



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Civil Appeal 96 of 2008

(Arising out of Kerugoya SRM.'S CIVIL SUIT NO. 318 OF 2005)

JAMES PIUS NJERU.....APPELLANT

Versus

HOSEA MWAI KIBIRI.....RESPONDENT

JUDGMENT

Hosea Mwai Kithiri, the Respondent herein, sued James Pius Njeru, the Appellant herein, vide the plaint dated 1st September 2005 filed before the Senior Resident Magistrate's court, Kerugoya. In the aforesaid plaint, the Respondent prayed for judgment in the following terms:

- (a) ***“A declaration that the defendant's actions for the exchange of their respective land parcels with the plaintiff were contrary to the express terms of the agreement and therefore the agreement stands vitiated and a nullity ab-initio.***
- (b) ***An order for rectification of the register by directing that L.R. No. Mrema/Kagio/3129 be registered in the names of the defendant and L.R. No. Inoi/Kerugoya/2366 be registered in the names of the plaintiff.***
- (c) ***The defendant be condemned to pay costs.”***

The Appellant (defendant) filed a defence with a counter-claim. In the counter-claim, the appellant prayed for the judgment in the following terms:

- (a) ***An order of eviction of the plaintiff from L.R. No. Inoi/Kerugoya/2366 to be effected by the D.O. Central division and the O.C.S. Kerugoya Police Station.***
- (b) ***Payment of Kshs. 50,000/= .***
- (c) ***Costs of the suit and counter-claim.”***

The suit was heard by A.K. Ithuku , learned Senior Resident Magistrate. In his judgment delivered on 4th August 2008, the learned Senior Resident Magistrate, entered judgment in terms of the plaint in favour of

the Respondent (plaintiff) as against the Appellant (Defendant). The defendant's counter-claim was dismissed. On the 5th day of September 2008, the Appellant filed an application in which he sought for the judgment to be set aside by an order for review. The application was opposed. The application was heard and dismissed on 17th October 2008 by Mr. A.K. Ithuku, learned Senior Resident Magistrate. The aforesaid ruling is the subject matter of this appeal.

The appellant raised three main grounds in his Memorandum of Appeal namely:

- i That the learned Senior Resident Magistrate misinterpreted the provision of order XLIV rule 1 of the Civil Procedure Rules. hence wrongly dismissing his application.***
- ii That the learned Senior Resident Magistrate failed to consider the merits of the application.***
- iii That the decision of the learned Senior Resident Magistrate lacked serious considerations of the material placed before him by the Appellant.***

Learned advocates appearing in this appeal agreed to file written submissions which they did not dispose of the appeal. I have considered those submissions and the material placed before me. The issue to be determined is whether or not the learned Senior Resident Magistrate properly exercised his discretion to dismiss the motion dated 5th September 2008. The record clearly shows that the learned Senior Resident Magistrate dismissed the motion for the reason that the formal decree had not been extracted and presented to the court. Basically, the learned Magistrate did not consider the merits of the application. There are ample authorities on the subject to show that a party seeking to have an order or judgment reviewed must extract and present the formal order and or decree before the court hearing the application for review under S. 80 of the Civil Procedure rules. It is admitted that was not done before the trial court. The learned trial Senior Resident Magistrate cannot therefore be faulted.

This being the first appellate court, the appellant is entitled to a re-evaluation of the arguments made before the trial court. It is said that the defendant's advocate failed to present the following documents at the trial:

- 1) Agreement dated 19th December 2001 evidence that I had paid this sum for the extra 1 acre thereby making land parcel INOI/KERUGOYA/2366 1½ Acres i.e; ½ an acre as per the exchange Agreement and Kshs. 189,000/- for the extra 1 acre.***
- 2) Application for consent of Land Board for land parcel INOI/KERUGOYA/2366 signed by both myself and Plaintiff/Respondent.***
- 3) Letter of consent dated 13th November 2001 for the land parcel INOI/KERUGOYA/2366.***
- 4) FOR. R.L.I dated 14th December 2001 signed by myself and Plaintiff/Respondent.***
- 5) Receipt number E31437 dated 14th December 2001 being transfer fees for land parcel INOI/KERUGOYA/2366.***
- 6) Acknowledgment note (undated) showing further payment of Shs. 84,000/= by myself to the Plaintiff/Respondent,***

It was submitted before the trial court that that had those documents been presented the decision would have been different in that the appellant would have been found to have genuinely acquired L.R. No. Inoi/Kerugoya/2366. I have reconsidered those arguments and I do not think they would have assisted the appellant for two reasons:

First, is that the recorded evidence indicate that the appellant referred to those documents. In fact he

tendered the evidence detailing how he transacted over the parcels of land in dispute. It is not in dispute that the documents alleged not to have been produced were in possession of the appellant and his erstwhile advocate. This court in Shah =vs= Dharamshi [1981]K.L.R. 560 held inter alia :

“that for an application for review to succeed the evidence must not only be new but the applicant must prove that he did not have them in his possession at the time and could not have been obtained it despite due diligence.”

In this appeal, there is evidence that the alleged documents were in possession of the appellant. There is no evidence that the appellant and his legal advisers applied due diligence. It would appear the appellant is blaming his erstwhile advocate for letting him down. I am of the view that if the appellant is well advised, his namely lies elsewhere and not through these proceedings. This is one of the instances where the appellant should be left to suffer for the mistakes of his advocate.

Secondly, it would appear from the record that the documents and or evidence the appellant claimed were not tendered before the trial court, were substantially presented before the learned Senior Resident magistrate at the time of trial. Again his remedy does not lie on review. It would appear the appellant's motion would have required the learned Senior Resident Magistrate sit in appeal against his own judgment. That is not permissible in law.

For the above reasons, this appeal is dismissed in its entirety with costs to the Respondent.

Dated and delivered this 13th day of November 2009.

J.K. SERGON

JUDGE