



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1351 of 1980

MIRIAM GACOKI KIARIEPLAINTIFF

V E R S U S

1. ATTORNEY GENERAL

2. WAWERU RANJA

3. WILLIAM WAITUIKA KIHURIADEFENDANTS

R U L I N G

This is an application (by notice of motion dated 12th October, 2006) by the Plaintiff for an order to review and set aside the order of this court dated 12th March, 2004 (Ojwang', J) by which the Plaintiff's suit was dismissed with costs for want of prosecution. The application is stated to be brought under Order 44, rule 1 of the Civil Procedure Rules (the Rules) and also under section 3A of the Civil Procedure Act, Cap. 21 (the Act). I heard the application only because Ojwang', J is no longer attached to this division of the Court.

The main complaint of the Plaintiff is that the application to dismiss the suit (which was by notice of motion dated 15th October, 2003) was heard *ex parte* and without her having been accorded an opportunity to be heard. Indeed the application was heard *ex parte*; the record of the court of 1st March, 2004 bears this out. Ruling was reserved for and delivered on 12th March, 2004. In the ruling the learned Judge addressed the issue of service of the application and hearing notice thereof. He was apparently satisfied that service had been duly effected upon the Plaintiff's advocate. This issue of service of the application to dismiss the suit is the very same one that the Plaintiff has raised and dwelt on at length in her affidavit sworn in support of the present application. The issue has been addressed at length in the two replying affidavits.

Order 44, rule 1 provides for three scenarios:-

(i) Where the applicant has discovered a new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time the decree or order sought to be reviewed was passed or made.

This scenario presupposes that the proceedings resulting in the decree or order were *inter partes*. This was not the case in the present matter; the application for dismissal of the suit was heard *ex parte* and no papers had been filed in response thereto. So, the Plaintiff cannot properly apply under this scenario.

(ii) Where there is some mistake or error apparent on the face of the record.

No mistake or error apparent on the face of the record has been pointed out in the supporting affidavit. None was pointed out during submissions. I find none.

(iii) Where there is any other sufficient reason.

This is a very old suit. I note that at some stage it had been referred to arbitration; the resulting award, it has been deponed by the Plaintiff, was in her favour but was subsequently set aside on legal grounds. The suit involves land, and it appears that it is the Plaintiff who is in possession of the suit land.

As disclosed by the supporting and replying affidavits, the issue of service of the application for dismissal of the suit is highly contentious. It has been contended by the Plaintiff that her then advocate had ceased to practice in 1993 and could not have been served with the application. For the 2nd Defendant it has been contended that though the Plaintiff's then advocate had not held a practising certificate from 1993 his offices were open on and off. Now that the issue of service of the application for dismissal has been addressed *inter partes* by affidavit, and given the status of the Plaintiff's then advocate regarding practising certificate, I hold that it will be just that the Plaintiff be accorded an opportunity to be heard upon the application for dismissal. This is a sufficient reason to review the order of 12th March 2004.

Having considered the submissions of the learned counsels, including the cases cited, I will allow the application by notice of motion dated 12th October, 2006 and set aside the order of dismissal of the Plaintiff's suit entered on 12th March, 2004. I direct the application for dismissal of the suit by notice of motion dated 15th October, 2003 be heard *inter partes*. To facilitate this, the Plaintiff shall within 14 days of delivery of this ruling file and serve a replying affidavit. Costs of the present application shall be in the cause. It is so ordered.

DATED AT NAIROBI THIS 18TH DAY OF APRIL, 2008

H. P. G. WAWERU

J U D G E

DELIVERED AT NAIROBI THIS 18TH DAY OF APRIL, 2008