



SETTING ASIDE EXPARTE JUDGMENT:

CONSIDERATION

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.473 OF 2000

HURBERT L. MARTIN.....1ST
PLAINTIFF/RESPONDENT

CYRIL ODENDO.....2ND
PLAINTIFF/RESPONDENT

FACET KHAEMBA (suing as officers of the CHURCH OF GOD OF PROPHECY).....3RD
PLAINTIFF/RESPONDENT

VERSUS

MARGARET J. KAMAR

DAMARIS LENAYARA

EILEEN KENDAGOR

MARY KAPARO (sued as Trustees of Rift Valley

Maendeleo ya Wanawake Organization).....4TH
DEFENDANT/APPLICANT

COMMISSIONER OF LANDS.....6TH
DEFENDANT/APPLICANT

RULING

The history of this dispute was succinctly brought forth in the judgment under review delivered by Koome. J (as she then was) on 24th October 2008.

That history may briefly be reiterated as follows:

The ownership of Nakuru Municipality Block 16/219 measuring 0.53 hectares is being claimed by both parties. The respondents in the instant application contend that the church which they represent, (Church

of God of Prophecy) purchased the property from one George Mutua at a consideration of Kshs.1,350,000/= in 1997 and a certificate of title duly issued on 18th April 1997. The respondent began to develop the property, but, *alas*, on 27th October 2000, they were stopped by the police with a claim that the property belonged to the applicants, Trustees of Rift Valley Maendeleo ya Wanawake Organization. That interference led to the filing of this action, in which the respondents sought, among other reliefs, that the suit property be declared to belong to the respondents and the applicants as trespassers.

It is apparent that simultaneous with the suit, the respondents brought an application to restrain the applicants from interfering with their activities on the suit property. The applicants filed a defence and a counter-claim and also brought an application for injunction against the respondents. Both applications were heard together after consolidation.

The judge (Rimita, J) granted the applicant's application and dismissed that of the respondent. He went further and dismissed the respondents' suit on the ground that they had no *locus standi*. The respondents appealed and the Court of Appeal reversed the decision of Rimita. J and the two applications reinstated with orders that they be heard a fresh.

That decision of the Court of Appeal was rendered on 20th May 2005. On 22nd February, 2006, the respondent took a hearing date for the main suit *ex parte*. On two scheduled hearings, the matter did not proceed. On both occasions, the applicants' counsel was absent. Similarly, on the third occasion, on 31st July 2008, when ultimately the hearing commenced, the applicants' counsel was not in attendance and the matter proceeded *ex parte* and judgment delivered on 24th October 2008, as explained earlier in favour of the respondents.

The applicants filed a motion on 3rd August 2011 for stay of execution pending *interpartes* hearing of the application, which prayer was granted on condition that they deposited Kshs.200,000/= as security for costs. The second prayer sought orders to set aside the judgment of 24th October, 2008 and all consequential orders and the suit as well as the counter-claim to be heard on merit.

The applicants contended that their erstwhile advocate did not inform them about the hearing date or any progress in the matter; that it was only in July, 2011 that they learnt that the matter had been determined against them; that parties ought to be given opportunity in court to ventilate their cases; that they have a strong claim against the respondents and still keen and interested in pursuing the matter; that they ought not to be condemned due to their former advocate's mistake.

Bishop Cyril Oendo, on behalf of the respondents has deposed that the application is bad in law and incompetent as it does not state the provision of the law under which it is brought; that the applicants' counter-claim has no merit ; that Hon. Prof. Margaret Kamar has used her close association with powerful individuals and her position as a cabinet minister to attempt to annex the respondents' land; that there has been a delay of over three years since the entry of judgment, that the judgment conclusively determined the issues in the dispute; that Prof. Kamar is using Maendeleo ya Wanawake for her own personal interest and has indeed sold plots adjacent to the suit property. The respondents further aver that after obtaining stay orders, the applicants took upto 81 days to serve it on them; that the applicants have acted in bad faith by involving the police in the dispute and approaching the Municipal Council of Nakuru to demolish the respondents' structures on the suit property.

Finally, it was submitted that the firm of Mirugi Kariuki and Company Advocates are not properly on record having come on record after the entry of judgment without leave of the court.

