



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 600 of 2009

JEREMIAH MBUGUA WANG'ATI.....APPELLANT

AND

JAMES KIARIE NG'ANG'A1ST RESPONDENT

LAND DISPUTES TRIBUNAL,

KIAMBU WEST DISTRICT2ND RESPONDENT

R U L I N G

1. The application before court is the 1st Respondent's Notice of Motion dated 24/11/2009 brought under Sections 3A and 80 of the Civil Procedure Act, Order 44 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The Applicant seeks an order to review and vary or set aside the orders of this court made on 10/11/2009 (Okwengu J). The Applicant also prays that the Appellant's appeal be dismissed with costs for being incompetent and or being an abuse of the court process.
2. The application is premised on grounds:-
 1. *THAT there is no judgment and or Decree and or Ruling to be appealed from.*
 2. *THAT the Appellant has misdirected this Honourable Court with falsehoods.*
 3. *THAT the Appeal is an abuse of the Court Process.*
 4. *THAT the Respondent does have a meritorious case with overwhelming opportunity of success.*
 5. *THAT it is in the interest of justice for the Applicant/Respondent to be given chance to be heard.*
3. The application is also grounded on the sworn affidavit of James Kiarie Nganga dated 24/11/2009 in which the deponent says that the orders of 10/11/2009 were made due to his non-attendance at court. The deponent says that his failure to attend court on 10/11/2009 was caused by the Appellant who had indicated on the hearing notice that the Chamber Summons application dated 03/11/2009 was slated for hearing on 09/11/2009, which application the deponent says was served on him on 05/11/2009. The deponent also says that he was not given sufficient notice to respond to the application and further that the 2nd Respondent had the jurisdiction to make the orders it did.
4. The application is opposed vide the Replying Affidavit sworn by Jeremiah Mbugua Wang'ati on 11/12/2009. The deponent concedes that the documents served upon the Applicant showed that the Chamber Summons dated 03/11/2009 was slated for hearing on 09/11/2009. The Respondent however says that the Applicant did not attend court on 09/11/2009 when the file was placed before Hon. Mr. Justice Onyancha who referred the matter back to Lady Justice Rawal (Duty Judge) who then directed the file to be

placed before Okwengu J on 10/11/2009 for hearing of the application dated 03/11/2009. Although the Respondent says that Justice Rawal stated that it was not necessary to serve the Chamber Summons application dated 03/11/2009 upon the Applicant, a second time, the record for 09/11/2009 simply states that the matter was to be placed before Okwengu J on 10/11/2009.

5. For the reasons stated in the Respondent's supporting affidavit, the Respondent is urging this court to dismiss the Applicant's application with costs to himself (Respondent).
6. The Chamber Summons dated 03/11/2009 was brought under Order 41 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Section 3 of the Land Disputes Tribunals Act, Act No. 18 of 1990 and Section 159 of the Registered Land Act. The Respondent (as Applicant) prayed for an order staying the hearing and proceedings in Kiambu West Land Disputes Tribunal Case No. KW/LDD/9/6/6/2009 pending the hearing and determination of the appeal herein. The said application was premised on the ground that the Kiambu West Land Disputes Tribunal had no jurisdiction to hear the case under the provisions of Section 3 of the Land Disputes Tribunals Act No. 18 of 1990 (Act No. 18 of 1990) and Section 159 of the Registered Land Act (the RLA).
7. The Respondent also supported the said application with an affidavit sworn on 03/11/2009. The deponent said that the suit land was still registered in the name of his mother one Zipporah Njoki who died way back on 29/12/1987, though by an agreement dated 31/12/2004, the Respondent had agreed to sell and the 1st Applicant herein had agreed to buy the said piece of land known as Ngecha/Rironi/T.208 at a cost of Kshs.500,000/= with a down payment of Kshs.50,000/= which payment was acknowledged. The Respondent later rescinded the agreement for sale and demanded back the original certificate of title which was in possession of the Applicant herein.
8. The Respondent also averred that since the sale agreement related to land belonging to a deceased person, he could not have sold it and that therefore the Agreement for Sale was both unlawful and a nullity ab initio. Infact the Respondent had not even taken out Letters of Administration in respect of his late mother's estate. The Applicant then referred the dispute to the Kiambu West Land Disputes Tribunal.
9. The Respondent says that though he objected, through his advocates to the hearing of the dispute by the Tribunal, and though the Respondent wrote a letter informing the Chairman of the Tribunal of his (Respondent's) inability to attend the Tribunal hearing on 23/10/2009, the Chairman informed the Respondent that with or without jurisdiction, the Tribunal would proceed with the hearing the Respondent's absence notwithstanding.
10. The above facts are the ones that gave rise to the Respondent's application dated 03/11/2009. The rest of the story regarding the said application of 03/11/2009 is clear from the record. Though served with the application and the hearing notice for 09/11/2009, the Applicant skipped the hearing on the ground that he was engaged in prayers for his KCPE 2009 sitting candidate. It is to be noted that by the 09/11/2009 the Applicant herein had not filed a Replying Affidavit to the Respondent's application dated 03/11/2009. Further, the Applicant did not appear in court on the 09/11/2009 to indicate to the court whether he intended to oppose the said application and to ask for time within which to file either the Replying Affidavit or Grounds of Opposition. So, when the matter eventually came up before Okwengu J on 10/11/2009, the learned Judge said:-

"No reply to the application having been filed Chamber Summons dated 3/11/2009 is granted and orders issued as prayed."

The above order was granted pursuant to the provisions of Order L Rule 16(3) of the Civil Procedure Rules.

11. Under Order 44 Rule 2 of the Civil Procedure Rules, this application should ideally have been heard by my sister Lady Justice Okwengu. However, two days before the hearing of the application, the learned Judge was moved to the Environment and Land Division of the High Court while I took over the portfolio of Civil Appeals. Since the Applicant herein has not demonstrated whether he has made the application on

- *discovery of new and important matter or evidence or*
- *on account of some mistake or error apparent on the face of the record or*
- *for any other sufficient reason,*
- *or existence of a clerical error or arithmetical mistake or error apparent on the face of the record,*

I think that the application is properly before me. This is how I ended up dealing with this application.

12. I have now considered the application and the reasons given for the order sought. The Applicant's main ground is that he was not aware that the application was coming up for hearing on 10/11/2009. On the other hand, the Respondent says, and it is admitted by the Applicant, that the Applicant was aware that the Respondent's application dated 03/11/2009 was slated for hearing on 09/11/2009. Despite that knowledge, the Applicant did not file any replying papers and also failed to turn up in court on the 9/11/2009 to seek the face of the court on how he could proceed with the Respondent's application. How would he have known that the application was to proceed on 10/11/2009 if he did not even care to attend court on 09/11/2009?
13. In light of the above and in the circumstances of this case, I do not think that there are any sufficient grounds for review or stay of the orders of this honourable court made on 10/11/2009. The Applicant has not shown
- (a) that there is discovery of new and important matter or evidence which after due diligence was not within the Applicant's knowledge or could not be produced by him at the time when the order was made;*
 - (b) that there is some mistake or error apparent on the face of the record or*
 - (c) that there is some other sufficient reason to warrant the review.*
14. Accordingly, the Applicants application dated 24/11/2009 has no merit and the same is hereby dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 13th day of May, 2010.

R.N. SITATI

JUDGE

Read and delivered in the presence of:-

Mr. Kihara (present) For Appellant/Respondent

Miss Munyua (present) For 1st Respondent/Applicant

No appearance For 2nd Respondent

Weche – court clerk