REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL CASE NO. 50 OF 2002

JASON INGIDA BULIMO…….…… PLAINTIFF/RESPONDENT
VERSUS
LABAN KINZI KIGASIA ..... DEFENDANT/APPLICANT

RULING

1. On 29.9.2009, *Chitembwe, J.* issued orders that **Laban Kinzi Kigasia**, the Defendant herein, be evicted from land Parcel No. **L.R. Hamisi/Tiriki'A'/338** and that he should be restrained permanently from interfering with the Plaintiff's ownership, possession and/or use of the land. From the learned Judge's Judgment, the hearing leading to his decision had proceeded without the Defendant's participation although he had been served but failed to come to court.

2. By a Chamber Summons premised on the provisions of ***Order IXB Rule 8*** of the Civil Procedure Rules, the Defendant now seeks orders that the Judgment and all subsequent orders be set aside and the grounds in support of the Application are that;

i) The Applicant was not served with hearing notice for 21st July, 2009.

ii) A prior suit *viz* Principal Magistrate's Court Kakamega P.M.C.C. No.562 of 2001 was still pending when this case was heard and determined.

iii) The Respondent had therefore concealed the fact that he had earlier filed another case over the same subject matter and between the same parties.

iv) The Respondent intends to demolish the Applicant's houses before he takes out a notice to show cause application as is the practice on land matters.

v) The applicant has a good defence to the Plaintiff's/Respondent's claim.

3. In the Affidavit in support sworn on 17.11.2009, the Defendant depones that he was also a party to Kakamega PMCC No. 562/2001 filed by the Plaintiff and that the said suit and the present suit relate to the same subject matter and raise the same issues for determination.

4. Further, that the Defendant was not served with a hearing notice to attend court for hearing of this suit and that the nature of the dispute is one in which he would have faithfully attended to state his case.

5. The Defendant has also made out the case that the Plaintiff obtained the land fraudulently and although they were step-brothers, he had no lawful claim to the land.

6. In a Further Affidavit sworn on 30.12.2009, the Defendant depones that PMCC 562/2001 was determined on 22.3.2002 and that failure to state so was fatal to the present suit.

7. That therefore the Defendant has a good defence to the suit and he should be allowed to state his case.

8. In a Replying Affidavit sworn on 2.12.2009, the Plaintiff depones that the Application for setting aside is incompetent and is made in bad faith. Further, that Kakamega PMCC 562/2001 had been withdrawn on 2.5.2002 and therefore no reference to it could have been made in the present suit. Further, that the Defendant had been served with notice to attend court but declined to do so and in any event, he had no lawful claim to the land.

9. I will ignore the submission that the Application should have been brought under ***Order IXB Rule 8*** of the Rules because it is patently clear to me what Order the Defendant desires and it is to set aside a judgment entered without him being heard because he was ostensibly not served and so failed to attend. This is therefore not a question of a default judgment as seems to be the argument of the Plaintiff. In any event, I am a firm believer that ***Order L Rule 12*** of the Rules cures such procedural errors.

10. On service of the hearing notice, I have read the Affidavit of service sworn on 4.7.2009 by one Robert Mbeja, a Process Server. He depones that he served the hearing notice on 6.5.2009 and for avoidance of doubt, he stated as follows;

"I ROBERT O. MBEJA a resident of Maraba area within Kakamega Municipality of P.O. Box 340 KAKAMEGA in the Republic of Kenya do hereby make Oath and state as follows:-

1. That I am a process server of this Honourable Court duly authorized to serve civil process.

2. That on 4th May, 2009 I received a hearing notice herein for 21-07-2009 in duplicate from M/S AKWALA & CO. ADVOCATES with instructions to effect service upon Laban Kinzi Kigasia the defendant herein.

3. That on 6th May, 2009 I traveled to Majengo and then to Gavutunyi village, Jebrongo Sub-location in Gisambai. The home of Laban Kinzi Kigasia the defendant herein is situated next to GavutunyiPrimary School and I traced him present at his home.

4. That after a brief introduction and explanation to him the purpose of my visit I served him with the hearing notice at 2.00 p.m.

