of both the petitioner and his advocate, the Court dismissed the said application with costs.

On 10th June 2015, the firm of **Munene Muriuki advocates** filed a notice of change of advocates to come on record for the petitioner in place of the firm of **S.N. Thuku & Associates Advocates** and at the same time filed a Notice of Motion under **Order 12 Rule 7 of the Civil Procedure Rules** seeking to set aside and/or review the orders of 22nd April 2015 dismissing the application dated 13th August 2014. In his affidavit in support of that application which is the subject of this ruling, the petitioner raises several issues but the most pertinent one for purposes of this application is to be found in paragraph 8 in which he has deponed as follows:-

> "***That I have perused the Court file and I have confirmed that the firm of <u>S.N. Thuku & Associates</u> is on record for me though I did not instruct them and I also confirm that they were served with the hearing notice by the firm of Magee wa Magee advocates. I wish to confirm that I was never called and or informed about the hearing of my application otherwise I would have been present in Court"*** emphasis added

He states that he had instructed the firm of **Sichangi and Partners Advocates** to file this petition and so when he sought to talk to Mr. Kioni of that firm to find out about the application dated 13th August 2014, he was informed that they had instructed the firm of **S.N. Thuku & Associates Advocates** to come on record. He depones in paragraph 6 of his supporting affidavit that he "***..… was baffled by this revelation since he had not instructed the firm of advocates above stated"***

In response, the respondent had deponed that if the petitioner did not instruct the firm of **S.N. Thuku & Associates Advocates** to act for him in the petition, then the said petition and application were fraudulently filed and without his consent and this dispute is of a civil nature.

Submissions have been filed by both Munene Muriuki advocates for the petitioner and Magee wa Magee advocates for the respondent.

I have considered the application, the rival affidavits and the submissions by counsels.

The application, as stated above, is brought under the provisions of **Order 12 Rule 7 of the Civil Procedure Rules.** ***<u>Order 12 of the Civil Procedure Rules</u>*** deals with hearing and consequence of non-attendance and ***<u>Rule 7</u>*** is in the following terms:-

> ***"When under this order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just"***

What was coming up before me on 22nd April 2015 when the orders sought to be set aside or varied was granted was an application dated 13th August 2015 seeking conservatory order to stay the arrest of the petitioner as ordered by the High Court Nyeri in Civil Case No. 5 of 2005. From the warrant of arrest annexed to the petition herein, the order was infact issued in High Court Nyeri Civil Case No. 10 of 2005. ***<u>Order 12 of the Civil Procedure Rules</u>*** is really not applicable. The applicable provision would be ***<u>Order 45 of the Civil Procedure Rules</u>*** which empowers the Court to vary or review any order on account of some mistake or error or upon discovery of new and important matter or for any other sufficient

reason. As I have already indicated above, the main ground upon which the petitioner has moved the Court is that he did not instruct the firm of **S.N. Thuku & Associates Advocates** to file this petition. The petition, as is clear from the record, was drawn and filed by the firm of **S.N. Thuku & Associates Advocates**. That includes the supporting affidavit which was signed by the petitioner himself on 13th August 2014. The petitioner cannot therefore be heard to say that he did not instruct that firm of advocates to act for him in this matter. It would be a different case if the petitioner alleged that the said advocates were not served or, having been served, did not attend the hearing for one reason or the other. Courts are usually very accommodating where a genuine mistake on the part of an advocate is disclosed because the general rule is that save for clear cases where there is evidence of an attempt by a party to overreach, the mistake of an advocate should not be visited on a client. However, that is not the position here. The petitioner herein now claims that he did not instruct the firm of advocate who filed the petition. That is inconceivable. How else would the firm of **S.N. Thuku & Associates Advocates** draw the pleadings subject of this petition unless the information therein was given to them by the petitioner himself? If indeed he had instructed the firm of Sichangi and Partners Advocates to file the petition as he alleges in paragraph 2 of his supporting affidavit, I should have expected an affidavit from that firm confirming that infact the firm of **S.N. Thuku & Associates Advocates** ***"stole"*** this petition and filed it in their names. There is no such affidavit. The petitioner will have to take up that issue between the two firms. As far as this Court is concerned, the petition herein was drawn and filed by the firm of **S.N. Thuku & Associates Advocates** who also drew the affidavit that was signed by the petitioner. The said firm of Advocates also drew and filed the Chamber Summons application dated 13th August 2014 together with the petitioner's supporting affidavit and they were duly served to attend Court on 22nd April 2015 for hearing but did not attend leading to the dismissal of the same. If the said firm had any good reason for failing to attend the Court on 22nd April 2015 nothing would have been easier than to swear an affidavit to that effect. The discretion to set aside an order obtained in the absence of one party is not meant to assist a party who seeks, whether by evasion or otherwise, to obstruct or delay the cause of justice – ***SHAH VS MBOGO & ANOTHER 1967 E.A 116.*** Similarly, powers of review are only available where there is new and important matter or evidence or a mistake apparent on the face of the record or for any other sufficient reason – ***KITHOI VS KIOKO 1982 K.L.R 177***. From the material placed before me, the petitioner is not deserving of the exercise of this Court's discretionary powers in his favour. In the circumstances, the order that commend itself to me to make is to dismiss the petitioner's Notice of Motion dated 10th June 2015 with costs which I hereby do.

