



REPUBLIC OF KENYA  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Civil Case 179 of 2008**

CHARLES ALEXANDER KIAI ..... 1<sup>ST</sup> APPLICANT

JOHN CIIRA GATHOGO ..... 2<sup>ND</sup> APPLICANT

VERSUS

LUKA WAGANA ..... 1<sup>ST</sup> RESPONDENT

GODFREY MAINA MWANGI ..... 2<sup>ND</sup> RESPONDENT

JAMES WANGUO KANYI ..... 3<sup>RD</sup> RESPONDENT

**RULING**

By an application dated 3<sup>rd</sup> April 2009 **Charles Alexander Kiai** and **John Ciira Gathogo** hereinafter referred to as “*the applicants*” sought as against **Luka Wagana, Godfrey Maina Mwangi** and **James Wanguo Kanyi**, hereinafter referred to as “*the respondents*” orders in these terms:-

**“1. That service of application be dispensed with**

**in the first instance.**

**2. That the Honourable Court be pleased to**

**certify this application as urgent and that the**

**same be heard during the High Court**

**Vacation and on priority basis.**

**3. That the Honourable Court be pleased to grant**

**interim stay of execution of orders issued on**

**30<sup>th</sup> March 2009 in terms of pray (sic) number**

**4 pending the hearing and determination of**

**this application.**

**4. That status quo be maintained until the hearing and determination of this application.**

**5. That this Honourable Court be pleased to review and set aside the orders issued on 30<sup>th</sup> March 2009.**

**6. That costs of this application be provided for:”**

The application was premised on the grounds that the property in dispute was solely owned by the applicant and it is their only source of income, have been in occupation of the same for the past 23 years, extensively developed the same and that this suit was in contravention of subjudice rule since a similar suit being Nairobi HCCC No. 171 of 1998 is still subsisting. Finally the applicants contended that unless this court sets aside the orders made on 30<sup>th</sup> March 2009, they would suffer irreparably.

The application was further supported by the affidavit for the 1<sup>st</sup> applicant. He deponed in pertinent paragraphs that on 9<sup>th</sup> January 2009 the Chamber Summons application dated 15<sup>th</sup> September 2008 was served on him. In turn he instructed **Messrs Kamau & Kamau advocates** to act for him in the matter. On the eve of the hearing of the application, he was called by the said firm of advocates and instructed to attend court which they duly did. However to their horror and dismay the judge proceeded to strike out and expunge from the record the Notice of preliminary objection filed by their advocates aforesaid on account of the fact that they had not filed a notice of appointment of advocates and or memorandum of appearance in the suit before filing the Notice of preliminary objection aforesaid. That the omission aforesaid by their former advocates in not filing in court relevant documents should not be visited upon them. That the orders obtained if executed will cause great prejudice and irreparable loss as they had invested massively in the suit premises which in any event is registered in their name. Finally he deponed that there was another similar suit pending in Nairobi being civil suit No. 171 of 1998 in which the 2<sup>nd</sup> applicant is the defendant and in which similar issues have been canvassed. The said case has yet to be heard and determined.

In support of the application, **Mr. Gori**, learned counsel for the applicants orally submitted that the applicants were now only keen on prayer 5 on the face of the application. That the applicants were not given a chance to be heard because they were never served with the summons to enter appearance together with the plaint. The advocates appointed by the applicants filed a Notice of Preliminary Objection without having come on record properly. The applicant and in particular the 1<sup>st</sup> applicant is the sole proprietor of the suit premises which he has occupied for the last 23 years and has title to the same. Finally, counsel submitted that the mistakes of counsel should not be visited on an innocent litigant. The effect of the order was to evict them from the suit premises.

The application as expected was vehemently opposed. Through **T.T.M. Aswani, esq.**, advocate, the respondents filed grounds of objection to the application as well as replying affidavit. In their grounds of opposition the respondents opined that the application was incompetent, misconceived, irrelevant, lacks merit, defective for want of grounds on its face, frivolous, vexatious, abuse of court process and meant to waste court's time.

In the replying affidavit sworn by the 3<sup>rd</sup> respondent on his own behalf and on behalf of the other respondents he deponed in particular that the applicants had been duly served with the respondents' Chamber Summons dated 15<sup>th</sup> September 2008. They had in turn instructed a firm of advocates to act for them. The said firm of advocates did not file any documents in opposition to the application. Accordingly the court did not err in proceeding to hear the application ex parte. The resulting order made

by the court on unopposed application was sound and just in all the circumstances and that the applicants would not suffer any prejudice or irreparable damage as a result as they knew what they were doing all the time. He disputed the fact that the 1<sup>st</sup> applicant had resided on the suit premises for over 23 years. Nothing else except grass, coffee trees and pig sheds were on the suit premises in 1999 when he illegally entered into the suit premises and started construction thereon. In so far as the Nairobi HCCC 171 1991 was concerned, the respondents' position was that, that fact had been disclosed to this court and that in any event in the said suit the respondents are seeking audited accounts and the sharing of the properties and profits from their partnership with the 2<sup>nd</sup> applicant and the act of the applicants in disposing off one of the assets of the partnership was to deprive and put that asset out of their reach.

There was yet another affidavit by the 3<sup>rd</sup> respondent sworn on 29<sup>th</sup> May 2009 and filed in court on 12<sup>th</sup> June 2009. Since it was filed out of time and without leave of court, I will ignore the contents thereof.

