



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 339 of 2010**

**RAMOKIA HOUSING CO-OPERATIVE SOCIETY LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**GEORGE KURIA MWAURA .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KIMANI KAHUHU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ARTHER K. WAWERU, ANTONY**

**K. NJUGUNA AND SAMWEL M. MUNGAI AS TRUSTEES**

**OF**

**MT. HEBRON SELF HELP GROUP.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

The application for determination before this court is a Notice of Motion dated 10<sup>th</sup> March 2011 brought by the Plaintiff under Order 10 Rule 11, Order 45 Rule 1, and Order 51 Rule 1 of the Civil Procedure Rules. The application is supported by the supporting Affidavit of Daniel Oganda and is seeking to set aside orders made on 6<sup>th</sup> December 2010 striking the application dated 11<sup>th</sup> October 2010, and that the said application proceed to be heard on merit.

The Plaintiff states that it had initially sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with whom it had earlier transacted in the sale of LR No.9363/85, and subsequently discovered there were further transactions involving sale of the said land to the 3<sup>rd</sup> Defendant. The Plaintiff was as a result, amended to join the 3<sup>rd</sup> Defendant and the Plaintiffs' earlier application dated 13<sup>th</sup> July 2010 thereby rendered nugatory as orders sought could not be directed to the 3<sup>rd</sup> Defendants who had been joined in the suit. The Plaintiff further states that it therefore became necessary to file a fresh application dated 11<sup>th</sup> October 2010 to include the 3<sup>rd</sup> Defendant, and that this application was struck out on a technicality as the previous application dated 13<sup>th</sup> July 2010 was then pending. Further, that subsequent to the striking out of the application dated 11<sup>th</sup> October 2010 the Plaintiff withdrew the application dated 13<sup>th</sup> July 2010 by way of a Notice of Withdrawal dated 7<sup>th</sup> February 2011 and filed on 8<sup>th</sup> February 2011.

The Defendants' Advocate filed a Notice of Preliminary Objection dated 19<sup>th</sup> May 2011 in which he raised the following objections:-

1. That the Applicant being dissatisfied with the striking out of the application dated 11<sup>th</sup> October 2010 ought to have filed an appeal against the ruling.
2. That the Applicants instant application dated 10<sup>th</sup> March 2011 is to wit:-
  - a. Illegal invalid and incorrect
  - b. Frivolous, vexatious and an abuse of the court process
  - c. Lacks legal legs as it is based on no legal foundation.
3. That the application has not been brought within a reasonable time after the ruling indicating the applicant's indolence.
4. That the application is incurably defective
5. That the application dated 11<sup>th</sup> October 2010 sought to be reinstated has been overtaken by events and the Applicant has failed to make out a prima facie case with a high probability of success that would warrant the Honourable Court to invoke its inherent jurisdiction in granting the equitable remedy of injunction against the Respondents.
6. That the Applicant has been brought the application under the wrong provisions of the Civil Procedure Rules.

With due respect to the Defendants' Advocate, it is my opinion that the said preliminary objection does not raise any pure points of law as required by the decision in **Mukisa Biscuit Manufacturing Co. Ltd v Westend Distributors Ltd (1969) E.A. 696**, but instead requires this court to ascertain facts through further evidence and argument, and to exercise judicial discretion in determining the grounds raised. It is therefore accordingly dismissed.

The application was substantively opposed in a Replying Affidavit filed by the 1<sup>st</sup> Defendant wherein he deponed that the properties in issue namely LR No. 9363/191 and 9363/197 were transferred to the 3<sup>rd</sup> Defendant for value for consideration by way of a transfer dated 15<sup>th</sup> June 2009. Further, that certificates of title were subsequently issued to the 3<sup>rd</sup> Defendant on 21<sup>st</sup> June 2010 when there was no suit pending in court between the parties herein over the said subject matter. He further stated that the property known as LR No 9363/85 which is referred to by the Plaintiff in their application was subdivided in the year 2005 and sold to various parties, and the application is therefore misplaced, fictitious, frivolous and an abuse of the court process.

The application was also opposed by the 3<sup>rd</sup> Defendant in a Replying Affidavit sworn by its Chairman, Arthur K. Waweru, on 19<sup>th</sup> May 2011. He deponed that the 3<sup>rd</sup> Defendant purchased plots No. 9363/191 and 9363/197 from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants for value consideration after due diligence, and upon transfer they obtained title for the said properties from the Registrar of Titles. Further, that after obtaining title the 3<sup>rd</sup> Defendant sold the properties to another party called John K. Kihagi, who subsequently applied to the relevant authorities to have the properties amalgamated, subdivided and for change of user. The Deponent stated that the 3<sup>rd</sup> Defendant are total strangers to the suit as they have never had any transaction with the Plaintiff in respect of the properties in issue or at all.

The Plaintiff's and Defendants' Advocates also filed submissions in which they reiterated the arguments made in the foregoing.

Are the orders given by this Court on 6<sup>th</sup> December 2010 striking out the application dated 11<sup>th</sup> October 2010 amenable to review? That is the issue before us in this application, and I am guided by Order 45 rule 1 of the Civil Procedure Rules provides the circumstances under which an order can be reviewed. The

said provisions state that any person considering himself aggrieved by:

- a. a decree or order from which an appeal is allowed but from which no appeal has been preferred or
- b. a decree or order from no appeal is hereby allowed

and 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 my apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

The Plaintiff in this application is relying on the fact that the application dated 11<sup>th</sup> October 2010 was struck out on a technicality, and that the offending application that was the cause of the said technicality has since been withdrawn. I have perused the Ruling by Honourable Justice Okwengu (as she then was) delivered on 6<sup>th</sup> December 2010, and do note that indeed the only reason for upholding the Defendants' preliminary objection to the application dated 11<sup>th</sup> October 2010, and for striking out the said application was the existence of an earlier pending application that raised the same issues. This earlier application had in addition not been decided on its merit. I therefore find sympathy with the Plaintiff's argument that their application was struck out on a technicality. This court is now enjoined by Article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to dispense substantive justice without undue regard to technicalities, and I find this sufficient reason to set aside the orders striking out the application dated 11<sup>th</sup> October 2010.

The only issue I need to consider raised by the Defendants in their submissions is whether there has been unreasonable delay by the Plaintiff in bringing the application for review. The orders sought to be reviewed were granted on 6<sup>th</sup> December 2010, and the Plaintiff's Advocates thereafter filed a Notice of Withdrawal of their earlier application on 8<sup>th</sup> February 2011. From the Court record, orders granting such withdrawal were issued by the Deputy Registrar on 6<sup>th</sup> April 2011, and the application herein filed on 7<sup>th</sup> April 2011. I find that in the circumstances the Plaintiff did act with alacrity and are not culpable of any unreasonable delay. The other arguments raised by the Defendants herein are best made in response to the merits of the application dated 11<sup>th</sup> October 2010.

For these reasons the Plaintiff's application dated 10<sup>th</sup> March 2011 is allowed and the orders made on 6<sup>th</sup> December 2010 striking the application dated 11<sup>th</sup> October 2010 are hereby set aside. The application dated 11<sup>th</sup> October 2010 shall accordingly proceed to be heard on merit, and the Plaintiff shall set a hearing date for the same within 30 days of the date of this ruling.

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_20<sup>th</sup>\_\_\_\_ day of \_\_\_\_November\_\_\_\_, 2012.

**P. NYAMWEYA**

**JUDGE**