REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 307 of 1998

JOHN JOSEPH MUKOMA.....PLAINTIFF

VERSUS

MICHAEL KARANJA KIBITI AND ANOTHER .....DEFENDANT

JOINT RULING

Joint Ruling for Plaintiffs Application dated 14.4.05 and defendants application of 28.6.2005.

The amended plaint amended on 20th day of February, l998 and filed on 4th March l998 indicates that the Plaintiff John Joseph Mukoma filed suit against Michael Karanja Kabuti Njubi, Josia Mburu Kabuti Njubi and Patrick Kamau Njubi. The summary of the claim is that the Plaintiff is the registered owner of the said suit property and that the defendants have without any lawful claim put a caution against the said property. In consequence of which the Plaintiff sought an order for the removal of the said caution, damages for encroachment [trespass on the plaintiff's land, an] other or alternative relief that this honourable court might deem fit to grant and costs of the suit.

The defence is missing from the record. Agreed issues were signed by both Counsels dated 4th day of June l998 and filed on 8.June l998. the record shows that on 7.4.03 the Court noted that the defendants had been served but they failed to attend Court and the Plaintiff proceeded exparte. The exparte judgment was delivered on 7.04.03. The salient features of the same are that the plaintiff claimed to have been given the said land by his grand father long before registration. It was later registered in his name. He was surprised to see his brother's place a caution on the said land, another brother had planted tea on a portion of it also for unknown reason, the brothers have turned violent and assaulted him severally.

The court after due consideration of the facts made findings to the effect that the plaintiff had exhibited a title deed in his name and on that ground granted judgment in the plaintiffs favour and ordered the District Land Registrar Kiambu to remove the caution placed on the said land and the defendant to pay damages in the sum of Kshs 70,000.00 for trespass plus cost of the suit.

Following that success, the plaintiff filed an application under Order39 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law seeking an order that one Joseph Mburu Njubi the 2nd defendant should be ordered to sign tea transfer form for Account No. KA 370028 at Kambaa Tea factory limited from his name to Joseph John Mukoma Njubi the Plaintiff applicant and that costs be provided for. The application is not dated but it is filed on 14th April 2005 although the certificate of urgency reads 14.4.05.

The application does not have grounds on which grounded in the body of the application save that it referred to the grounds in the supporting affidavit. The salient features of the same are that the Applicant/Plaintiff decree holder is the legal owner of the said suit land, he planted tea plants on the suit land, the second defendant started picking the said tea plants and started delivering the same at Kambaa Tea Factory through an account he obtained as no KA 370028 in the name of Josiah Mburu Njubi, that he obtained a Court order which he served on to the Kambaa Tea factory, who requested the said 2nd defendant to call on them to sign a transfer of the said account but he declined hence the application to compel him to do so.

The reply of Josiah Mburu Njubi is vide a replying affidavit sworn on 11th day of July 2005 and filed on the same date. The salient features of the same are that the suit land was registered in the name of the Plaintiff as trustee for all the other members of the family by his late father, denied that the applicant is the sole owner of the said land, denied that the applicant planted the said tea bushes, that him Josiah Mburu was the one who planted the said tea bushes during the life time of their late father, him and other brothers are entitled to share in the said land he has cultivated the same for the last 20 years.

The defendants on the other hand filed a chamber summon under order 1XB Rule 8 Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law among others seeking orders that the honourable court be pleased to set aside the judgment of Honourable justice Hayanga made on 7th April 2003.

The grounds in support are in the body of the application and the supporting affidavit sworn on 27th June 2005 by Josiah Mburu Njubi and filed on 1st July 2005. The sum total of the content is that they had counsel on record who never alerted them of the hearing date, that it will be unfair for the plaintiff to obtain final orders on the matter before they are heard as they will suffer irreparable damage incapable of being compensated by way of damages, that mistakes of Counsel should not be visited on them, that it is the interest of justice that the judgment be set aside as they are entitled to the suit land which their late father had registered in the name of the plaintiff as trustee, maintain that the plaintiff has misrepresented the facts to court and has come to court within unclean hands, that the suit land is his only source of livelihood, they maintain that they have a strong case against the Plaintiff.

The application dated 14.4.05 and that one of 28.6.05 were consolidated by Ojwang J. on 4.7.05 and ordered to be heard together. On 12.07.06 the Deputy Registrar also made orders that the said applications be heard together as so consolidated.

On 04.03.08 the Plaintiff did not turn up for the hearing and the court being satisfied that they had due notice allowed the defence Counsel to proceed exparte.

On the first application of 14.4.05 Counsel submitted that it is better the ownership issues was dealt with and finally determined first before the 2nd defendant can be compelled to sign the transfer form for the said tea account. They still maintain that the land is family land.

On the second application for setting aside Counsel maintained that on the facts presented to Court, the said orders should be granted as it is the fault of Counsel on record that exparte orders were visited against the defendants, the defendants have given a reasonable explanation that they were not aware of the proceedings until served with the Plaintiffs application. They maintain, the Plaintiff is trying to take advantage of other family members who have a right to share in the said lands, that the court has a discretion to grant the orders sought to enable the defendants defend the suit, that serious triable issues are raised, maintains that mistake of Counsel should not be visited on innocent litigants.

On case law Counsel referred the Court to the case of **EVANS VERSUS BARTLAM [1983] 1A ER 646** where the Court of Appeal held inter alia that unless if it can be shown that the judge acted wrongly in exercising his discretion to set aside an exparte order, an appellate Court will not interfere with the exercise of that discretion.

