



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 478 of 2004

PRISCILLA WAMBUI KAMAU.....APPELLANT

VERSUS

MARGARET WAMBUI KAMAU.....RESPONDENT

(Appeal from the ruling of the learned Principal Magistrate Thika Mr. Alex Anambo delivered on 9th June, 2004 in Civil Suit No.154 of 2001)

J U D G M E N T

1. Priscilla Wambui Kamau (hereinafter referred to as the appellant), is dissatisfied with the ruling delivered by a Principal Magistrate in Thika Civil Case No.154 of 2001. She has lodged a memorandum of appeal dated 6th July, 2004. The memorandum of appeal does not however state the specific date of the ruling.

2. Margaret Wambui Kamau is the respondent to the appeal. The appeal was argued before Kubo J. on the 18th November, 2008. The Honourable Judge having retired from the service, it has now fallen upon me to prepare the judgment.

3. From the record of appeal and the submissions made before the presiding judge, I have gathered the following. The genesis of the appeal is a suit which was filed by the respondent in the Chief Magistrate's Court at Thika. The respondent had sued Samuel Kamau Karuthui (hereinafter referred to as Karuthui), seeking an order directing Karuthui to transfer Land parcel number Loc 2/Makomboki/416(hereinafter referred to as the suit property), to the respondent pursuant to an agreement entered into between the respondent and Karuthui, in the alternative the respondent sought refund of the sum of Kshs.53,700/= allegedly paid by the respondent to Agricultural Finance Corporation to redeem a charge created over the suit property.

4. In response to the respondent's claim, Karuthui filed a statement of admission indicating he was ready and willing to effect the transfer to the respondent. Consequently, following a consent letter signed by the parties a consent judgment was recorded in favour of the respondent that Karuthui do transfer the suit land to the respondent.

5. The appellant who claims to be a wife to Karuthui is aggrieved by the dismissal of her application dated 29th January, 2004. In the application the appellant sought to be made a party to the suit filed by the respondent. The appellant also sought to have the consent judgment reviewed and set aside. The appellant's application was anchored on the allegation that the respondent did not disclose to the court all material facts.

6. The appellant swore an affidavit in support of the application in which she explained that the respondent and the appellant were both married to Karuthui, and that Karuthui was a sick man who was under a disability and could not therefore enter into a consent judgment. The appellant maintained that the consent was procured

through fraud and non-disclosure that the appellant and her children were residing on the suit land.

7. In a replying affidavit sworn on 3rd February, 2004, the respondent objected to the application contending that the same was *res judicata* as a similar application had been dismissed by the court. The respondent further maintained that the application was misconceived and an abuse of the process of the court as the appellant had also filed a suit against the respondent over the suit property which suit was still pending in the High Court.

8. The application was argued before the Principal Magistrate on 15th March, 2004. The court was urged to allow the appellant to be joined as a party to the suit, and further to review the consent judgment under Order XLIV Rule 1 as the same was procured by fraud.

9. For the respondent, it was argued that the prayer for review was premature as the same could not be entertained before the appellant being joined as a party to the suit. It was maintained that the application for the appellant to be joined as a party to the suit was *res judicata* a similar application having been dismissed.

10. In his ruling, the Principal Magistrate found that the appellant had previously made an application to be joined as a 3rd party to the suit but that the application was dismissed, and that the appellant took no action to have the order of dismissal set aside or appeal against the dismissal, and therefore she could not file a fresh application. The magistrate further held that the application for review of the consent judgment could not succeed in the light of rejection of her prayer to be joined as a party to the suit. The magistrate further noted that the appellant had filed a suit in the High Court in respect of the same land. He therefore dismissed her application.

11. Being aggrieved by that judgment, the appellant filed a memorandum of appeal raising 3 grounds as follows:

- (i) The learned magistrate erred in refusing to make the appellant a party to the suit.
- (ii) The learned magistrate erred in refusing to review the judgment despite the proof of fraud in the handling of the civil appealed against.
- (iii) The learned magistrate erred in failing to consider the contents of the affidavits in support of the applications in the suit.

12. In support of the appeal, Mr. Wandai who appeared for the appellant argued that Order XVI Rule 6 of the Civil Procedure Rules allows for a fresh application to be filed where an earlier one was dismissed for want of prosecution provided limitation period under Cap 22 had not set in. Mr. Wandai submitted that under Section 2 of the Civil Procedure Act, a suit included an application. He therefore maintained that the dismissal of the application was wrong. It was contended that the magistrate failed to address the reasons why it was necessary to have the appellant joined as a party to the suit.

13. For the respondent it was submitted that the appellant's application which was dismissed was an abuse of the court process; in the light of the dismissal of the previous application and the fact that the appellant had filed a suit in the High Court over the same subject matter.

14. I have given due consideration to the arguments which were made before Kubo J. I have also carefully perused the court record. I do note that apart from the application dated 29th January, 2004, which resulted in the ruling subject of this appeal, there were 3 other similar applications filed by the appellant. The first application was one dated 23rd July 2001 which was filed by the appellant in person for review of the orders of 12th March, 2001. This application was stood over generally and remains pending to date. The second application which was dated 3rd December, 2001, was filed on 5th December, 2001 by J.G. Waweru seeking orders for the appellant to be joined as a defendant. That application was dismissed for non attendance on 17th June, 2002.

15. The 3rd application was one dated 9th October, 2002, filed on 14th October, 2003 by Karuga Wandai,

for the appellant to be made a party to the suit and for review of the consent judgment. The application was struck out on 26th January, 2004 for incompetence as Karuga Wandai & Company only filed a notice of appointment on 29th January, 2004.

16. From the above it is apparent that the appellant's application dated 29th January, 2004 was improperly before the court as there was another similar application which was pending i.e. the one dated 23rd July, 2001 which was filed by the appellant in person. Secondly, the appellant's application dated 3rd December, 2001 which was also seeking similar orders as the application dated 29th January, 2004 was dismissed on 17th June, 2002.

17. The appellant appears to be under the mistaken belief that the application was dismissed for want of prosecution under Order XVI of the Civil Procedure Rules, such that the appellant could subject to the limitation period, bring a new application. Nonetheless, it is apparent that the appellant's application dated 3rd December, 2001, was actually dismissed on 17th June, 2002 for non-attendance at the hearing of the application. That means the application was dismissed under Order IXB Rule4(1) of the Civil Procedure Rules. and therefore as provided under Order IXB Rule 7(2) of the Civil Procedure Rules, no fresh application could be filed but the appellant could only apply for the order of dismissal to be varied and or set aside. Therefore it was wrong for the appellant to ignore the order of dismissal made on 17th June, 2002 and file a fresh application.

18. The application dated 29th January, 2004 was therefore misconceived and an abuse of the court process. Further the appellant's main reason for seeking to be enjoined as a party and to have the consent order set aside was that Karuthui was sick and under a disability. Assuming that to have been the case, the correct approach was to first have a guardian *ad litem* appointed to represent the interest of Karuthui under Order XXXI Rule 4, 5 and 15 of the Civil Procedure Rules. In other words the appellant could not purport to be acting in the best interest of Karuthui without first being appointed a guardian *ad litem*.

19. Finally the appellant having filed HCC No.1542 of 2002 against the respondent seeking the same redress as the one sought in his application of 29th January, 2004. It would not have been proper to have the same issues tried in another suit.

20. For the above reasons, I come to the conclusion that the appellant's application dated 29th January, 2004 was properly dismissed and that this appeal has no merit. It is accordingly dismissed with costs.

Dated and delivered this 16th day of April, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Ms. Amondi H/B for Macharia for the respondent

Eric - Court clerk