



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 2128 of 1982

NGUGI KAMAU..... PLAINTIFF

VERSUS

KAMAU NG'ANG'A..... DEFENDANT

RULING

There are two applications for determination, and both are brought by the Plaintiff. The first is a Chamber Summons dated 10th February 2011 brought under Order 51 Rule 15 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act, seeking orders that the dismissal orders against the application dated 17th July, 2003 in default of appearance and/or attendance that were granted on 1st December, 2009 be set aside, and that the Plaintiff be allowed to present the application dated 17th July, 2003 for hearing on merits inter-partes.

This application is grounded on the facts that the non-attendance in court on the 1st December 2009 for the hearing of the application dated 17th July 2003 was due to a mistake of the Plaintiff's Advocate, who was waiting outside the court, and that the application was not called out loudly or by names if the parties or case number. This application is supported by the affidavit sworn on 10th February 2011 by Anthony Kahuthu, an Advocate of the High court of Kenya, wherein he explains the circumstances leading to the dismissal orders given on 1st December 2009, and wherein he also stated that this suit being a 1982 matter should be decided on merit, as the Plaintiff's land is bound to be lost forever to a stranger.

This application is opposed and the Defendant swore a replying affidavit on 29th April 2011 wherein he stated that the application dated 17th July, 2003 had earlier been dismissed on the 19th July, 2006, and was only reinstated after the Plaintiff's application dated 30th January 2007 was allowed. Further, that even after the said application dated 17th July 2003 was reinstated the Plaintiff did not exercise diligence to have it prosecuted. He further swore that the award that is the subject of the suit herein was made on 14th October 2001 and the Plaintiff has never bothered to file an appeal or object to the said award up to date.

The second application for determination is a Notice of Motion dated 13th December 2011 brought under Order 12 Rule 7 and Order 51 Rule 15 of the Civil Procedure Rules and section 3A and 3 of the Civil Procedure Act seeking for orders that:-

1. That the Order/Ruling of 1st December 2011 allowing the Defendant's Application dated 15th November 2011 be stayed pending the hearing and determination of this Application.
2. That the said order issued on 1st December 2011 allowing the Defendant's Application dated 15th

November 2011 be set aside altogether.

The grounds for the second application are that Plaintiff's Advocate was not in court on 1st December 2011 when the Defendant's Application dated 15th November 2011 was scheduled for mention, as he was in the Embu High Court on Succession Cause No. 378/2008 and 428 of 2009. Further, that he was not aware of the said application as he had only been served on 29th November 2011, and became aware of the application late in the evening on 30th November 2011. Furthermore, that the application served on 29th November 2011 did not have a hearing date or a mention date on it when served. The Plaintiff's Advocate swore a supporting affidavit on 13th December 2011 reiterating these facts, and also stated that the orders issued on 1st December 2011 were grave on the Plaintiff as they meant transferring and subdividing his land on orders of a land tribunal irregularly consulted when it had no powers and through fraud.

This application was also opposed, and the Defendant swore a replying Affidavit on 22nd December 2011 wherein he deponed that the Plaintiff's advocates were properly served and they acknowledged receipt by signing and stamping at the front of the application which was returned to court.

Are the orders given by this Court on 1st December 2009 and 1st December 2011 amenable to review, and is there just cause for this court set aside the said orders? That is the issue before us in this application, and I am guided by Order 45 rule 1 of the Civil Procedure Rules which provides the circumstances under which a court 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 may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

I note that the application dated 17th July 2003 that is the subject of the Plaintiff's first application and that was dismissed on 1st December 2009 sought to set aside an award and judgment made herein, which is alleged to have been irregular, and that the suit herein proceeds afresh. I however also note that the Plaintiff delayed for over one year before filing the application dated 10th February 2011 to set aside the said dismissal orders.

The Defendant's application dated 15th November 2011 that was allowed on 1st December 2011, and which is the subject of the Plaintiff's second subject application was for orders that “The Deputy Registrar be directed to sign and execute the transfer of land R.L.I and an application for consent of Land Control Tribunal Board form and all relevant transfer documents in respect of parcels of Land known as Nyandarua /Karati/2504 and Nyandarua/Kirati/2505 in favour of the applicant/defendant”. This order in effect executes the decree complained of by the Plaintiff in his application of 17th July 2003. It is also not lost to the court that the Defendant's application of 15th November 2011 was filed during the pendency of the Plaintiff's first application dated 10th February 2011. I have also perused the affidavit of service sworn by Humphrey W. Okuku on 30th November 2011 and filed on 1st December 2011, and note that indeed the Defendant's application dated 15th November 2011 was served on the Plaintiff's Advocate on 29th November 2011 and received under protest.

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 of 1st December 2009 dismissing the application of 17th July 2003 for non-attendance. I also find that there was late service and inadequate notice given to the Plaintiff's Advocate of the Defendant's application of 15th November 2011 and hereby also set aside the orders granted with respect to that application on 1st December 2011 for this reason.

The Plaintiff's applications dated 17th July 2003 and the Defendant's application dated 15th December 2011 shall now proceed to be heard on their merits together. The Plaintiff's Advocate shall take out hearing dates for the two applications at the registry within 60 days of the date of this ruling. In default thereof the Defendant shall be at liberty to proceed with the hearing of its application dated 15th December 2011.

The costs of the Plaintiff's applications dated 10th February 2011 and 13th December 2011 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____13th____ day of ____December____, 2012.

P. NYAMWEYA

JUDGE