The case of **PITHON WAWERU MAINA (1982-88) 1 KAR 171** at page 172 Potter J. as he then was made observation of case law principles thus:-

(i) There are no limits or restrictions on the judge's exercise of his discretion, except that when he does so the terms should be just, and the aim of doing so should be to do justice and the court should not impose conditions on itself to fetter the wide discretion is bestowed on it.

(ii) As per the principle in the case of **SHAH VERSUS MBOGO [1967] E.A.116 and 123 (65) –** the discretion is intended so to be exercised to avoid injustice or hardship, resulting from accident, in advertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion, or otherwise, to obstruct or delay the cause of justice.

(iii) The discretion of the Court is perfectly free and the only question is whether upon the facts of any particular case it should be exercised. In particular mistakes or misunderstanding of the appellants legal advisors even though negligent may be accepted as a proper ground for granting relief but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate the manner in which the discretion should be exercised.

(iv) A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice.

The Court has given due consideration to all points raised by both sides in relation to both applications and the Court moves to make the following findings in respect to the same

It is noted from the face of the 1st application presented by the Plaintiff on 14.4.2005 that it is not dated, it does not have grounds in the body of the application as required by order 50 rule 7 Civil Procedure rules, neither does it have the note as mandatorily required by order 50 rule 15(2) of the Civil Procedure Rules. It therefore does not comply with the rules. The Court is entitled to point these out irrespective of whether raised by counsels or not.

The Court notes that these defects are not curable under Order 50 rule 12 Civil Procedure rules which deals with failure to cite each and even rule under which the application has been presented. The Court has however no doubt that since it is a pleading, it is subject to the provisions of Order 6 rule 12 Civil Procedure Rules which prohibits the faulting of a pleading on account of its want of form. This Court is of the opinion that failure to comply as noted above is a want of form which can only be treated as being fatal if it has occasioned injustice, and or hardships to the opposite party or it renders the entire process hopeless and nonsensical which is not the case here. The omissions therefore fall under the general principles the courts discretion either to uphold sanctity of the rules of procedure or fail to uphold them in favour of substantial justice.

In the case of **SARAH HERSI VERSUS KENYA COMMERCIAL BANK CIVIL APPEAL NO. NAI 165/1999** Akiwumi JA as he then was ruled inter lia that

"*Rules are hand maidens of this Court which court is called upon to ensure that the hand maidens do not become bad masters"*. In the case of **NDEGWA WACHIRA VERSUS RICARDA WANJIRU NDANJEU [1982] 1KAR** it was held inter alia that where a breach of the rules is not fundamental, the proceedings will not beset aside. And in the case of **CONSOLATA NDINDA JULIUS AND 4 OTHERS VERSUS BANUEL BOVIS OMAMBIA, NAIROBI HCCC, NO. 2050 0F 1993** Kubo J. held that

"*a court of law at least must be prepared to do substantial justice to the parties undeterred by technical procedural rules"*.

When the foregoing principles are applied to the facts herein, it is clear that failure to comply with the

technical rules as set out above has not caused any hardship or miscarriage of justice to the applicant who is the defendant, who even argued the plaintiffs application in the absence of the plaintiff without asking the court to have the said application struck out on those points of technicality. The Court therefore rules, that failure to comply with the rules is not fatal to the plaintiff's application. It was proper to have it argued and ruled upon on merits.

On its merit the courts consideration of the totality of the arguments by both sides for and against reveals that granting the plaintiff the relief he seeks is only feasible where it can be shown that the plaintiff's rights as regards the suit property have crystallized. As long as the defendants nurse a desire to be heard on their challenge of these rights, this court has no alternative but to put the Plaintiffs move on hold until the issues raised herein are finally determined. For this reason the plaintiffs application filed on 14.4.05 be and is hereby dismissed.

(2) Costs of the same will be paid to the 2nd defendant to whom it was directed.

As regards the defendants application of 28.6.05, the court has considered it in totality of all the arguments presented by both sides in the light of applicable principles on setting aside of exparte orders already set out on the record, and in view of the apparent non denial that disputants are brothers or related, that the dispute over the subject matter is on the basis that one party asserts sole ownership of the property while the other party asserts trusteeship, and which dispute has at times led to violent confrontations, interests of justice demands that the matter be reopened for the defendants to be heard on their case so that the issue is ruled upon on merit.

This move is necessitated further by the undisputed fact that failure to alert, the defendants of the hearing lies within their advocate then on record for the defendant. There is no justification to penalize the defendants for wrongs committed by their advocates though they are deemed to assume the risk of the professional competence of their said Counsel. Justice demands that the said application be allowed.

As for the costs the Plaintiffs who could not police the defendants Counsel and whip him into ensuring attendance at the said hearing cannot be penalized in terms of costs. He will therefore be awarded the said costs.

The final orders are as follows:-

(1) The Plaintiffs/Application of 14.4.2005 be and is hereby dismissed for the reasons given.

(2) Costs of this application to the 2nd defendant.

(3) The defendants application dated 28.6.05 be and is hereby allowed. This Courts judgment of 7.04.03 by Hayanga J.(as he then was) be and is hereby set aside.

(4) The Plaintiffs will have costs of the said application.

(5) Parties are at liberty to process the matter for trial and disposal on merit on a priority basis.

DATED, READ AND DELIVERED AT NAIROBI THIS 24TH OF APRIL 2008

R.N. NAMBUYE

JUDGE