



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 72 OF 2007

PETER KINYUA NGACHA..... PLAINTIFF

VERSUS

JAMES WACHIRA MUNENE.....DEFENDANT

RULING

The Plaintiff filed a Notice of Motion dated 22nd August 2012 seeking review of this court's order of 19th July 2012, and an order to reinstate the suit herein. The said Notice of Motion which is supported by an affidavit sworn by the Plaintiff on the same date is based on the grounds that there is a mistake apparent on the face of the order.

The Plaintiff stated that on 19th July, 2012 this Court made a ruling stating that the Defendant herein had passed on 26th November 2006. However, that the Defendant is alive and actively participates in this matter, and that the person who passed on in the year 2006 is Joseph Munene Kithu who sold the Plaintiff the suit land and not James Wachira Munene the Defendant herein. Further, that the Defendant is the son of the late Joseph Munene Kithu, and the Plaintiff exhibited an affidavit and summons for confirmation of grant of letters of administration for the estate of the deceased as his evidence.

The Defendant opposed the Notice of Motion in Grounds of Opposition dated 20th June 2013 on the grounds that the Plaintiff's application is fatally and substantively defective in law as it does not comply with the principles of law governing review of orders. Further, that the said application lacks merits and does not lie in that there is no competent suit to be reinstated as no summons to enter appearance has ever been extracted or served upon the Defendant since the suit was filed on 24/1/2007, and there is pending an application by Defendant/Applicant dated 12/8/2008 to strike out the entire suit on those grounds.

The above arguments were reiterated in written submissions filed by the parties. The Plaintiff's counsel in his submissions dated 10th July 2013 argued that none of the procedural flaws alleged had been proved and that the court be guided by Article 159(2) (d) of the Constitution which enjoins the court to administer justice without undue regard to procedural technicalities.

The Defendant's counsel in submissions dated 5th August 2013 contended that no orders were formally extracted or annexed in support of the Plaintiff's application which rendered the application fatally defective. In addition that the Plaintiff's application did not bear the footnote required by Order 51 Rule 13 (2) of the Civil Procedure Rules to the effect that "If any party served does not appear at the time and place above- mentioned such order will be made and proceedings taken as the court may think just and expedient". The counsel cited various authorities in support of his position that such a footnote is mandatory.

I have considered the pleadings and arguments made by the parties herein, and I will as a preliminary issue consider the objection raised by the Defendant of the procedural flaws in the filing of this application, and find in this regard that they are not fatal. This is for the reasons that the Defendant was not only served with the Plaintiff's Notice of Motion and its hearing dates, but also participated in the hearing of the said Notice of Motion and is therefore not prejudiced by the lack of the footnote required by Order 51 Rule 13 (2) of the Civil Procedure Rules.

In addition the ruling and orders given by this court on 19th July 2012 are on record, and the failure to annex the orders of the court is not fatal. Article 159(2) (d) of the Constitution now requires this court to dispense substantive justice and not to give undue regard to procedural technicalities, and the judicial authorities cited by the Defendant in his submissions are distinguished as they were in decisions made before the enactment of the Constitution of 2010.

I will proceed to consider the outstanding substantive issues, which are whether the ruling given herein on 19th July 2012 is amenable to review, and if so whether the suit herein should be reinstated. I am guided in this respect by Order 45 Rule 1 of the Civil Procedure Rules which provides as follows with regard to the review of orders:

“(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but

from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence

which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

I have perused the ruling given by this court on 19th July 2012 and it is indeed stated therein that the suit is against a Defendant who died on 26th November 2006, and it is on this basis that the court found the Plaintiff's suit to have abated. The Plaintiff has sworn an affidavit to the effect that the Defendant is still alive, and this fact is not disputed by the said Defendant. It is thus the case that to this extent there is an obvious error on the face of the ruling of the 19th July 2012, which makes it amenable to review. The arguments by the Defendant as to the suit not being competent for reasons of failure to serve summons to enter appearance, and his application to have the suit struck out for this reason will have to be heard and considered on their own merits.

The Plaintiffs' Notice of Motion dated 22nd August 2012 is allowed for the reasons given in the foregoing, and I accordingly order that the Plaintiff's suit herein be and is hereby reinstated.

The costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____27th____ day of ____November____, 2013.

P. NYAMWEYA

JUDGE