



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Civil Case 153 of 1995

NTARANGWUI M'IKIARA PLAINTIFF
VERSUS
THE COMMISSIONER OF LANDS 1ST DEFENDANT
MUNICIPAL COUNCIL OF MERU 2ND DEFENDANT
JACKSON MUNYUA MUTUERA 3RD DEFENDANT

RULING

The application dated 22nd July 2009 is brought under Order XLIV Rule 1 of the Civil Procedure Rules. The plaintiff by that application seeks that the court do review the order of the court made on 25th July 1996 and that the court do order that the two cases that is, High Court Civil Case No. 153 of 1995 and HCC No. 202 of 1995 be tried separately. The order of 25th July 1995 had consolidated those two suits. Order XLIV Rule 1 provides as follows:-

- “1. (1) Any person considering himself aggrieved –
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed,

and who 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.”

In considering that Rule, I will say that this application for review has been brought after inordinate delay. The latter part of that Rule provides that review should be made without delay. The orders sought to be reviewed was made on 25th July 1996. The application to review that order is dated 22nd July 2009. The plaintiff was obligated to explain the delay in filing that application. In this regard, I rely on the case of Nderitu Gicheru Vrs. Cecilia Gathoni Gatere Civil Application No. 122 of 2008 where D.K.S. Aganyanya J.A. had this to say:-

“It is now settled law that whenever there is a delay, the party guilty of the same should offer some explanation for it before an extension of time in his favour can be considered: Kenya Ports Authority Vs. Silas Obengele Civil Application No. 297 of 2004 (unreported).

In the case of Reliance Bank Limited (In liquidation) & 2 others Vs. southern Credit Bank Corporation Civil Application No. 118 of 2007 (UR 78/2007) R.S.C. Omolo J.A. had this to say:-

Then there is the delay of 64 days to which I have referred and in my view that delay remains unexplained, and as I have stated, any amount of delay, even if it be one day ought to be explained in some way.” (Emphasis provided).”

The plaintiff did not explain the delay, in fact, he was silent over that matter in this affidavit in support of the application. On that ground

alone, this application will be dismissed. The pertinent part of the plaintiff's affidavit in support of the application are:-

"That on 25th July 1996 when the parties were controvverting certain applications, the judge made an abrupt order calling it, "by consent" and he ordered consolidation of the two suits.

That in the mean time, the A.G. has filed a long affidavit with several annextures which seems (sic) that the A.G. has already taken sides and he is sqmerely (sic) (perhaps he meant squarely) on the side of the 3rd defendant who is my real opponent as he wants to grab my land.

The Attorney General's position is prejudicial to my interest in CC Number 202/1995 and therefore that suit should be separated from CC Number 153/95 since it would be problematic to me to prosecute both suits in one suit."

The plaintiff does not state whether he was in court when the judge made the consent order on 25th July 1996. If he wasn't in court and that information had been relayed to him, he then needed to disclose the source of his information. But perhaps of more importance as seen from the above quote is his disclosure of what has aggrieved him to the extent that he now seeks review. He has stated that the A.G has become partisan and will prejudice his case. The principles that govern review applications under order XLIV Rule 1 were considered in the case National Bank of Kenya Limited Vs. Ndungu Njau Civil Appeal No. 211 of 1996 (unreported), thus,

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and shouldn't require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provisions of law cannot be a ground for review."

Indeed, none of the conditions set out in Order XLIV Rule 1 are present in the plaintiff's application. There is no discovery of new important matter or evidence that has been shown by the plaintiff. The plaintiff has also not shown an error apparent on the record. The 3rd defendant filed a replying affidavit where he deponed thus:-

"That I was in court on 25th July 1996 and I wish to confirm that the order of 25th July 1996 consolidating this matter with Meru HCC No. 202 of 1995 was made following a consent by the parties and their advocates and it is grossly misleading to state that the same was by the court on its own motion.

That in the course of canvassing an application dated 17th June 1996 it immerged that there was an earlier application dated 8th February 1995 filed in a different suit which had been dismissed by the lower court.

That is the point that the existence of Meru HCC No. 202 of 1995 was brought to the attention of the court.

That counsel for the plaintiff then sought to have the two suits consolidated."

There was no further affidavit to controvert those depositions by the 3rd defendant. It would therefore seem that the plaintiff counsel was the one who sought consolidation of the two suits. How then can the plaintiff now complain of that order? The plaintiff if he was aggrieved by the order of 25th July 1996 ought to have extracted the same to enable this court determine his grievances. That was clearly stated in the case G.M. Jivanji Vs. M. Jivanji & Another [1929 – 30] 12 KLR 44 where the Court of Appeal for East Africa held:-

"Apart from any consideration whether the course adapted by the learned judge in relation to the exparted order of the 8th July 1930 was or was not well founded, the question emerges as to the precise character of the grievance which must be experienced by a person applying for a review under that Order must be "aggrieved by a decree or order." The words "decree" and "order" are here used in the sense set out in the definitions Section 2 of the Civil Procedure Ordinance. Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree his application should be for a review of the judgment upon which it is based. But in my opinion, however aggrieved a person may be at the various expressions contained in a judgment as a whole, that person cannot under Order XLII appear before the judge who passed the judgment and argue

whether this or that passage in the judgment is tenable or untenable. The ratio decidendi expressed in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievances to a suit. In these proceedings no resultant decree on the 29th August, 1930, had yet come into existence. It is the duty of a party who wishes to appeal against or apply for a review of a decree or order to move the court to draw up and issue, the formal decree or order.”

The plaintiff having failed to extract the order the subject of this application leads this court to find that the application is for rejection. I find that the Chamber Summons dated 22nd July 2009 is without merit and I dismiss the same and the costs thereof are awarded to the 3rd defendant.

Dated and delivered at Meru this 28th day of May 2010.

MARY KASANGO
JUDGE