



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE 8 OF 2006

● **BASILIO GATOBU PETITIONER/RESPONDENT**

VERSUS

RIUNGU MUCHAI OBJECTOR/APPLICANT

RULING

On 26th May 2009 the hearing of the protest by Riungu Muchai was slated to come before court. On that day, counsel who held brief for the protestor sought an adjournment on the basis that the whereabouts of the protestor and his witnesses was unknown. The application for adjournment was opposed by the petitioner. The court in its ruling rejected the application for adjournment. Counsel for the protestor offered no evidence in support of the protest.

The court proceeded to strike out the affidavit of protest and the grant was confirmed as per the summons dated 4th Jan. 2007. An application was filed by way of chamber summons by the protestor. That application is dated 29th May 2009. It is brought under order XLIV of the Civil Procedure Rules. It seeks the court to review the orders made on 26th May 2009 and the setting aside of that order and the reinstatement of the protestor's affidavit.

In the affidavit in support of the application, the protestor deponed that he was aware that his protest was coming up for hearing on 26th May 2009. He however was unable to attend court because he was bedridden and had been sick since 2007. He had been suffering pneumonia, malaria, stomach problems and headache. He attached to his affidavit treatment notes of his hospital attendance. That after the striking out of his affidavit of protest, his counsel called his son to inquire why he had not attended court.

At this point, it should be noted that he did not disclose the name of his son who was called by his counsel. He proceeded to say that he had in the past attended court on various dates. That he would suffer if his application was not allowed because he would be condemned unheard since the petitioner would stand to get a bigger portion of their deceased father's property.

The application was opposed. The petitioner by his replying affidavit deponed that he was present in court on 26th May 2009 together with his witnesses. That the protestor had been absent from court without proper explanation for his absence.

On 27.5.09 the petitioner visited his mother. Whilst he was a kilometer away from his mother's home he met the protestor talking to another person. He greeted him and noted that the protestor was not sickly and nor was he behaving as though he was sick. At his mothers compound he met the protestor's wife who informed him that on 26.5.2009 the protestor had spent the day at home doing various chores.

The protestor had an obligation as a party who had filed the protest to attend court. The hospital documents which he relied on as a reason why he was not in court do not show that he was sick on 26th May 2009. They do not show he was either admitted to the hospital or that he was bedridden. Mr. Mwirigi, advocate for the petitioner did argue that the applications does not fall within the reams of Order XLIV of the Civil Procedure Rules. The protestor's advocate responded that the protestor had shown sufficient reason why the court should review its orders.

Order XLIV 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 and decree or made the order without unreasonable delay.”

As correctly stated by the protestor's advocate, the court can, for sufficient reasons, review its orders. That is clearly borne out in that rule. The issue however I need to consider is whether the protestor has shown sufficient reason.

The protestor stated that he had been sick on and off since 2007. If that is to be believed, when he appointed learned counsel Ms. Mwangi advocate on 26th March 2007, she would have known that. Yet when the matter came before court on 26th May 2009 counsel for the protestor stated that the whereabouts of the protestor were unknown and it was not clear why he had not attended court. If the protestor wanted the court to accept that he had been ill, it would have been prudent to get a medical report rather than rely on treatment notes with medical jargon which, to a lay person such as I, mean nothing.

Further as correctly stated, even amongst those treatment notes there is nothing to show the state of health of the protestor on 26th May 2009. The fact that this is a land matter was more the reason why the protestor should have ensured his counsel knew where he was. I find no sufficient reason is shown why this court should review its orders. But perhaps of more concern is that the protestor, whenever he has filed affidavits in this cause, each of those affidavits has had different signatures to the other. The protestor's affidavit dated 11th May 2007 in support of an application for leave to file an objection out of time, the protestors signature therein does not correspond even remotely to his signature in his affidavit dated 7th July 2008.

The other affidavit dated 29th May 2009 in support of the present application bears a thumb print rather than a signature. It is not clear whether the thumb print was before the Commissioner of Oath Eusebius P.O. Omayo. Not only is it strange that three affidavits of the protestor would bear different signatures, but I think the difference in those signatures goes to the credibility of the protestor. The question that arises in my mind is, did the protestor sign any of those affidavits?

On the whole, having considered the application, the arguments before me, I find that the protestor's application is undeserving.

The chamber summons dated 29th May 2009 is dismissed with costs being awarded to the petitioner.

Dated and delivered at Meru this 23rd day of July 2009.

MARY KASANGO

JUDGE