



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 225 OF 1993

NAGENDRA SAXENA.....PLAINTIFF

VERSUS

MIWANI SUGAR MILLS LIMITED.....DEFENDANT

AND

MIWANI SUGA COMPANY (1989) LIMITED.....INTERESTED PARTY/APPLICANT

R U L I N G

Introduction

1). The applicant Crossley Holdings Limited being aggrieved by orders of this court dated 6th February 2013 seeks that the said order be set aside and or vacated, reversing, annulling and or declaring null and void any action, entry, dealing or activity taken/made in respect of LR No. 7545/3 (I.R 21038) by the respondents at any event.

The application is brought pursuant to Article 40, 50, 159, 162 and Chapter 4 of the Constitution and Order 40 and 51 Rule 15 of the Civil Procedure Rules (Cap 21) Laws of Kenya. The application is based on the grounds stated on the face of the application. The application is supported by annexed affidavit sworn by Sukhwinder Sing Chatte dated 6th March 2013 and annexures thereto.

Facts of the Case

The simple facts of the case are that the 2nd interested party in this suit filed in this court an application dated 22nd February 2012. In that application the 2nd interested party sought for orders:

That the Registrar of Titles or the Principal Registrar of Titles does cancel entry numbers 30, 31 and 32 registered against the title to LR No. 7545 (I.R. 21038) that were made pursuant to the orders given on 24th December 2007.

The order emanating from this application be served upon the Registrar of Titles or the Principal Registrar of Titles for compliance.

The application came up for hearing on two occasions but the same could not proceed as the court was away on official duties. On 6th December 2012, the application was heard before this court where upon the same was allowed in the absence of the 2nd interested party (the applicant herein).

Counsel Submissions

In its submissions, Crossley Holdings raised several issues. The first ground raised is that the application was heard and allowed in the absence of all the parties. Whereas, Crossely Holdings did not deny service, Mr. Oduol argued that the applicant was denied a chance to be heard and while it had triable issues which it could have raised at the hearing of the application.

Counsel further argued that the court lacked jurisdiction to entertain the matter. He argued that the court sitting as a commercial court lacked the jurisdiction to hear a land matter. As a result, any other order that was made in the absence of jurisdiction was a nullity. He stated that Article 162 (5) of the Constitution excluded jurisdiction to hear matters relating to land to the Land and Environment court and as such this court lacked jurisdiction. Counsel relied on the case of **Owners of the Motor Vessel “Lilian S” -VS- Caltex Oil (Kenya) Ltd [1989] KLR 1** in which the court of appeal sitting in Mombasa dwelt on the importance of jurisdiction.

Mr. Nowrjee counsel for the plaintiff made oral submissions only. It was his submission that the court had the unfettered discretion to set aside its own orders taking into account certain necessities. In the present case, he urged the court to take into account that the application by the respondents was based on repealed law. The Notice of Motion was brought under Section 64 of the RTA which had been repealed by the Land Act 2012. Counsel argued that there were several triable issues in the application and the court did not have to concern itself with whether the applicant would succeed.

On the other hand, Mr. Otieno for the respondent argued that, whereas it is a well established principle of the law that every person had a right to be heard, the court could not force any person if he himself did not want to be heard. Affidavits of service annexed to the replying affidavit of David Otieno showed that the applicant had been served and service was not disputed. Counsel relied on **Shah -VS- Mbogo & Another [1976] EA 116**, in which Harris J as he then was stated thus:

“Applying the principle that court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused”.

Determination of Issues

The main issue that begs determination is whether this court should set aside its order. It is not in issue that the applicants were served. The respondent produced return of service to show that the applicant was served and the applicants did not dispute service. Should the court thus vacate its orders?

The court of appeal in **Amayi Okumu Kasiaka & 2 Others -VS- Moses Okware Opari & Another [2013] eKLR** while dealing with a similar issue state as follows:

“The Court of Appeal in England considered the factors to be considered in an application such as the one which faced the learned Judge in Day -VS- RAC Motoring Services Ltd [1990] 1 ALL ER 1007 and held that the court did not need to be satisfied that there was a real likelihood that the defendant would succeed, but merely that the defendant had bonfide triable issues”.

Mr. Nowrjee counsel for the plaintiff raised several issues which required determination. He raised the issue of the application having been brought under section 64 of the RTA. RTA was repealed by the Land Act 2012. What is the effect of an order made under repealed law? Does the issue of jurisdiction suffice? Were the applicants entitled to the orders given in the circumstances? Was the application the right procedure or should they have filed a fresh suit to seek cancellation of title?

This court is satisfied that the applicants were duly served as evidence by the affidavit of service. Mr. Oduol apparently glossed over the same.

However, taking into consideration the totality of this case and the history behind it, it would be unfair to shut the applicants from the judgment seat. The provisions of Article 159 of the Constitution come into play herein. The said provisions grants this court the discretion to allow parties some latitude to be heard despite their past transgression.

I shall however in allowing the application order that the respondent be paid throw away costs of Kshs. 30,000/= which I consider reasonable taking into account the extreme length it went to have their application heard. The said amount should be paid within 30 days from the date of this ruling so as to prosecute the expeditious disposal of this matter.

I do order that the respondent should respond to the application dated 22-2-2012 within the next 14 days and the applicant shall have the right of reply within 14 days after service. The respondent shall have the cost of this application.

Dated, signed and delivered at Kisumu this 18th day of June, 2014.

**H.K.
JUDGE**

CHEMITEI