REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Application 411 of 2006

SUSAN WAIRIMU NGANGA…….APPLICANT

Versus

THIKA LAND DISPUTES……..…RESPONDENT

RULING

On 26th October 2007, the ex parte Applicant's Notice of Motion dated 2nd August 2006 which was coming up for hearing was dismissed after the Applicant was called out and was absent. The court indicated that the said Notice of Motion was dismissed under Order IX b Rule 4 Civil Procedure Rules.

On 8th May 2009, the ex parte Applicant through Wachira & Co. Advocates filed an application seeking to set aside the order issued by the Court on 26th October 2009, dismissing the Applicants Notice of Motion and that pending the application, an order of stay do issue staying the proceedings in DO case No. 37/06 in Chief Magistrate's Court Thika.

The grounds upon which the Application is made are that the failure by the Applicant and Counsel to attend Court on 26th October 2007 was inadvertent, honest and excusable and that it is in interests of justice the dismissal order be set aside. Counsel swore an affidavit in support. That this matter had come up before Justice Nyamu for directions on 17th May 2007 and the judge did direct parties to file skeleton arguments and lists of authorities. That they filed their submissions by 17th October 2007 and the matter was given a serial listing on a Friday. inadvertently the matter was not listed in his court diary for 26th October 2007 the day it was to be listed as a Friday judge matter. He annexed a copy of his diary (JWW 2). That neither the Applicant nor the Respondents appeared. That he only became aware of the case when he was served with the award from Chief Magistrate's Court (JWW 3.) That it would be unfair for the Applicant to lose her land due to inadvertence yet this matter has not been determined on merit.

Counsel relied on the case of **R V COMMISSIONER OF LANDS ex parte JAMES KINUTHIA MISC APPLICATION 87/01** where the court invoked the inherent powers of the court to bring the matter under the ambit of Order 53 Civil Procedure Rules.

Counsel for the Respondent filed grounds of opposition that the application is fatally incompetent as the court does not have the jurisdiction to grant the orders sought and that the application is scandalous and vexatious case urged that the Applicant should have preferred an appeal pursuant to S 8 (5) of the Law Reform Act.

The original proceedings herein were Judicial Review. The Applicable law is Ss 8 and 9 of Law Reform Act Cap 26 Laws of Kenya and Order 53 Civil Procedure Rules Judicial Review proceedings have been described as a special jurisdiction to which the Civil Procedure Act or Rules do not apply. The Court of Appeal in interpreting S 8 (1) of the Law Reform Act held so – see the case of **COMMISSIONER OF LANDS V HOTEL KUNSTE (1994-1998) KLR 1.** The court held that the Civil Procedure Act and Rules and even S 13 of Government Proceedings Act did not apply to Judicial Review proceedings. Similarly in **R V CCK (2001) EA 82** The Court of Appeal again held that Order VI Civil Procedure Rules which relates to striking out of proceedings did not apply to Judicial Review proceedings.

S. 8 (3) of the Law Reform Act reads as follows;

"**8(3) No return shall be made to any such order and no proceedings in jurisdiction shall be allowed but the order shall be final, subject to the right of appeal herefrom conferred by subsection (5) of this section."**

Order IX Civil Procedure Rules, S 3A of the Civil Procedure Act which have been invoked by the applicant does not apply. The fact that the court in dismissing the Notice of Motion invoked wrong provisions of law does not give the Applicant a licence to invoke the same provisions. Two wrongs do not make a right. This still remained Judicial Review proceedings and once one brings himself within the limited and narrow application of Order 53 Civil Procedure Rules and S 8 and 9 of the Law Reform they must stick within that narrow path that they have chosen. In this case the Applicant has not properly moved the court under its inherent powers. The orders cited do not apply and this court can grant such orders.

Further to the above S 8 (5) of the Law Reform Act is clear, that an appeal lies to the Court of Appeal for order made in Judicial Review application. A final order was made in the Notice of Motion whether it was under wrong provisions of law or not and the only option that the Applicant has is to appeal to the Court of Appeal.

S 8 (5) reads:

"**8 (5) Any person aggrieved by an order made in exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal."**

That section provides that there will be no return or review of a Judicial Review Order. That is the law and this court will not go round it by applying a Rule that does not even apply.

Looking at the merits of the application, even if the court were to accept that the counsel failed to diarise the case for some reason, I note with concern that the order of dismissal was made on 26th October 2007 (not 26th October 2009 as pleaded). This issue at hand concerns land which the Applicant now says she will suffer irreparably if the orders are not granted. Does it mean that the Counsel never remembered that they had not presecuted the case for over one and half years until somebody else had to wake him up with the award? What of the ex parte Applicant, if they had been interested in the case. How is it that she did not check on its progress from 26th October 2007 till the award was served on her? Counsel deponed to having served the Respondent's Counsel with submissions just a few days before the hearing; Contrary to what Mr. Wachira deponed that the Respondents were not present in court on 26th October 2007 when the dismissal order was made, the record clearly shows that Mr. Mayova was in attendance. If at all the Applicant had been keen on this matter they would have noted that it had been dismissed earlier and moved with speed to seek for relevant orders. To add to the above an appeal is a remedy available to the applicant under the Law Reform Act. The question is why has the applicant chosen not to follow that path?

In the following cases, the court declined to set aside dismissal order even where the application had not been heard on merit. In HMisc 1238/98 **R V COMMISSIONER OF LANDS ex parte JEMIMAH NJUGUNA,** an Applicant sought to set aside or vary an order dismissing a Judicial Review

application which had not been heard on merit but dismissed when the Applicant was called out and found to be absent. Justice Makhandia held that the dismissal order was an order of the court under Order 53 Civil Procedure Rules and there lies a right of appeal under S 8 (3) and (5) of the Law Reform Act and declined to review the order. In **KENYA FARMERS ASSOCIATION V THE MINISTER FOR CO-OPERATIVE DEVELOPMENT MISC 284/03**, a party whose application had been heard in his absence sought to set it aside but Justice Kimaru relied on Sections 8(3) and (5) of the Law Reform Act and held that he lacked jurisdiction to re-hear the Judicial Review application. Lastly, in **REP V UNITED INSURANCE CO LTD ex parte LUTTA KASAMANI MISC APPLICATION 1047/04;** the court declined to set aside a dismissal order in a Judicial Review application holding that no review proceedings would be entertained in a Judicial Review application.

I hold the same views held in the above authorities, that in Judicial Review proceedings there is no review of the court's orders but an appeal lies to the court of appeal and the Applicant should move to the court of appeal for the appropriate orders. The upshot is that the application dated 8th May 2009 is dismissed with the Applicant bearing the costs.

Dated and delivered this 20th day of July 2009.

R.P.V. WENDOH

JUDGE

Present

Muturi Court Clerk

Mr. Wachira for the Applicant