Having said so, I have looked at the petition itself. The supporting affidavit and the responses thereto and it is clear to me that the petition is an abuse of the Court process which this Court is entitled to strike out at this early stage. This petition invokes the provisions of **Article 40 of the Constitution** which protects the right to own property and the order sought include a declaration with regard to land parcel No. INOI/KARIKO/2268 and this Court is seized with powers to determine Constitutional petitions that touch on the use and ownership of land.

I shall now examine whether infact this petition is justiciable. I have at the start of this ruling set out the orders that this petitioner seeks. He seeks a declaration that the interlocutory judgment entered in favour of the respondent in Nyeri High Court Civil Case No. 10 of2005 is in violation of his Constitutional rights and a declaration that the respondent being the registered proprietor of title number INOI/KARIKO/2268 is not entitled to a refund in respect of the purchase price paid to the petitioner or any amount at all. Finally, he seeks a stay of the warrant of arrest issued against him in the High Court at Nyeri pending the determination of this petition which I have already dealt with and dismissed. While ***Rule 3 (2) of the Mutunga Rules*** as read with ***Rules 5 and 10*** obligate the Court to do substantive justice to the parties in a Constitutional petition, ***Rule 3 (8)*** of the same also obligates the Court to ensure that no party abuses its process. ***Rule 3 (8)*** provides as follows:-

> "***Nothing in these Rules shall limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court***" emphasis added.

It is clear from the record herein that the respondent sued the petitioner in Nyeri High Court Civil Case

No. 10 of 2005 and obtained judgment against him for the refund of the purchase price in respect of land parcel No. INOI/KARIKO/2268. An application by the petitioner to set aside that judgment and a stay of execution of the decree therein was dismissed with costs by **Sergon J.** on 21st February 2014. Thereafter, a notice to show cause was issued for the petitioner's arrest and committal to civil jail unless he liquidates the sum of Ksh. 848,000. It was then that the petitioner moved to this Court and filed this petition. The petitioner's grievances can be addressed in Nyeri High Court Civil Case No. 10 of 2005 where the judgment against him was obtained or alternatively, he could appeal against that decision. He has no shortage of options but this petition is clearly not one of those options because where a clear procedure is prescribed, then it must be followed. In ***SPEAKER OF NATIONAL ASSEMBLY VS KARUME C.A. CIVIL APPLICATION NO. 92 OF 1992 (NBI)***, the Court stated as follows:-

> ***"In our view, there is considerable merit in the submissions that where there is a clear process for re-dress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed"***

The execution process that is ongoing in the High Court in Nyeri Civil Case No. 10 of 2005 and the notice to show cause dated 18th May 2014 are all pursuant to a lawful judgment obtained against the petitioner in that case. Nothing done under the authority of the law can be held to be in contravention of the Constitution unless that law is in itself un-Constitutional. This petition is an attempt to circumvent lawful proceedings and initiated within the sole purpose of scuttling the execution process ordered by a Court of competent jurisdiction. That is not what Constitutional petitions are meant to address and that is a clear abuse of the Court processes. Though disguised as a Constitutional petition, this petition is a guise through which the petitioner seeks to obtain orders to forestall his lawful obligations in another Court where he has not been denied audience. This Court is enjoined to ensure that even as it dispenses justice to the litigants, its processes must not be used for ulterior motives. Judicial time is a valuable resource. It should be expended in solving real disputes and not squandered on processes that do not advance the cause of justice. This Court find that this petition is such a process and must therefore strike it out with costs.

Ultimately therefore, and upon considering all the matters herein, this Court makes the following orders:-

1. ***The Notice of Motion dated 10th June 2015 is dismissed with costs.***
2. ***The petition dated 13th August 2014 is struck out with costs.***

B.N. OLAO

JUDGE

26TH FEBRUARY, 2016

Ruling delivered this 26th day of February, 2016 in open Court.

Ms Kiragu for Respondent present

Mr. Macharia for Muriuki for Petitioner present.