



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Application 1702 of 1976

GEORGE NJUGUNA GACHOHI PLAINTIFF

VS.

RUTH WANJIKU KAMAU 1ST DEFENDANT

LAND REGISTRAR KIAMBU 2ND DEFENDANT

MUCHAI KARU 3RD DEFENDANT

CYRUS KOMO 4TH DEFENDANT

RULING

This is probably the oldest case I have come across since I joined the judiciary. The subject matter is land and one may not be surprised as to the nature of litigation in this matter. As at the time of perusing this file, there were four cases which are said to have been consolidated but which remains a contested issue. These are files Nos. HCCC No. 1702 of 1976, HCCC No. 912 of 1975, HCCC No. 781 of 1975 and HCCC No. 712 of 1975. (The last file herein, though mentioned in the order of S. Amin J is not among the files I have seen).

The parties appear to be interchanging from file to file, but in this particular case, the application relating to this ruling was brought by one George Njuguna Gachohi who is the plaintiff in HCCC No.1702 of 1976.

On 26th September, 2005, the parties herein through their advocates appeared before Visram J (as he then was), where the learned judge observed:

“Clearly, this case is not ready for hearing. There are 3 cases consolidated. Documents have not been exchanged, nor issues agreed. The parties shall have 30 days to complete all procedures, failing which this suit, which is more than 20 years old, shall stand dismissed.

ALNASHIR VISRAM

JUDGE

26.9.05

Mention on 27.10.05 before any Judge.

ALNASHIR VISRAM

JUDGE

26.9.05.”

On 27th October, 2005, the parties appeared before Mugo, J in compliance with the order by Visram J (as he then was), and it became apparent that they had not complied with the said order. The learned judge, i.e. Mugo J, then made the following order:

“It seems to me that the orders made by the Hon. Mr. Justice Visram have not been complied with in that whereas exchange documents have been done in part, the issues have not been agreed upon. None of the Plaintiffs have complied with this requirement. The result therefore is that the suits filed by the three Plaintiffs stand dismissed as of today. I so order.”

By an application dated 16th October, 2008, the plaintiff in HCCC No.1702 of 1976, George Njuguna Gachohi moved the court by way of chamber summons under Order 39 rules 1, 2 and 9 and Order 44 rule 1 and Order 50 rule 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for injunction orders and that the order made on 27th October, 2005 dismissing this suit be reviewed and or set aside and the suit be reinstated. The application is based on the grounds set out on the face of the said application which are that, the plaintiff herein had complied with the orders of the court made on 26th September 2005 and as such there was an apparent error on the face of the record and that the three matters or suits were being handled as one yet consolidation had not been finalized and that was also an error apparent on the face of the record.

It is also the applicant’s contention that he is still interested in the suit and he intends to proceed with the same and any mistake should not be visited on him as he had an advocate on record with clear instructions. In any case, the defendants will not suffer any prejudice if the suit is reinstated and disposed off on merit. In the event the said orders are not issued, the plaintiff/applicant risks being evicted from the suit property where he and his family have lived throughout their lives and upon which they claim beneficial ownership. There is also an affidavit sworn by the applicant in support of the application.

My first observation is that the applicant should have first sought reinstatement of the suit before seeking injunctory orders, because there must be an existing suit, before the injunction orders are sought. It is therefore surprising that the prayer for the order to review and set aside the dismissal order comes after the orders of injunction in that said application.

However, nothing much turns on that discrepancy. I have taken some time to go through the record before me and noted that, whereas the applicant says that the three suits were never consolidated, there is at page 12 of the handwritten notes by Sheikh Amin J in HCCC No.1702 of 1976, that the suits were actually consolidated. If the learned counsel for the plaintiff/applicant had taken the trouble to peruse the court record, this would not have been a contentious matter. It is not clear as to why this matter has taken over 30 years to address, and one can only guess that the competing interest of land had a big role to play in this regard.

That notwithstanding, Order 44 rule 1 of the Civil Procedure Rules states that if any party is aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred or by a decree or order from which no appeal is allowed, and for purposes of this ruling, where there is an error apparent on the face of the record, he may apply for a review of the judgment of the court which passed the decree or made the order without unreasonable delay.

According to the material before me, it is the applicant’s case that, whatever Visram J (as he was then) had ordered, had already been complied with, and therefore it was wrong to revisit the issue and, having

done so, that was an error apparent on the face of the record. However, Mr. Rakori then appearing for the applicant, said that he had not complied. In his own words “I have not done that”. That may have prompted the learned Judge to make the said order. The order by the learned judge was specific that in the event the parties did not comply, then the suit shall stand dismissed.

When counsel appeared before Mugo J, it was clear that the judge was satisfied that there was no full compliance with the order made earlier. In fact, there is an observation by Mr. Chege who before Mugo J, was appearing for the 1st defendant, that he filed issues and served but the plaintiffs in the other two suits had not severed him with any papers.

The order by Visram J (as he then was) addressed all parties, and if any of those parties had not complied, and considering that the suits herein had been consolidated, then the same would stand dismissed.

In my ruling, there is no error apparent on the face of the record to compel the court to address the issues raised under order 44 of the Civil Procedure Rules cited by the learned counsel for the applicant. The application in my view falls on that point alone. However, there is yet another point that has not been justified either by the facts or affidavit evidence presented herein.

It is required of the applicant that such an application must be filed without unreasonable delay. The order sought to be reviewed was given on 27th October, 2005. The application before me was filed on 23rd October, 2008. This is three (3) years down the line and no convincing reason has been advanced by the applicant save to say that he was looking for counsel to take up his matter. I am not persuaded that the applicant applied due diligence in trying to protect his interest in the said suit property if he had any. This litigation has taken quite some time. It is now time to rest the issues *albeit* to the disadvantage of some of the parties herein; but the law and practice points to the fact that litigation must come to and end.

I am not persuaded that the applicant is entitled to any of the orders sought in his application. Accordingly the application dated 16th October, 2008 and filed on the 23rd October, 2008 is hereby dismissed with costs to the defendants/respondents.

Orders accordingly.

Dated, signed and delivered at Nairobi this 30th day of September, 2009.

A. MBOGHOLI MSAGHA

JUDGE