REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Case 180 of 1983

KARIUKI NYAGA …….....……. PLAINTIFF

VERSUS

GICHOBI KARIUKI ……. DEFENDANT

JAMES MUCHIRA NDAMBIRI ……..... INTERESTED PARTY

RULING

This ruling relates to two applications. I will begin by considering the application dated 18th May 2007. That application is brought under Order IXB rule 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The plaintiff by that application seeks the setting aside of the dismissal of his application dated 6th October 2006 which was dismissed for non-attendance on 15th May 2007. In support of that application the advocate for the plaintiff swore an affidavit. He deponed that on the 15th May 2007 at about 5.20a.m. he left Nairobi on his way to Nyeri to attend the hearing of that application. That he did his best to be punctual in court but arrived at 9.27a.m. On his arrival he found the application had been dismissed for non-attendance. The advocate deponed that it was due to his mistake the application was dismissed. He stated that it is in the interest of justice that the dismissal be set aside and the application be reinstated for hearing. If such orders were given he stated that there would be no prejudice to the defendant. The application was opposed on three main grounds by the defendant.

Firstly, it was argued that Section 3A does not apply to the present application. The reliance on it made the application to be incompetent according to the defendant's counsel. He relied on the case of *Mediterranean Shipping Co SA v International Agriculture Enterprises Ltd & ETCO (MSA) Ltd [1990] KLR.*

" ***It is trite law that the inherent jurisdiction of the court should not be invoked where there is specific statutory provision, which would meet the necessities of the case. Section 3A of the Civil Procedure Act ought not be called into the aid of a litigant in all situations not specifically legislated for. It all depends on the circumstances of each case."***

The defence also relied on the case of *HIGH COURT CIVIL APPEAL NO. 28 OF 2002* and in particular the following portion in that case.

"***It is evident that the appellant erred in seeking reliance on section 3A of the Civil Procedure Act to bring her application. That section is appropriate to invoke the inherent powers of the court where there are no specific provisions provided. An application under section 3A of the Civil Procedure Act ought to be brought by a notice of motion under Order 50 rule 1. In the instant case there are clear provisions dealing with applications for setting aside orders of dismissal. Indeed the appellant cited the provision which is Order IX B rule 8 of the Civil Procedure Rules. The rule requires the***

application to be brought by summons. It is evident that the appellant complicated her situation by citing section 3A of the Civil Procedure Act which was unnecessary. It is the bringing in of this section that rendered her application defective."

In response to this opposition I make a finding that the fact that the application was made under Section 3A and Order IX rule 8 does not render the application to be incompetent. In raising that opposition the defence did not say that reliance on that order prejudiced them. It is clear that the defence knew the application that they were to meet. I am supported in that finding by the case ***Civil Appeal No. 189 of 2001 between Postal Corporation of Kenya and I. T. Inamdar and others*** where the Judges of Appeal stated:-

"***in our view, the Notice of Motion that was before the superior court could have been better drafted and the appellants sentiments are not altogether baseless, particularly when one considers that the application was seeking orders that were to see finality of the entire suit ……. We do not find that the appellant was prejudiced by the bad drafting of the notice of motion and thus, nothing turns out on the first and tenth grounds of appeal. Citation of wrong order or rule is not necessarily fatal to an application".***

The *second* ground of opposition is that the plaintiff did not swear an affidavit in support of the application and yet the application which was dismissed had been made by him in person. In response to that argument it ought to be noted that the plaintiff instructed S.G. Wachira advocate to act for him and the said advocate did file a Notice of Appointment dated 14th May 2007. That ground of opposition therefore is rejected. *Thirdly* the defence in their opposition argued that counsel for the plaintiff had not brought anything before court to prove that he was in court as stated. In this regard it is not clear what would have sufficed to prove that counsel for the plaintiff was in court after the application was dismissed for non-attendance. Having considered the application as a whole I find that the wider justice of this case would best be served by setting aside the dismissal of the application dated 6th October 2006 and reinstating it for hearing.

The other application was dated 23rd March 2007. This is an application filed by the interested party. The application is brought under Sections 3A and 51 of the Civil Procedure Act. The third party seeks for an order that the plaintiff/respondent, his servants or agent or any person claiming under him to be forcibly evicted from the property Baragwe/Kariru/1970. In support of that application the interested party stated that the defendant was previously registered as the owner of Baragwe/Kariru/183. That property was sub-divided into plots Baragwe/Kariru/1969 and Baragwe/Kariru/1970. The defendant sold to him plot Number Baragwe/Kariru/1970. In order to understand this matter it is important to know the background of it. On 4th October 2001 judgement was entered to the effect that the plaintiff was to get 3.6 acres of Baragwe/Kariru/183. The defendant who is the son of the plaintiff that is Gichobi Kariuki was to get the reminder one acre of that land. On 26th July 2002 James Muchira Ndambiri was joined by the Deputy Registrar as an interested party in this action. By an application dated 30th July 2002 that interested party sought the removal of the inhibition placed on plot Numbers Baragwe/Kariru/1969 and Baragwe/Kariru/1970. On perusal of the court file it seems as though this was the first time the court was informed of the sub-division of the original property. Even though the Deputy Registrar of this court did not have power to entertain that application under the Civil Procedure Rules it does seem that he proceeded to hear the same and delivered a ruling on 23rd January 2003. By that ruling the Deputy Registrar removed the inhibition that had been placed there by the plaintiff. It does seem that during the argument of that application the interested party informed the court that he had purchased one acre of that property from the defendant. The interested party has hinged his present application on the ruling of the Deputy Registrar dated 23rd March 2007. In that ruling there was no decision made that the interested party should get any portion of land. Accordingly I am of the view that the remedy the interested party seeks cannot be granted in this matter. This is because judgment was entered as stated herein before on 4th October 2001. On entry of that judgment a decree that would ensue thereof cannot be the subject of review or alteration. See Order XX of the Civil Procedure Rules. Accordingly that application would fail. Further I do make a finding since judgment was entered as stated herein before the interested party has no Locus to seek eviction of plaintiff. If he is the owner of parcel No. 1970 the remedy he seek can

only be obtained in a suit instituted by him. In the end the court grants the following orders;-

1. The Chamber Summons dated 18th May 2007 is granted in that the dismissal on 15th May 2007 of the application dated 6th October 2006 is hereby set aside and the application dated 6th October 2006 is hereby reinstated for hearing. The costs of that Chamber Summons shall follow the outcome of the hearing of the application dated 6th October 2006.

2. Notice of Motion dated 23rd March 2007 is dismissed with costs to the plaintiff.

3. ***Because of the age of this matter at the reading of this ruling the court will give a date for hearing of the reinstated application dated 6th October 2006.***

Dated and delivered at Nyeri this 8th day of April 2008.

MARY KASANGO

JUDGE