



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Civil Application 210 of 2001

ALI OLIVER AMBO.....APPLICANT

VERSUS

MAGEREZA SACCO SOCIETY LTD.....RESPONDENT

R U L I N G

1. The application before me is the Chamber Summons dated 28/01/2009 and filed in court on 4/02/2009. The application which is brought by Magereza Sacco Society Ltd. is expressed to be brought under Order IXB Rule 8, Order XLV Rule 15 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya and Section 35 of the Arbitration Act No. 4 of 1995 and all other enabling provisions of the law. Though the application was filed under Certificate of Urgency, it was not certified as such. The application seeks 5 orders, as follows:-

(i) Spent

(ii) THAT this Honourable Court be pleased to set aside the award of the Arbitrator dated 29th day of June 1995 by S.M. Mureithi arbitrator and all other consequential orders resulting therefrom be set aside.

(iii) THAT this Honourable Court be pleased to order that the award of the Arbitrator dated 29th day of June 1995 cannot be adopted by this Honourable Court.

(iv) THAT this Honourable Court be pleased to order that the properties known as Mageso Chambers and Mageso Courts situated in the L.R. No. 209/579 (I.R. 33490) and L.R. No. 1870/V/68 belongs to the Mageresa Sacco Society Limited and not the shareholders.

(v) THAT the costs of this application be provided for.

2. The main reason for the orders sought is that the Applicant failed to file the award in court within the required time. The Applicant also says that the original Applicant has fraudulently concealed essential matters which he ought to have disclosed, namely that the ex parte judgment was set aside on the 9/11/2007. The Applicant herein also says that the two suit properties known as L.R. No. 209/579 (I.R. 33490) and LR No. 1870/V/68 belong to Magereza Sacco Society Ltd. The Applicant also avers that the original Applicant failed to serve the Applicant herein with their application dated 22/02/2001 and continued to mislead the court by continually failing to serve the properly appointed firm of advocates

acting for the Applicant herein. The Applicant also avers that it will suffer irreparable loss unless the ex-parte arbitrators award dated 29/06/1995 together with the ruling and judgment is set aside.

3. The application is supported by an affidavit sworn by **Jane W. Ombongi** dated 28/01/2009. She says that the Applicant herein appointed the firm of Ratemo Oira & Co. Advocates to move the court with a view to having the ex-parte orders issued on 19/12/2001 against the Applicant herein set aside. She also says that the ex-parte order was set aside on 8/11/2007. The record shows that on the 8/11/2007 the court (Hon. Lady Justice Nambuye) made orders granting the application in terms of prayers 3 and 4 of the application dated 29/10/2007, that is to say:-

“3. THAT this Honourable Court be pleased to stay ex-parte orders issued on 9th December 2001 against the Respondent and all other consequential orders of application dated 22nd February 2001 and the Respondent be allowed to defend the said application unconditionally.

4. THAT this Honourable Court be pleased to set aside the ex-parte judgment obtained herein on 19th December 2001 and all other consequential orders resulting therefrom be vacated.”

4. The application dated 22/02/2001 brought by way of Notice of Motion prayed for 2 orders,, that is to say

1. *THAT the award made on 29/06/95 in respect of the above arbitration be hereby read and confirmed as a judgment of this Honourable Court.*

2. *THAT the cost of this application and the arbitration be paid by the Respondent.”*

5. I have perused the court record but I cannot find a record of the hearing and disposal of the said application dated 22/02/2001. What appears to me now is that the instant application comprises grounds in opposition to the application dated 22/02/2001. It is my view that the Applicant herein, Magereza Sacco Society Ltd. has not adopted the correct procedure in dealing with this matter. Instead of prosecuting the application dated 22/02/2001, the Applicant has filed a fresh application. What the Applicant should have done is to file either a Replying Affidavit or Grounds in Opposition to the application dated 22/02/2001. Instead the Respondent is engaging in a multiplicity of applications that can only create confusion and vex both the court and the other party to this matter. I therefore see no merit in the instant application. I also find and hold that the application is not properly before this court as the same purports to take the place of either a Replying Affidavit or Grounds in Opposition to the application dated 22/02/2001.

6. In the premises, I hereby strike out the Respondent’s application dated 28/01/2009 with costs to the Respondent/Applicant. The parties should now proceed with speed to prosecute the application dated 22/02/2001 and filed in court on 8/03/2001.

It is so ordered.

Dated and delivered in Nairobi this 17th day of September, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Oira (present) For the Plaintiff/Applicant

No appearance for the Defendant/Respondent

James Nyagah – Court clerk