



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 352 OF 1996

JOHN SENEMA SIRIMANI.....PLAINTIFF

VERSUS

OKERO AYIENGA.....1ST DEFENDANT
STEPHEN OKERO.....2ND DEFENDANT

RULING

1. The Notice of Motion before me has been filed by John Senema Sirimani the plaintiff herein. He prays for the following substantive orders:-

- *THAT the Honourable court be pleased to extend or enlarge time within which the applicant/plaintiff is to file its notice of Appeal and serve the same.*
- *THAT the Honourable court be pleased to enlarge time within which the applicant/ plaintiff is to file its memorandum of appeal and record of Appeal.*

2. The application is premised on the seven (7) grounds on its face, the gist of which is that the applicant was not aware of the judgment until on or about 6th October, 2009. The application is also premised on the affidavit sworn by the applicant on 28th September, 2010. The applicant depones that after the taking of evidence in this case, judgment was reserved for 28th January, 2003 but that when he did not get any communication about the judgment he filed his application to have the matter referred to the Divisional Officer-Ogembo. He avers that he learnt of the handwritten judgment when he applied for proceedings of the case. The applicant contends that his failure to file appeal within the stipulated time was neither deliberate nor willful nor negligent on his part; that the delay was due to the fact that he was not notified of the judgment.

3. Though served, the respondents did not file any replying papers, but at the hearing of the application, the court allowed the 1st defendant/Respondent, **Okero Ayienda** to address the court. He opposed the application on the grounds that the applicant had not demonstrated to the court why he failed to file his appeal within the time stipulated by the law. Secondly, the 1st defendant/respondent submitted that the disputed land does not belong to the applicant and that the 1st defendant/respondent has lived on the suit land for over 40 years, a fact which was disputed by the applicant.

4. From the record, judgment in this case was delivered on 28th March, 2003, dismissing the suit with no

order as to costs. Further on the 7th April, 2008 the court dismissed the plaintiff's application dated 6th July, 2005 for want of prosecution. By that application, the plaintiff/applicant had sought an order for review of the court's judgment dated 28th March, 2003. He had also sought an order staying execution pending hearing and determination of the application for review. It appears from the record that despite the dismissal order of 7th April, 2008 the applicant still went ahead and fixed the dismissed application for hearing on 15th September, 2008 but nothing else is heard about that order taken on 15th April, 2008. The next order made by the High Court Registry was for fixing the application dated 19th May, 2009 for hearing. That application was heard and dismissed by an order of this court dated 6th October, 2009. By that application the plaintiff sought to have the suit referred to the Lands Dispute's Tribunal at Ogembo for hearing and final determination.

5. I have now carefully considered the pleadings generally and the instant application in particular. The issue that arises for determination is whether the applicant is entitled to the order sought. In my humble view the applicant is not entitled to the order sought. I am satisfied that though the applicant's right of appeal is enshrined in the constitution, there has been inordinate delay in bringing the instant application. I am also of the view that the application has been brought in bad faith. Although the applicant says that he only discovered that judgment had been passed in this matter in October, 2009, there is evidence on record showing that on 19th October, 2005, the applicant filed an application seeking a review of the court's judgment herein. The applicant has therefore stated blatant lies on oath. If the applicant wants equity done to him, he must also do equity by stating the truth and not by trying to mislead the court by swearing to falsehoods.

6. In the circumstances of this case, I find that the application before me lacks merit. He same is accordingly dismissed with costs to the 1st defendant/respondent.

7. It is so ordered.

Dated and delivered at Kisii this 26th day of January, 2012.

RUTH NEKOYE SITATI

JUDGE

In the presence of :-

Present in person for Plaintiff/Applicant.

Absent for 1st Defendant/Respondent

Absent for 2nd Defendant/Respondent.

Mr. Bibu - Court Clerk.

RUTH NEKOYE SITATI

JUDGE.