Starting with the last and the first technical points, it is clear to me that the last ground is based on the provisions of **Order 9 rule 9** of the **Civil Procedure Rules, 2010**. The rule requires a party who intends after judgment to act in person or to engage another counsel having previously retained one, to do so only with the leave of the court upon an application with notice to all the parties, or upon consent between the outgoing advocate and the proposed incoming advocate or party wishing to act in person, as the case may

be. There is no doubt that the applicants were originally represented by Yano and Company Advocates before the judgment. The firm of Mirugi Kariuki and Company Advocates instead of either filing an application for leave to come on record or a consent between them and the firm of Yano and Company Advocates filed a notice of change of advocates. Is that sufficient ground for a court of justice and equity to disallow an application?

The mischief for the introduction of **Order 9, rule 9**, previously **Order 3 rule 9A** of the revoked **Civil Procedure Rules**, has been adequately explained in numerous decision of the court and I find no need to repeat them. Suffice however, to state that the requirement under **Order 9, rule 9** aforesaid is between the litigants' erstwhile advocates and the proposed in-coming advocate. I see no prejudice that the respondents in this application will suffer by failure of the firm of Mirugi Kariuki & Co. Advocates coming on record without leave. It would be draconian to dismiss the application purely on such a technical ground.

The first point raised relates to the fact that the provision of law under which the application is brought has not been indicated on the application. That argument is based on the provisions of **Order 51 rules 10** which stipulates that:

“10 (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule”

(Underline supplied)

The underlined parts supply the answer to the respondents' object on that ground. I also need to point out at this stage that both the applicants and the respondents have spent considerable energy arguing matters which are relevant only at the hearing of the main suit. At this stage, an application for setting aside an *ex parte* judgment, under **Order 13, rule 7**, is concerned with the exercise of the court's discretion which must be done only to achieve the ends of justice.

The courts over the years have developed the parameters for the exercise of this discretion. See, for instance, **Maina V Mugiria**, Civil Appeal No. 27 of 1982 to which learned counsel for the applicants made reference. In **Tabaki Freight Services International Ltd V Margaret Mwhaki Kiarie**, Nbi HCCC No. 2027 of 1997 the law was summarized thus:

“The court's power to set aside an *ex parte* judgment is very wide and is exercised without limits or restriction except that if the judgment is set aside or varied it must be done on terms that are just. The power is exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but it will not be exercised to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice (see **Shah V Mbogo (1969) EA 116). The matters to be considered in deciding the application was discussed in **Jammades V. Sodha V. Gordandas Hemraj** (1952) URL 7. In that case, Ainley, J said as follows:**

“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregular should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court”

The court, from the foregoing, is expected to consider:

- a) the reason for the failure to appear;
- b) the merits of the applicants' case or defence;
- c) whether costs would be reasonable compensation to the plaintiff for the delay, and;

d) that the application is not motivated only by a desire to obstruct or delay the course of justice.

I reiterate that the hearing date, 31st July 2008, was taken *ex parte* by counsel for the respondents. When the matter came up for hearing on that day, the court was satisfied that there was proper service and proceeded to hear the respondents' witness. Indeed from the affidavit of service dated 28th July 2008 & filed on 31st July, 2008, the applicants' advocate was served. The applicants have deposed that between 2007 and 2011 they inquired on the status of the matter from their advocate who assured them that the matter had not been listed for hearing. The advocate who has put them in this situation has not even sworn an affidavit to explain her circumstances. Be that as it may, it suffices that the applicants made an effort and relied on the expertise and experience of their advocate. They cannot be punished for the omissions of their advocate. There is nothing to show, even remotely, that the applicants' intention in bringing this application, is to obstruct or delay the finalization of this dispute. Their defence and counter-claim raise weighty issues. The dispute involves land, an emotive aspect of life in the country. It would amount to gross miscarriage of justice to deny the applicants a chance to be heard.

For these reasons I allow this application and order that the judgment of 24th October, 2008 as well as consequential orders be set aside. The suit will be set down for hearing on a priority basis after parties have complied with pre-trial procedures.

I award costs to the respondents.

Dated, Signed and Delivered at Nakuru this 25th day of January, 2012.

**W. OUKO
JUDGE**