In his oral submissions in opposition to the application **Mr. Aswani** submitted that the application being one of Review nothing had been brought to the fore by the applicants in terms of order 44 rule 1(b) of the civil procedure rules. Secondly, the application ought to have been by way of Notice of Motion and not Chamber Summons. Further the application was not premised on any grounds as mandatorily required. That when a party is served with an application, he can either file grounds of opposition or a replying affidavit. One does not need to be served with summons to enter appearance in order to oppose an application. The applicants were duly served with the application and were therefore aware of it. They cannot now claim that the facts came to their knowledge after the striking out of their Notice of Preliminary objection. Finally counsel submitted that there were no material placed before court to warrant the court to review and set aside its order of 30<sup>th</sup> March 2009.

I have now carefully considered the application, the supporting affidavit as well as the annexures thereto, the replying affidavit, rival oral submissions and the authorities cited as well as the law. The genesis of this dispute is the application dated 15<sup>th</sup> December 2008. In that application the respondents had sought against the applicants an order of mandatory injunction so that they could not continue to remain or continue in occupation or use of or in anyway interfere with the land parcel number **Loc. 14/Kiru/2836** until the suit was heard or until further order. That application was filed contemporaneously with the filing of the main suit. On the 30<sup>th</sup> March 2009 when the said application was scheduled for hearing interpartes, it transpired that though the applicants had been served with the application, they had neither filed grounds of opposition or replying affidavit to the application. Indeed what their lawyer had done was to file a notice of preliminary objection. However in filing the same, he had done so irregularly and in breach of procedural law. It was breach of procedural law because, the said firm of advocates had not properly come on record as representing the applicants. The said firm of advocates had neither filed notice of appointment of advocates or memorandum of appearance before they filed the notice of preliminary objection. Since therefore the said Notice was irregularly on record, it was struck out and expunged from the record. Again since the said firm of advocates was not properly on record, they had no right of audience before court. They could not therefore be heard on the application. **Mr. Muthigani**, learned advocate who had been detailed to hold brief for **Messrs Kamau & Kamau advocates** for the hearing of the application admitted that much. That being the case there was nothing on record to deter this court from proceeding with the hearing of the application ex-parte. The applicants if they were in court did ask the court to hear them on the application in person. I therefore proceeded to grant the prayers sought in the application. These are the prayers that I am now being asked to review and set aside.

Under section 80 of the civil procedure Act and Order 44 rule 1 of the civil procedure rules, a litigant is entitled to

apply for a review of an order and or decree passed by a court. However for that to happen, the applicant must satisfy the court that he has sought the review because of 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 reasons. See **Kithoi v/s Kioko (1982) KLR 177**. In the instant application, the applicants are

not saying that they are seeking review on the basis that they have come by new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time the order was made or on account of some mistake or error apparent on the face of the record. Neither have they specifically stated that they seek review on the grounds of any other sufficient reason. All that they are saying is that yes, they were served with

the application, yes, upon service they instructed a firm of advocates to represent them at the interpartes hearing of the application, yes, acting on the instructions aforesaid, the said firm of advocates without first coming on record properly, proceeded to file a Notice of Preliminary Objection, Yes, at the hearing of the application much as there was an advocate detailed to represent them, he could not do so as he was not properly on record. Finally, yes the notice of preliminary objection was subsequently struck for being irregularly on record. However all these happened due to circumstances beyond their control. Having instructed a firm of lawyers, it was their expectation that the said firm of advocates would act in accordance with the procedural law. It was beyond them to know that before an advocate can file pleadings in a matter and indeed act in the same, first and foremost he/she must come on record properly. As it

turned out, the firm they had instructed acted rather unprofessionally and negligently in failing to follow the laid down rules of procedure. Accordingly, they are saying that the sins of their advocates aforesaid should not be visited upon them as they are quite innocent. I quite agree. I think that the applicants have been able to bring themselves with above submissions within the last requirement of Order 44 rule 1 of the civil procedure rules. That is to say that they have been able to demonstrate that there is sufficient reason why a review of the order of 30<sup>th</sup> March 2009 should be granted.

The respondent has raised the issue that the application is incompetent, having been brought by way of Chamber Summons instead of Notice of Motion. The submission is not without merit. However the applicants can seek refuge in order L rules 10, 11 and 12 of the civil

procedure rules. Further section 72 of the Interpretation and general provisions Act, takes care of the respondents' submission. The same arguments would apply to the respondents' further contention that the applicants had not set out on the face of the application the grounds upon which they have brought the same.

The applicants too should have not invoked section 3A of the civil procedure Act when there is section 80 of the civil procedure Act and Order 44 of the civil procedure rules upon which they should have anchored their application. However besides section 3A of the civil procedure act aforesaid, the applicants also invoked order 44 as well. The story would perhaps have been different had the applicants only cited section 3A of the civil procedure Act in support of the application. I would have had no problems at all in concluding that the application was incompetent and fatally defective.

The upshot of the foregoing is that I would allow the application in terms of prayer 5. However I would award the costs of the application to the respondents.

***Dated and delivered at Nyeri this 22<sup>nd</sup> day of July 2009***

**M. S. A. MAKHANDIA**

**JUDGE**