



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL SUIT NO. 43 OF 2007

JOHN KUNDU KHISA PLAINTIFF

VERSUS

KENNEDY KHISA KUNDU DEFENDANT

RULING

The Applicant herein brought a Notice of Motion dated 16/05/2012 seeking orders for review of the Court's orders of 18/12/2011. The Applicant contends that he had filed an application dated 10/08/2011 seeking stay of execution of ex-parte orders issued by the Court on 25/02/2011. The Applicant contends that the application was heard by the late Justice Muketi who dismissed the same. The Applicant contends that the application was dismissed on the ground that the Applicant had not annexed a draft defence to the application. The Applicant contends that there was already a defence filed in this case and that had the judge noticed that there was a defence on record, she would have arrived at a different decision.

The application was opposed by the Respondent through a Replying Affidavit sworn on 03/09/2011. The Respondent contends that the Applicant has no defence with triable issues and that he has been filing a multiplicity of applications.

I have considered the Applicant's application herein as well as the opposition to the same by the Respondent. The issue which arises for determination is whether the Applicant has raised grounds upon which the Court's Orders can be reviewed. The Applicant contends that during the hearing of the application of 10/08/2011, the Counsel for the Respondent raised the issue of the Applicant's failure to annex a draft defence to his application. He contends that the judge took this as a ground for dismissing the application. The Applicant contends that he has all along known that there was a defence on record and that he was taken by surprise by the Respondent's assertion that there was no defence.

I have looked at the ruling of Justice Muketi in which she stated as follows:-

“The Respondents argued that the Applicant has not even annexed a draft defence which is the prerequisite in applications such as this. That how then is the Court going to know what defence he has so that it is determined whether or not it raises triable issues.

Discretion may be exercised but it has to be judiciously exercised. The Court of Appeal decision of Maina Vs Mugiria Civil Appeal No. 427 of 1982.

This application as it stands is incapable of being determined on its own merit. The application dated 25th January, 2011 is therefore struck off with costs to the Respondents.”

I have looked at the proceedings recorded by the Judge during the hearing of the application. It is recorded that the Respondent's Advocate said that there was no draft defence annexed. The Applicant's Advocate was present when this submission was made. He had the opportunity to point out to the Court in reply that indeed there was a defence on record and if any was required, there was no need for annexing a copy. The Applicant cannot claim that this was something which was not within his knowledge as at the time of the hearing of the application.

The Advocates for the parties had been allowed to file submissions prior to the hearing of the application which is sought to be reviewed. In the Respondent's submissions, it is clearly acknowledged that there was a defence on record. What the Respondent's Advocate raised is the fact that the Applicant had not annexed a draft reply to the application which had proceeded ex-parte. The Respondent's Advocate had clearly stated in his opening remarks during the hearing that he was relying on his submissions and the Respondent's Affidavit. If the judge did not consider the submissions in her ruling or misapprehended the same, this cannot be a ground for review. It can only be a ground for appeal.

The Applicant contends that the judge arrived at the decision because she failed to find one in the file. This is not true as the defence which the Applicant had filed was and is still in the Court file. I find that the application lacks merit. The same is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered in Open Court on this 22nd day of August, 2013.

E. OBAGA

JUDGE

In the absence of Parties. Court Clerk: Lobolia.

E. OBAGA

JUDGE

22/08/2013