



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL CASE 218 OF 1991

SAMWEL THIAURU AKWARU PLAINTIFF

VERSUS

MBURUKU M'RINKANYA DEFENDANT

RULING

By a Notice of Motion dated 22nd December, 2005 the applicant is seeking

- (i) *That interlocutory judgment and all subsequent orders be reviewed and applicant allowed to defend the suit.*
- (ii) *That the applicant be allowed to file a replying affidavit to the originating summons, and*
- (iii) *That the costs be provided for.*

The application is premised on the following grounds;

- *That the interlocutory judgment was irregularly entered*
- *That the interlocutory judgment has been set aside as against the 2nd defendant*
- *That the applicant's application to set aside the interlocutory judgment was dismissed*
- *That now the suit is due to be heard and that the applicant is desirous of being heard too.*

In opposing the application the respondent filed a replying affidavit in which he has deposed that since the applicant's earlier application was heard and determined on merit, the present application is not only *res judicata* but also amounts to an abuse of the court process. It is further argued that the interlocutory judgment sought to be reviewed was entered over 15 years before the filing of the present application. It is finally deposed that it is not sufficient to state that since the 2nd defendant succeeded in setting aside the interlocutory judgment, the applicant must be entitled to defend the suit.

The brief facts forming the background of this dispute are that on 19th June, 1999 the respondent filed an originating summons seeking a declaration that he has become entitled, by adverse possession, to a portion of a larger parcel of land comprised in land title No.Tigania/Thananga/62, registered in the name of the applicant.

The originating summons was subsequently amended to include the name of the 2nd defendant on 19th May, 1995- and to change the number of the disputed land to Parcel Nos.Tigania/Thananga/547 and 548.

On 21st November, 1991 a default judgment was entered against the applicant, and a decree drawn – on 18th October, 2002 after the hearing of the originating summons. But earlier, on 17th March, 2000 the applicant had sought in his application dated 13th March, 2000 the setting aside of the *ex parte* judgment.

On 3rd August,2000 the applicant again filed a similar application. Yet another application dated 29th July, 2003 was filed seeking stay of execution of the decree, injunction and the setting aside of *ex parte* judgment. This application was settled by consent where it was agreed that judgment dated 18th October,2002 and all subsequent orders against the 2nd defendant be set aside and the 2nd defendant be served with summons and amended originating summons within 21 days.

In the meantime the applicant's Chamber Summons date 3rd August,2000 was dismissed on 7th August,2000.

What this means in brief is that the judgment against the 2nd defendant has been set aside by consent and he has been granted leave to defend the suit, while the applicant's attempts to set aside the *ex parte* judgment has been unsuccessful. He has now brought the instant application under Sections 80 and 3 of the Civil Procedure Act, and Order 44 Rules 1,2 and 3 of the Civil Procedure Rules.

The substantive law for review of a judgment is Section 80 of the Civil Procedure Act, which allows any person who is aggrieved by a judgment to apply to the court which passed the decree or made the order for a review of the same. Order 44 of the Civil Procedure Rules made pursuant to Section 80 provides the parameters for the consideration of an application for review.

An application for review will be allowed where;

- (i) the applicant has discovered 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 order made,
- (ii) there is some mistake or error apparent on the face of the record, or
- (iii) For any other sufficient reason the court finds it necessary to review a judgment.

From the above it follows that the arguments advanced by learned counsel for the applicant regarding the decision dismissing his application for the setting aside of the *ex parte* judgment are without merit.

He submitted that the entry of *ex parte* Judgment in an unliquidated claim was erroneous – as the court ought to have set down the case for hearing instead. With respect to counsel, this is not the kind of error or mistake apparent on the face of the record envisaged by Order 44 Rule 1 (1) of the Civil Procedure Rules.

It must be an error, as explained in Rule 2, such as clerical or arithmetical mistakes or error apparent on the face of the decree. It is an error which must be so clear as to be without dispute.

Secondly a distinction ought to be drawn between a review and an appeal. As was correctly observed in the Uganda case of Belinda V- Kangwama and Another(1963).

“A point which may be a good ground of appeal may not be a ground for an application for review. Thus an erroneous view for evidence or law is no ground for a review though it may be a good ground for an appeal”

There is also a useful passage in the 13th Edition of Mulla on the Indian Code of Civil Procedure at page 1672. It states:

“A mere error of law is not a ground for review under this rule. It must further be an error on the face of the record. The line of demarcation between an error simplicitor and an error apparent on the face of the record may sometimes be thin. It can be said of an error that is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established”

It follows therefore that whether the entry of *ex parte* judgment was irregular, such irregularity is not a matter for review as the other side maintains that it was regular as evidence in formal proof was called. Counsel for the applicant also submitted that there was discovery of new and important matter, namely that the court in entering *ex parte* judgment failed to consider Order 104 Rule 5 of the Civil Procedure Rules. This argument too must fail in view of what I have stated above with regard to appeals and review. Even the order setting aside the *ex parte* judgment cannot constitute discovery of new and important matter.

Similarly, stretching the rules to invoke the last ground, “*for any other sufficient reason*”, cannot assist the applicant as I see no other sufficient reason. Given the number of applications the applicant has brought and considering the time it has taken him to bring the present application, the court cannot exercise its discretion in his favour.

Litigation has come to an end. This application, I conclude, must fail and is dismissed with costs.

DATED AND DELIVERED AT MERU THIS 2ND DAY OF MARCH, 2007

W. OUKO

JUDGE

2.3.2007

W. Ouko, J

Mr. Mwanzia for plaintiff/respondent

N/A Mr. Kariuki for the Defendant/applicant

C/clerk Marangu

Ruling delivered.

W. OUKO

JUDGE