



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

HC MISC. APPLICATION NO. 76 OF 2006

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS

THE REPUBLIC APPLICANT

VERSUS

KIMILILI LAND DISPUTES TRIBUNAL RESPONDENT

AND

DISMAS ZACHARIA HARUN 1ST INTERESTED

PARTY/APPLICANT

HAJI ABDUL WEKESA MAUNGO 2ND INTERESTED PARTY/APPLICANT

AND

JANE NAFULA JUMA EXPARTE APPLICANT

RULING

The Applicant filed an application dated 3rd March 2011 brought under Sec. 1 A & B of the Civil Procedure Act and Order 53 Rule 3 of the Civil Procedure Rules. The Applicant is the 2nd Interested Party in the Judicial Review application.

There are three orders being sought i.e temporary stay of sale of the Applicant's attached goods/properties, the exparte judgment delivered on 29.9.2010 and all consequential orders be set aside and the auctioneers costs and costs of this application be paid by the Exparte Applicant. The basis of the application was that there was no proper service and the Applicants have a good answer to the Applicant's claim

The application is opposed. The 2Respondent (Exparte Applicant) depone in his replying affidavit that service was properly done and has annexed affidavit of service. She urged the court do dismiss the application as lacking merit.

Setting aside exparte judgment has been left at the discretion of the court to consider the circumstances of each case. There are set down principles for courts to consider while exercising that discretion, see **Patel Vs. E.A Cargo Handling Services Ltd. [1974] EA 74** which include;

- I. The defendant to show he has a good defence on merit.
- II. Prejudice to the other party.
- III. Explanation for the delay.

The Applicant did not file a further affidavit to deny issues of service as espoused by the Respondent. Instead his advocate chose to attack the affidavit in his submissions which in my view was not proper. The Counsel also submitted that the application dated 5.12.2006 (which he is seeking to set aside) was fatally defective and ought to have been dismissed. Also the Respondent ought to pay the auctioneers costs as she did not comply with the provisions of Order 22 Rule 6. The Applicants cited the following cases in support of their application:

- (a). Commissioner of land vs. Kuuste Hotel Ltd. 1995 – 1998 pg. 1, 2 & 6.
- (b). Farmers Bus Services [1959] E.A 779
- (c). James Kega Kangau vs. ECK
- (d). R. vs. Chairman ECK exparte Welamondi [2008] 2 KLR.
- (e). R. vs. Secretary PSC & 2 others exparte Peter Gikihi [2010] e KLR.

In the case cited at (a), it refers to the authority making the decision being challenged (in this case, the Land Disputes Tribunal and not the High Court). Similarly Farmers Bus case refers to format of application for judicial review. This applies to James Kega case too and the remaining case law cited. None of the cases cited refer to setting aside of exparte judgment which is the subject of this application. In asking this court to refer to the cited cases which questions the incompetence of the earlier application, is asking me to sit on appeal over a judgment delivered by a court of concurrent jurisdiction.

I wish to point out that the Applicant did not annex to his supporting affidavit any document by way of “draft replying affidavit or defence” to the notice of motion dated 5.12.06. All that was said in the supporting affidavit at paragraph 10 is ***“That I have a good defence to the Exparte Applicant’s claim.”***

It is therefore improper for his advocate to raise a defence through submissions as parties are to plead issue before raising them in submissions. Further, the submission of the Applicants is worded as if the application for determination before this court is the Judicial Review application and not one for setting aside.

Further, the Applicants have not demonstrated to this court any prejudice they have suffered as a result of the exparte judgment issued other than the execution for costs. Perusing the affidavit in support, there is no mention on entitlement to the suit property **Kimilili/Kamukuywa/2707** by the Applicants. I have also read the ruling of the learned judge that is to be set aside. The judgment was given not because of the non-appearance of the Applicants but based on merit of the documents presented. As is the nature of judicial Review Application, parties do not adduce evidence before the trial court except the court to look at the proceedings undertaken before the Tribunal and draw its own conclusions.

In light of the foregoing circumstances, I find the application for setting aside as lacking in merit for failing to show there is a defence that raises triable issues and no prejudice has been incurred by the Applicants. The same is dismissed but I order that each party will bear their respective costs.

DATED, SIGNED AND DELIVERED In open court this 4th Feb 2014

A. OMOLLO

JUDGE