



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

Civil Case 159 of 2007

WILLIAM KILEKWANG.....PLAINTIFF

VERSUS

CHRISTOPHER SIYWAT.....DEFENDANT

R U L I N G

By an amended Notice of Motion, pursuant to the leave of the court granted on 29th July, 2009, under Order XXXLIV Rules 1(1), 2 and 6 and Order XX1 Rule 22 of the Civil Procedure Rules and sections 3A & 63 (e) of the Civil Procedure Act, the applicant seeks orders:

1. That the application herein be certified as urgent and an order for stay of execution of the decree herein and consequential orders be granted in the interim pending inter-parties hearing.
2. That there be stay of the execution of the decree issued herein and its consequential orders pending the hearing and determination of this application.
3. That the honourable court do a review and set aside its orders of decree issued 5/11/2008 of entering summary judgment against the defendant and its consequential orders that the suit herein proceed inter-partes.
4. That costs be in cause.

The application is based on the grounds:

- (a) The application has high chances of success.
- (b) There is new and important evidence which was not within the knowledge of the applicant when the application dated 21/4/2008 was heard.
- (c) The respondent/plaintiff can execute the decree herein and render this application nugatory.
- (d) That the respondent will not be prejudiced if orders herein sought are granted.
- (e) The application is made without any delay as the applicant was awaiting for a certified copy of a decree.

- (f) That the applicant has built a permanent residential house for the family and if evicted, he has nowhere to go thus will be highly prejudiced beyond being compensated on terms of money.
- (g) Affidavit of the applicant Christopher Siywat.

The application is predicated upon the annexed affidavit of Christopher Siywat sworn on the 4th day of August 2009.

On behalf of the applicant, it was submitted that when the applicant received summons to enter appearance, he informed Joseph Kilekwang who had sold part of the disputed land to him as per the agreement exhibited herein as 'CS 2'. That Joseph Kilekwang then undertook to apply to court to be enjoined as the 2nd defendant in the suit. That in deed the said Joseph Kilekwang filed an application dated 11th July, 2008 exhibited herein as "CS 3". Unfortunately the application dated 21st April 2008 was heard before the application dated 11th July 2008 thus closing out the intended 2nd defendant.

Against that background the 1st issue for consideration is that the said Joseph Kilekwang is occupying half of the suit land and the order of eviction affects him yet he has not been heard and he is an interested party.

That the applicant occupies a half of the suit land after he purchased the same from Joseph Kilekwang who was allotted the subject parcel exhibited as "CS 4". That upon allotment Joseph Kilekwang continued to pay receipts for premiums exhibited as "CS 5". That subsequently the applicant moved to do enquiries from Pokot County Council who confirmed that the plot was in the names of Joseph Kilekwang before the record was transferred to Chepareria Town Council as per letter of enquiry and reply exhibited as "CS 6 (a) and (b)" respectively.

It was the contention of the applicant, in the premises, that there are triable issues as to how the records from Pokot County Council changed from No. G 12 allotted to Joseph Kilekwang to William Kilekwang.

That on further investigations, he found out that the plaintiff herein is known as Ptiman Kilegon and hence the name William Kilekwang is fictitious. In this regard the applicant exhibited a copy of a National Identity Card as "CS 7".

It was the applicant's last and final position that the decree herein, if executed could lead to a miscarriage of justice hence this application.

The respondent filed grounds of opposition dated 18th September 2009. It was argued on behalf of the defendant that this application is an abuse of the process of the court since there is no new or important evidence which was not within the defendant's knowledge or could not be produced by him after the exercise of due diligence when the orders of 5th November, 2008 were made.

That the application dated 10th June 2009, but amended on 4th August 2009, amounts to an appeal in disguise. Moreover, the said application raises a cause of action against a third party in favour of the defendant and as such ought to be brought by a separate suit.

Order XLIV of the Civil Procedure Rules provides:

- (1) any person considering himself aggrieved-**
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
 - (b) by a decree or order from which no appeal is hereby allowed.**

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when

the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.....”.

From the language of order XLIV, it is clear to me that there must be discovery of new and important matters or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him by the time the decree was passed. Alternatively there must be some record, or any other sufficient reason.

On the evidence available, it is clear to me that the applicant is fighting on behalf of Joseph Kilekwang. Firstly, his complaint is that the application by the said Joseph Kilekwang to be enjoined in the proceedings was not heard before his application dated 21st April 2008 thus closing out Joseph Kilekwang. Secondly his complaint is that he has since discovered that the plaintiff is known as Ptiman Kilegon and hence the name William Kilekwang is fictitious.

In my view the first issue would have been addressed by an application for third party Notice.

Order 1 Rule 14 of the Civil Procedure Rules provides:

- (2) Where a defendant claims as against Any other person not already a party to the Suit (hereinafter called the third party)-**
- (a) that he is entitled to contribution or indemnity: or**
- (b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or**
- (c) that any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he may, by leave of the court, issue a notice (hereinafter called a third party notice) to that effect, and such**

leave shall be applied for by summons in chambers *ex parte* supported by affidavit.

- (3) a copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.
- (4) the notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within the time limited for filing the defence, and shall be in or to the effect of Form No.22 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.
- (5) where a third party makes as against any person not already a party to the action such a claim as is mentioned in subrule (1), the provisions of this order regulating the rights and procedure as between the defendant and the third party shall apply *mutatis mutandis* as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this order shall apply *mutatis mutandis*, and the expressions “third party notice” and “third party” shall respectively apply to and include every notice so issued and every person served with such notice.
- (6) where a person served with a notice by a third party under subrule (4) makes such a claim as is mentioned in subrule (1) against another person not already a party to the action, such other person and any subsequent person made a party to the action shall comply *mutatis mutandis* with the provisions of this rule”.

The applicant failed to comply with the provisions of order 1 Rule 14 with the consequences that he cannot now be heard to say that there is miscarriage of justice.

Secondly, it is now settled law that it is the duty of a party who wishes to appeal against or apply for a review of a decree or order to move the court to draw up and issue a formal decree or order. Such decree or order must be annexed to the application for review. This has not been done by the applicant. In support of this principle of law, I call in aid the authority of GULAMAN HUSSEIN MULLA JIVANJI & TAIBALI MULLA JIVANJI Vs IBRAHIM MULA JIVANJI

(C.A) 19/1930.

For those reasons this application fails and is dismissed with costs to the respondent.

Dated and delivered at Kitale this...**15TH** .day of.....**DECEMBER**.....2009.

N.R.O. OMBIJA

JUDGE

Ms Kendagor for Njoroge for Plaintiff

Mrs Munialo for Barongo for Defendant