REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI Miscellaneous Civil Application 159 of 2008

REPUBLIC……..…….…APPLICANT

VERSUS

THE LAND DISPUTE TRIBUNAL MATHIOYA….1ST RESPONDENT

SENIOR RESIDENT MAGISTRATE KANGEMA……..2ND RESPONDENT

INTERESTED PARTY……ISAAC KARIUKI KAMWITHA

EXPARTE APPLICANT ……BILHA NJERI KAMWITHA

RULING

The subject matter of this ruling is the summons dated 25th January 2010 in which Bilha Njeri Kamwitha, the exparte applicant, seeks to have exparte order made on 25th September 2009 set aside. The summons is supported by the affidavit of Charles Wahome Gikonyo sworn on 21st January 2010. Isaac Kariuki Kamwitha, the interested party herein, filed grounds of opposition and a replying affidavit he swore to oppose the summons. The honourable Attorney General on behalf of the Respondents filed grounds of opposition to resist the summons.

I have considered the grounds set out on the face of the summons plus the facts deponed in the affidavits filed for and against the summons. I have further considered the grounds of opposition filed by the interested party and the Respondent. The facts leading to the filing of the summons dated 21st January 2010, are quite simple and straightforward. Isaac Kariuki Kamwitha, the interested party herein filed a complaint before the Mathioya Land Dispute's Tribunal claiming a portion measuring one (1) acre to be excised from L.R. No. Loc. 19/Gacharageini/2124. The aforesaid parcel of land is registered in the name of Bilha Njeri Kamwitha, the exparte applicant herein. The Mathioya Land Disputes Tribunal heard and determined the dispute in favour of the interested party herein in its decision dated 16th August 2002. The Interested Party was awarded 1 acre to be excised from L.R. No. Loc. 19/Gacharageini/2124. The aforesaid decision was adopted as the decision of the Kangema Senior Resident Magistrate's court vide L.D.T. No. 24 of 2002. The exparte applicant upon obtaining leave, filed the Notice of Motion dated 28th July 2008 in which she sought to have the decision of the Mathioya Land Dispute's Tribunal Vide L.D. Case No. 15 of 2002 and that of the Kangema Senior Resident Magistrate's court L.D.T. case 24 of 2002 to be removed into this court for quashing by an order of Certiorari. The aforesaid motion was fixed for interpartes hearing on 21st September 2009 which date was declared a Public Holiday, that is **IDD FITTUR.** It would appear all matters listed for the aforesaid date were rescheduled for 25th September 2009. The motion was consequently dismissed on 25th September 2009 when the exparte applicant and her counsel failed to turn up to

prosecute the motion.

The exparte applicant is now seeking for the aforesaid order to be set aside because they were not aware that the motion had been rescheduled for hearing on 25th September 2009. The interested party and the Respondent have raised two preliminary points against the summons which must be disposed of first before looking at the merits of the summons. First, it is argued that the jurisdiction of the court has not been properly invoked in that the provisions of order LIII rule V do not exist. Secondly, that the order sought does not lie within the provisions of order LIII of the Civil Procedure Rules. It is said that the law bars this court from going back to a decision it has made under S. 8(3) of the Law Reform Act. On the first preliminary point, Mr. Wahome, learned advocate for the exparte applicant conceded the defect. He however urged this court to excuse the defect on the ground that the same was a typographical mistake which was made inadvertently by his office. He said he meant to refer to "*order LIII rule 5*" of the Civil Procedure Rules instead of "*order LIII rule V*". I have considered the two divergent submissions. I am prepared to accept that the exparte applicant meant to refer to order LIII rule 5 of the Civil Procedure rules but due to a typographical mistake she referred to order "*LIII rule V".* As to whether or not order LIII rule 5 is the appropriate provision, is a matter I will deal with later in this ruling. As regards, the second preliminary point, Mr. Wahome was of the view that this court has the discretion to return back to its decision under section 8(5) because the law used the word '*may'.* According to Miss Munyi, learned litigation couunsel, this court became funtus officio when it dismissed the motion on 25th September 2009. I have carefully considered the rival submissions over this issue. It is not dispute that the provisions of section 8(3) of the Law Reform Act (Cap. 26 Laws of Kenya) bars this court from returning back to its decision. The provision clearly stipulates that an aggrieved party's remedy is to appeal to the court of Appeal under section 8(5) of the same Act. It is also not in dispute that the Honourable Mr. Justice M.S.A Makhandia, dismissed the substantive motion on 25th September 2009 for want of attendance on the part of the exparte applicant and her counsel. It is obvious that the learned judge did not dismiss the motion on its merits but for want of attendance. He did so in exercise of this court's inherent jurisdiction which is not specified under the Law Reform Act nor in order LIII of the Civil Procedure Rules. The provisions of section 8(3) of the Law Reform Act is only applicable when the motion is decided on its merits. It was not meant to apply to situations like the one befalling this case. In such a case the court retains its inherent power to revisit an order it had made in exercise of that power. The court is endowed with such powers to enable it act effectively in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempt to thwart its processes..

Having disposed of the second preliminary issue, let me now go back to the issue touching on the applicability of the provisions of order LIII rule 5 of Civil Procedure Rules. I have carefully perused the aforesaid provision and it only relates to how the hearing of the substantive motion should be heard. That provision has no relevance to the application before court. The preliminary objection in that regard were merited. However it will not determine the summons because the application before court is treated as one which this court's inherent jurisdiction is invoked. The court's residual power has been invoked hence a party does not have to cite any provision or follow any format like say a summons or a motion. Any of the two forms can be used to provoke the court to exercise its inherent power so long as there is no specific provision provided by the law and or rules. Caution must be taken when accepting applications in exercise of this court's inherent power. A party must state that it is beseeching this court to exercise its inherent jurisdiction. I will accept the summons on this basis.

Having disposed of the preliminary points of law, let me now look at the merits of the summons. It is the submission of the exparte applicant that she was not aware that all matters scheduled for hearing on 21st September 2009 had been adjourned to 25th September 2009. The interested Party depones that the court informed all litigants and Advocates five days in advance that all the matters fixed for hearing on 21st September 2009 would be heard on 28th September 2009. Two issues arise from the aforesaid affidavit and that of Kebuka

Wachira sworn on 9th February 2010. The deponents refer to the order of 28th September 2009 yet the order being sought to be set aside is that of 25th September 2009. The deponents do not state when the court told the parties that matters listed for hearing on 21st September 2009 had been rescheduled for 25th September 2009. There is no notice annexed to those affidavits. There is no averment as to whether or not the exparte applicant and her counsel were aware of the court's directive or notice rescheduling the matter as aforestated.

In the end I am convinced that the Exparte applicant has explained why she and her counsel were absent from court on 25th September 2009. In exercise of my inherent power I hereby grant the orders sought in the summons dated 25th January 2010. Consequently, the order made on 25th September 2009 dismissing the Notice of Motion dated 28th July 2008 is set aside. The aforesaid motion is reinstated and should be fixed for hearing on priority basis. Costs of the summons to abide the outcome of the aforesaid motion

Dated and delivered this 17th day of March 2010.

J.K. SERGON

JUDGE

Miss Koli h/b Wahome for Applicant. Wahome for 1st and 2nd Respondents and Wachira

for interested party.

J.K. SERGON

JUDGE