5. That he accepted service but declined to sign in acknowledgement thereof.

6. That he was well known to me at the time of service as I had served him before with court process herein.

7. That what is stated herein is true to the best of my knowledge, information and belief."

11. In respect of paragraph 6 above, I have read the record in the matter and there are two other Affidavits of service by the said Robert Mbeja and so he clearly knew the Defendant prior to 6.5.2009 and much as I try, I am unable to fault his mode of service because in no instance prior to 6.5.2009 had the Defendant signed the Hearing Notice served upon him. In submissions by the advocate for the Defendant, the process server has been labeled a liar but I am unable to say so with the evidence before me.

12. But suppose I am wrong and in fact the Defendant was not served, does he have a credible defence to the suit? Arguments have been made in submissions that because the Defendant has been on the land for over 38 years, the rights of the Plaintiff have been extinguished. Sadly, the claim before me is not one for adverse possession and in the statement of Defence filed on 12.6.2002, the Defendant's answer to the claim that he should be evicted is that he inherited the land from his father, Charles Busumu Jwanda (deceased). *Chitembwe, J.* like myself, could find evidence that Jwanda ever owned the land and neither that claim nor the one for adverse possession can properly be sustained in the context of the pleadings herein.

13. The other issue to address is that relating to PMCC 562/2001. I have read the proceedings in that case and the judgment is as follows;

"The Plaintiff has brought this matter for the prayers of eviction against the Defendant from piece of Land No.TIRIKI/HAMISI 'A'/338 and costs of this suit.

The plaintiff gave evidence that he is the registered proprietor of the said piece of land TIRIKI/HAMISI 'A'/338 and he also produced a title document in support of this, measuring 0.37Ha. and registered in his name. It is the Plaintiff's case that he bought this piece of land from Onyango Muhindi for Kshs.70,000/= who is a step brother to the Defendant and he advanced entire purchase price to the vendor. He also produced an agreement dated the 2nd March, 2001. In determining this matter this court will observe that the plaintiff's case went uncontested as the matter was heard ex-parte. The Plaintiff also supported his case well.

However, I wish to note that this court does not have the jurisdiction to hear and determine this matter under the LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990 Sec. 3. This matter should therefore be referred to the respective land disputes tribunal.

Judgement dated, signed and delivered this 22nd day of March, 2002 in open court and in the presence of the Plaintiff.

C. A. S. MUTAI, DMII (PROF)
22/3/02"

14. I note that in fact the learned magistrate appears to have accepted the Plaintiff's case and whether the Plaintiff later withdrew it is of no consequence because there was a direction to refer the matter to the Land Disputes Tribunal. Having been so directed, he filed the present suit and it is now argued that the present suit is ***res-judicata***. Can that be so and should this suit be allowed to survive?

15. The issue is certainly triable and it is not my place at this stage to determine it. The Defendant has certainly raised credible arguments that would require answers and a decision by this court. The

matter is not idle in any event. I quite agree with the Defendant that this issue, although raised in his statement of Defence was not placed before *Chitembwe J.* I therefore also agree with *Harries J.* in ***Kima vs. Macnuel & Another [1966] E.A. 547 at 555*** where he stated as follows;

"Looking at O.IX as whole, and attempting to comprehend the purpose of rr.10 and 24, it seems to me that a reasonable approach to the application of these rules, to any particular case would before the court, first, to ask itself whether, any material factor appears to have entered into the passing of the ex-parte judgement which would not or might not have been present had the judgement not been exparte, and then, if satisfied that such was or may have been the case to determine whether, in the right of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or very the judgement, if necessary, upon terms to be imposed."

16. The learned Judge's opinion meets my favour because setting aside of a judgment is a matter of discretion and it has been said time and again that discretion must be exercised judiciously and for the ends of justice to be met. In this case, whether or not the Defendant was served or not, the issue of ***res judicata*** would need to be addressed and that fact necessitate that for the ends of Justice to be met, the suit must be heard afresh.

17. In the end, I will set aside the judgment herein together with all consequential orders and decrees but in doing so, I will order that the Defendant pays the Plaintiff thrown away costs of Kshs.10,000/= within 30 days of this order.

18. Orders accordingly.

Delivered, dated and singed at Kakamega, this 28th day of September, 2010.

ISAAC LENAOLA
J U D G E