



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

Civil Appeal 643 of 2003

HARRISON MWANGI.....APPLICANT

VERSUS

NJOROGE GITAU.....RESPONDENT

RULING NO 1

On 23/07/2009 the court was presented with an application dated 30th day of September 2008 having been presented by one Njoroge Gitau and filed the same date. There was an accompanying return of service showing that the said application had been served on to the counsel for the Respondent to it. It was noted that two of the Respondents were present and they informed the court, that their counsel had sent a clerk to ask another counsel to hold their brief. Indeed counsel appeared to that effect, and in view of the age of the matter the court, stood over the matter to 3.00 p.m, to enable the Respondents counsel attend court.

The record bears witness that as at 3.00 p.m, counsel for the Respondent had not turned up.

- (i) It was observed from the record, that no stay orders were in place.
- (ii) It was further observed that the said application had not been responded to.

There being no reason for non response, and no attendance of counsel, the court then seized of the matter on behalf of the respondent, and since counsel who held brief on behalf of the said Respondent counsel said that he had inadequate instructions to proceed, the court saw no reason to adjourn the matter further. The court took into consideration the age of the proceedings, age of the applicant in the application then under review, the physical condition of the applicant and of paramount importance the fact that there was no opposition against the said application which had been traced on the record. The court, was of the view that justice demanded that the said application be proceeded with exparte.

The court indeed proceeded and granted prayer 1 of the said application which read:-

“(i) That the officer in charge of police station Murang’a be allowed to conduct this eviction order on behalf of the applicant taking over from m/s Mulbau Agencies who were previously engaged by the applicant.

(2) That costs be granted to the applicant.”

Prayer 1 was granted and the costs ordered to be in the cause and further that the Respondents if aggrieved be at liberty to take any action they deem fit to take.

It is against the afore set out background information that the current applicant who was responding to the application dated 30/9/2008 and which was disposed off on 23/7/2009 has presented an application dated 28th day of July 2009 and filed the same date. 6 prayers are sought namely:-

(1) *Spent*

(2) *That the honourable court, do issue an ex parte order of stay of the orders made on 23rd July 2009 pending the hearing of this application inter parties.*

(3) *That the honorable court, do stay the order made on 23rd July 2009, pending the hearing and determination of this application.*

(4) *That the honourable court, do review the orders made on 23rd July 2009 allowing the respondents application dated 30th September 2008.*

(5) *That upon the granting of order (4) above the court, do hear the application dated 30th September 2008 simultaneously together with the application dated 17th day of October 2008.*

(6) *That costs be provided for.*

The grounds in support are set out in the body of the application and supporting as well as oral submissions to court and these are that:-

- Indeed there is on the record the respondents application dated 30th September 2008.
- That indeed the current applicant had been served with the same and responded to the same vide a replying affidavit dated 17th October 2008.
- That the court, did not take the content of the said replying affidavit when making the orders sought to be reviewed.
- That it is not true as found by the court, that the Respondents counsel had been served. It is the respondent who had been served. He indeed took the papers to his counsel for action.
- That the notice summoning them to court, was defective as it talked of an application dated 30th day of September 2009 which was non existent.
- That the matter had not been listed for hearing on 23/7/2009 and so it was erroneous for the court, to proceed and grant orders in respect of the same.
- That when the matter came up at 3 p.m, it was for taking of another hearing date but was surprisingly heard and disposed off.
- The court, is therefore urged to set aside those orders and then pave the way for the disposal of the application dated 17/10/2008 and the respondents application dated 30/9/2008.
- That they have strong evidence against eviction sought and they should be heard before any substantive orders are heard in respect of the same.
- That the Respondent has never been in occupation of the said property which has all along been in the occupation of the current applicants.
- That eviction alone will not serve any useful purpose to the respondent as the title is in the names of 3rd parties.
- The evidence relied upon by the respondent to seek eviction are not supported by registration documents.

The respondent to the current application put in a replying affidavit through the assistance of the civil registry. The sum total of the same is that he maintains the shamba is his. Those who attempted to snatch it from him were ordered to be evicted by courts in Nyeri and Murang'a. They have no right to take the land as they do not come from his clan. They are Thimba while he is Muchera. They also have bigger pieces of land elsewhere.

- They also have money and are just interested in frustrating him in respect of the said land. That it is the advocates who have been dragging on the case for long and yet they are not willing to compensate him for the loss suffered.

In response counsel for the applicant stated that indeed the matter is old as it started off in the land disputes tribunal and it landed here as an appeal.

- That if the matter is not reopened in justice will be occasioned to the current applicant.
- New evidence has emerged which the court, needs to consider in its attempt to resolve this matter as the suit land was not adjudicated in the name of the respondent.
- That the current applicant believes that they have a genuine title.

In further response, the current respondent added it is not possible for counsel to know how the parties are related or not related since he does not come from their clan.

-that if the land is in their name then the same was given to them fraudulently by the chief.

On the courts assessment of the Rival arguments herein, it is clear that indeed it has emerged that as at the time the orders sought to be reviewed were made on 23/7/2009, the current applicant also had a pending application on record.

It has also emerged that one reason which weighed heavily on the mind of the court, was the lack of an opposing affidavit to the respondents application of 30/9/2008 coupled with lack of attendance. It has now transpired that indeed there was such an affidavit filed but a copy was not on the record then. This being the case, it follows that failure to reflect the issues that in response in the ruling of 23/7/2009 is prejudicial to the party who had filed the same and who was entitled to have a pronouncement on the merits made on the same irrespective of non attendance by their counsel. There is therefore justification for having the matter reopened for a rehearing. But when reopening the same, the court, has to bear in mind the age of the litigation herein and make appropriate orders aimed at bringing the matter to an end.

For this reason it is proper to make orders that will ensure that justice is done to both sides and for this reason it is advisable to follow the advise given by the current applicant that both applications one dated 30/9/2008 and 17/10/08 be heard together as these applications are finally going to determine the rights of the disputants herein. For this reason the court proceeds to make the following orders in disposing off the current application dated 28/7/2009.

- (1) That this courts, orders made on 23/7/2009 disposing off the application of 30/9/08 be and are hereby set aside.
- (2) That the said application of 30/9/08 has been restored for hearing interparties in order to enable the respondent to it be heard on his replying affidavit filed in opposition to the said application which was not on record then but which has transpired to have been in existence as at the time the said application was disposed off.
- (3) For purposes of speeding up the disposal of this matter which has been protracted, it is prudent to hear the said application of 30/9/08 with that of 17/10/08 simultaneously but separate ruling be written for each.
- (4) Costs will be in the cause.
- (5) Hearing date to be fixed forth with.

Dated, Read and delivered at Nairobi this 27th day of September 2009.

R. N. NAMBUYE

JUDGE