REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 2247 of 1999

MOHAMMED HANIF …….....…..……..PLAINTIFF

VERSUS

1. JUSTUS NYAMU

2. GATUNDU WANJAGI

3. GERAND MUTURI MAINA

4. KABILE KIGERA

5. MURUNGA FRANCIS KIGOTHO

6. JAMES COSMAS NJOROGE…….....……DEFENDANTS

RULING

In an application dated 22nd and filed in Court on 23rd March 2006, the applicant sought a prayer to review the judgment of this Court entered on 31st August 2001 and another order to provide for the costs of the application.

The applicant was one of the Defendants in the case subject to this application. When it was filed in Court on 24th November 1999 all the Defendants, except one (now the applicant herein), were served with summons to enter appearance.

It would seem from the records therefore that none of the Defendants filed appearance and on 3rd May 2000 an interlocutory judgment was entered for the Plaintiff.

On 1st March 2001 the case was fixed for formal proof. On that day, present counsel for the applicant appeared in Court but conceded that since he had not filed an appearance on behalf of his client, he had no right of audience. He left the Court and the formal proof proceeded.

The Plaintiff testified and completed his evidence on that day and the case was adjourned to another date not mentioned, but before that date, counsel for the present applicant filed an application in Court to set aside the interlocutory judgment. This application is not readily available on the record but it would seem by letter dated 2nd April 2001 this application was dated 21st March 2001 and filed in Court on 28th March 2001.

It was heard on 30th May 2001 and in a ruling by ***Judge Kuloba***, as he was then, he said.

"***The hearing shall continue regarding all the Defendants except the sixth Defendant".***

The case then continued still as a formal proof. Then submissions were made by counsel for the Plaintiff on 12th June 2001 and judgment delivered on the same day wherein orders were made in terms of the prayers sought in the Plaint.

There is then an application dated 17th August 2001 by the present applicant and filed in Court on 23rd August 2001 but there is no record that this application has been dealt with so far.

But back to the hearing of the case subject to the present application by way of formal proof, I do not understand how and why the case continued by way of formal proof on 12th June 2001 after the Court ruled that the applicant had not been served with summons to enter appearance in the first place.

I would have expected at this juncture the first witness to be availed for cross-examination after the applicant is allowed to file his papers in Court since it had, by implication in the Judge's ruling of 30th May 2001, been agreed that this particular Defendant ought to have taken part in the proceedings from 1st March 2001 when it was heard by way of formal proof for the first time. But before doing this he had to file appearance and defence.

Apparently the Counsel who had applied for setting aside the interlocutory judgment did not seize this opportunity to apply for adjournment so as to file the documents stated above.

Judgment on the formal proof was delivered on 12th June 2001. No further action was taken until the application dated 22nd and filed in Court on 23rd March 2006 for review of the above Judgment.

Under ***Order XLIV*** of the Civil Procedure Rules, an application for review of an order or decree of the Court can be made and obtained; on account of:

"***discovery of new and important matter or evidence which, after the exercise of due diligence was not within (the applicants') knowledge or could not be produced by him at the time when the decree was passed or order made; or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason***".

Counsel for the applicant herein does not complain of any error or mistake apparent on the face of the record or give any other sufficient reason for this application for review, but that the Judge who ruled on the case on 12th June 2001 relied on the conviction of the first Defendant in ***Criminal Case No. 13 of 1996*** in arriving at his decision in the Civil Case when in fact that Defendant had appealed against that conviction in ***Criminal Appeal No. 88 of 1998*** in which the judgment was delivered on 15th April 1999 acquitting that accused.

Counsel stated in his submission that since the reason given for the decision in the Civil Case was non-existent on the day that decision was made, the basis of that judgment cannot stand. He prayed that his application be granted.

Counsel for the Respondent was ***Mr. Maina*** who opposed the application and referred the Court to the replying affidavit.

According to counsel, there has been a delay of five years and that this was not a case where an order of review should be given because of indolence.

According to him, no new matter had been raised because the judgment in Criminal Appeal was delivered in 1999 and was within the knowledge of the applicant at the time the judgment the subject to

this application was delivered. He urged Court to dismiss the application.

I have heard and considered submissions from both counsel for the parties.

It is true to say that the Judge's judgment the subject to this application was mainly hinged on the outcome of the ***Chief Magistrate's Court Criminal Case Number 1306 of 1996.***

Though there was an appeal from the Chief Magistrate's Court decision the judgment in the appeal was delivered in 1999 in which event, by the time the judgment subject to this application was delivered on 12th June 2001, or even when the case was going on that year, the applicant was aware of the result of that appeal and did not bring it to the notice of the Court.

Can one call this a new and important matter which was not within the knowledge of the applicant when the decision subject of this review application was made? I cannot say "***yes***" to this question. Even so, the proviso to ***Order XLIV Rule 3*** of the Rules requires strict proof of the allegation that the applicant had no knowledge that the applicant had successfully appealed against the Chief Magistrate's Court decision. No such proof has been produced by the applicant herein.

In any event, since the Judgment was delivered on 12th June 2001 it is nearly five (5) years; but under ***Order XLIV 1(1)*** of the Rules, the application for review should be made without unreasonable delay.

During the applicant's counsel submissions on this application there was no attempt on his part to give any reason for or explain this delay of five (5) years.

In the case of ***James M. Kingaru & 17 Others v. J. M. Kangari & Muhu Holdings Limited and Others, (HCCC No. 693 of 2002) Judge Visram*** held a four (4) month delay in filing an application for review of a ruling in ordinate so was a delay of twenty (20) months in the case of ***Fidelity Commercial Bank Limited v. Vinay Shah HCCC No. 10 of 1998 (Milimani Commercial Courts).***

In this application a nearly five (5) years delay without any explanation is an inexcusable delay.

Consequently the application dated 22nd March 2006 and filed in Court on 23rd March 2006 is hereby dismissed with costs.

Delivered and ***dated*** at ***Nairobi*** this 29th day of March 2007.

D. K. S. AGANYANYA

JUDGE