



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 50 OF 2013

EMARTI OLE NARAU GROUP RANCH.....APPELLANT/APPLICANT

VERSUS

SEWANI OLE NKUSHUNAROK.....1ST RESPONDENT

NCHOSIYA OLE LEBOI.....2ND RESPONDENT

NTIYANI OLE LEPONYO.....3RD RESPONDENT

AIKANAE OLE SAPURU.....4TH RESPONDENT

RINCHO OLE MARDADI.....5TH RESPONDENT

RULING

1. By way of Notice of Motion dated **17th September, 2014** brought pursuant to **Section 1A, 3A, 99 and 100** of the **Civil Procedure Acts**, the Applicant seeks review by setting aside the order of the court issued on the **23rd May, 2014** dismissing the Notice of Motion dated **25th March, 2013** and issuance of prayers sought in the aforestated Notice of Motion.
2. The application is based on the grounds that the court made an error by confusing the Applicants Notice of Motion dated **25th March, 2013** with the Respondents Motion dated **12th March, 2014**. The court made an error in erroneously deeming that the Applicants Counsel on record was representing the Respondent for there was no appearance or representation on **19th May, 2014**. **Patrick Rugo** who was present in court addressed the court on the Appellant's Motion dated **25th March, 2013**. It is therefore just that orders issued on **23rd May, 2014** be reviewed and set aside and be replaced with the grant of Notice of Motion dated **25th March, 2013** so that the matters in dispute may be heard and determined on merits.
3. The Applicant's Counsel deponed an affidavit supporting the Application where he stated that his firm filed the application dated **25th March, 2013** which was fixed for hearing on the **4th July, 2013** but it was taken out of the cause list by the court. He then fixed the matter for hearing on **9th October, 2013** when he arrived in court late and the matter was stood over generally. He later fixed the matter for hearing on **4th February, 2014** and the application was taken out of the cause list on courts own motion. The registry later granted hearing date for **19th May, 2014** following a request letter. On the **13th March, 2014** they were served with an application dated **12th March, 2014** by the Respondent. On the **19th May, 2014** he appeared in court to argue the application

- which he did though there was no appearance by the Respondents. The ruling was delivered and he realized that it was based on the wrong application.
4. The Respondent filed grounds of opposition where he claimed that the application is frivolous, vexatious and made in bad faith. Further, he stated that there was no plausible reason for failing to prosecute the application dated **12th March, 2014** for over a year and there was evidence of trying to obtain the orders of the court through deceit by not inviting the Respondents advocate to fix a hearing date.
 5. It is argued by Mr. Rugo Advocate that there was an error on the face of the record as the court confused the application dated **25th March, 2014** with that of the Respondents application dated **12th March, 2014**. It therefore behooves upon this court to interrogate what transpired.
 6. According to the court record the firm of Muthoga Gaturu & Company who described themselves as advocates for the Appellant filed a Notice of Motion dated **25th day of March, 2013** on the **26th March, 2013** seeking *inter alia* leave to appeal out of time. The matter was fixed for hearing by the Deputy Registrar on the **4th July, 2013**. There was no appearance in court by the Applicant on the date fixed. A representative of the firm appeared before the Deputy Registrar on the **10th July, 2013** when the matter was fixed for hearing on **9th October, 2013**.
 7. There is nothing to suggest that the court on its own motion took out the matter. Had this been the case the party present would have taken another date on the same day at the registry.
 8. The matter came up on the **9th October, 2013** as scheduled but there was no appearance by either parties and orders were issued for them to seek a date at the registry. In fact the Applicant who had taken the date was penalized to pay court adjournment fees.
 9. Thereafter, on the **16th October, 2013** a representative of the firm of Muthoga Gaturu & Company appeared before the Deputy Registrar and fixed the application dated **25th March, 2013** for hearing on **4th February, 2014**. There was no appearance on the hearing date.
 10. Subsequently, an application dated **12th March, 2014** was filed by the firm of Agina & Associates Advocates for the Respondents seeking dismissal of the Notice of Motion dated **25th March, 2013** for want of prosecution on the ground that a year down the line the Appellant had not set down the application for leave to appeal out of time amongst other grounds.
 11. On the **25th March, 2014** a representative of the firm of Muthoga Gaturu Advocates & Company took a date at the registry. The application that was fixed for hearing was the one dated **12th March, 2014**. The record reads thus:

“12/3/2014

In the High Court Civil Registry

before D R

J. Mutende for L. Muthoga & Gaturu Adv.

N/A for defendant

Fixed for hearing on 19th May, 2014

For appl. dated 12th March, 2014

N. T. I.”

12. On the **19th May, 2015** the record reads:

“Before L. Mutende J.

CC Collins.

Mr. Rugo for the Applicant

No appearance for Respondents.

Mr. Rugo – The Respondents are duly served. The application is not opposed. I rely entirely on the affidavit of the Applicant.”

13. This was the first time Mr. Rugo appeared before the court. He never introduced himself as counsel instructed by the firm of Muthoga and Gaturu Advocates. Having stated that he appeared for the Applicant in an application that was not opposed, the application scheduled for hearing having been the one dated **12th March, 2014** the court was inclined to retire and write a ruling on that particular application. It was therefore unethical for the same advocate who was not diligent enough to find out which application had been fixed for hearing to allege that the error was as a result of confusion on the part of the court.
14. Be as it may, it is apparent that there was an omission which resulted into a wrong application being fixed for hearing. This is sufficient reason to have the order made reviewed. **(Vide Order 45 of the Civil Procedure Rules)**. In the premises I do set aside the order dated **23rd May, 2014**. I however decline to allow the second limb of the application as the same had not been fixed for hearing. The Applicant is therefore directed to fix a hearing date for the application dated **25th March, 2013**.
15. No orders as to costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 16TH day of JUNE, 2015.

L. N. MUTENDE

JUDGE