



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL CASE NO. 43 OF 2012

RAYLEIGH W. WANYAMAPLAINTIFF

VERSUS

LONAH MUKHWANA WANYAMA

KHISA MUYUNDO

HENRY WAMALWA WANYAMA

MAURICE JUMA WANYAMADEFENDANTS

RULING

[1] The applicant RayLeigh W. Wanyama brings this Notice of Motion under Order 42 Rule 13(1) of the Civil Procedure Rules. He prays that this court give directions on the mode of proceeding with this Appeal. He sought for orders that the Appeal be disposed of by way of written submissions and that those directions be highlighted on the hearing of the appeal.

[2] The application came up for hearing on 5/5/2015 when Mr. Makokha learned counsel for the respondent raised a Preliminary Objection and stated that the appellant herein filed an application in Bungoma CMCC number 460 of 2009 and applied to be enjoined in that suit. His application dated 28/1/2010 was dismissed by Hon. Ng'ang'ar SRM. That no appeal was preferred against such dismissal. That later on 14/5/2012 he filed another application whereby he sought several orders among them an order for review and setting aside the judgement and decree of Hon Ng'ang'ar entered in that suit.

It is argued by counsel for the respondent that, this was a fresh application. That he never applied to be enjoined in the said suit as an aggrieved party under Order 45 of the Civil Procedure Rules and under Section 80 of the same. That he remained an interested party. Mr. Makokha submitted that the application was not attacking the ruling and judgement Hon. Ng'ang'ar but was attacking the ruling of Hon. Atiang in his review. He stated that there was no review from the decree and orders of Ng'ang'ar SRM. He argued that when a party does not appeal from a decree, he shall be precluded from disputing the same. He also said that the appellant did not seek leave to appeal. Mr. Makokha argued that the appellant had no locus to file this Appeal.

[3] Miss Mumalasi learned counsel for the respondent replied and said, that they were not attacking the ruling of Ng'ang'ar SRM. She argued that the application before Ng'ang'ar was to join the suit while, what they were attacking was the ruling of Hon. Atiang. She argued that the appellant was joined in the suit by Hon. Kyambia. She argued that the applicant does not need orders to approach the court under Order 45 and under Section 80 of the Civil Procedure Rules and the Civil Procedure Act. Consequently, it was argued that the appellant did not need orders of leave as argued by the advocate for the respondent.

[4] By an application dated 28th January 2010, Layleigh W, Wanyama(the appellant herein) Henry Wamalwa Wanyama and Maurice Juma Wanyama who called themselves interested parties filed the aforesaid application and prayed among other prayers to be enjoined as interested parties. This matter came before the Hon F. Kyambia on 29th January 2010. The order issued by the said magistrate is headed,

“Upon hearing counsel for the applicants under Certificate of Urgency and ex parte and reading the application dated 28/1/2010”

IT IS HEREBY ORDERED

That this matter be and is hereby certified as urgent and service priorly dispensed with in the first instance.

- 1. That the applicants herein RAYLEIGH WANYAMA, HENRY WAMALWA and MAURICE JUMA be and are hereby enjoined in those proceedings as interested parties.*
- 2. Pending the hearing and determination of this application there be and is hereby ordered a temporary stay of execution and or enforcement of the decree herein plus all consequential orders.*
- 3. That this application be heard interpartes on 10/2/10*

[5] There is no doubt that these orders were granted ex parte. There was no input of the parties to the suit. The service of the same had been dispensed with by the court. The application was to be argued inter partes after due service on 10/2/10. That was the day when the court was to consider the replies by the parties to the suit if any. The four orders granted by Hon. Kyambia were not final. They were ex parte. The order itself says so.

The application was disposed of by Hon. J.K. Ng’ang’ar PM and he delivered his ruling on 14/7/2011. The learned magistrate declined to grant the order and the application dated 28/1/2010 was dismissed with no order as to costs.

[6] The result therefore was that the interested parties were not made parties to the suit. Later the appellant herein purporting to be an interested party went to Chief Magistrate’s Court and filed a Notice of Motion dated 14th May 2012 and sought for the judgement herein to be reviewed and the orders to be set aside. The matter came before Hon. B.M. Atiang PM who dismissed the said Notice of Motion on the ground the court had declined to enjoin the applicant(appellant herein) as an interested party. It is against that dismissal by Hon. B.P. Atiang PM that the appellant herein appeals.

[7] This appeal clearly has no merits. The appellant is not a party to this suit. When the Court, (Hon. Ng’ang’ar) declined to enjoin him and two others to the suit on 14/7/2011 that is when he ceased to have any recognition in this suit as a party. He did not appeal against the said order. His door was thus shut. His subsequent application before Hon. B.M. Atiang PM on the same suit for review of the orders made by Hon. J.K. Ng’ang’ar dismissing his application to be enjoined as an interested party in the suit was misconceived. The Appellant has no capacity to file this appeal. The Preliminary Objection succeeds.

The appeal is struck out with no order as to costs.

Dated, signed and delivered this 27th day of July, 2016.

S.MUKUNYA - JUDGE

In the presence of

Joy/Gladys – Court Assistants

Madam Mumalasi for the Applicant

Makokha for the Respondent