REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Civil Appeal 19 of 1999

BEATRICE WAKONYU KAMAU……..……..…….APPELLANT

Versus

JOYCE MUTHONI KIRIGI…….…….……...…….……...…..….RESPONDENT

(Being appeal from the Judgment of the Senior Resident Magistrate's Court at Murang'a in Civil Case No. 304 of 1994)

RULING

The Applicant in the Chamber Summons dated 2nd of April 2003 was successful in her claim in the lower court where the lower court ordered that she be given two acres out of the suit property namely LOC.15/KANGURE/163. The Defendant who is the Respondent to the present application filed an appeal from the lower court's decision. That appeal was fixed for hearing on 7th March 2002. The Appellant's advocate served a hearing notice on the Applicant's advocate. On the day of hearing the Applicant and her advocate were absent. The appeal was heard and the court dismissed the lower court's suit and upheld the appeal. The end result of that decision was that the Applicant lost the two acres that had been awarded to her by the lower court. She has now filed a Chamber Summons brought under *Order XLIV* of The Civil Procedure Rules and *Section 3A* of the Civil Procedure Act. The Applicant seeks by that application that the judgment made on 27th day of June 2002 whereby this appeal was upheld be reviewed, varied or set aside. In her supporting affidavit the Applicant stated that she had engaged the services of J. N. Mbuthia who failed to attend court for the hearing of the appeal. She stated that the advocate did not also inform her of that hearing date and accordingly she did not attend. She was of the view that had she been allowed to argue that appeal, that a different decision would have been reached.

In opposition to that application the Appellant argued that the application was incompetent for having been filed as a Chamber Summons and yet it ought to have been filed as a Notice of Motion. To this argument I respond as follows: Such an error, if it can be so called, is not fatal to an application. This indeed was the finding in **Civil Appeal No. 284 of 1997 JOHNSON JOSHUA KINYANJUI & ANOTHER AND RACHEL WAHITO THANKE & ANOTHER.** The appropriate portion of that case is as follows:

"***If an application is brought under different rules, one calling for a Notice of Motion application and another calling for a chamber summons application then the party applying has a choice to use a Notice of Motion procedure. If during the course of the hearing the party abandons the application under a rule which entitles him to apply by way of a Notice of Motion, the application does not become incompetent."***

*Order 50 rule 11 provides**:***

"***Where any application which is authorized to be made in court is made in chambers the judge may either adjourn the application into court or hear it in chambers."***

*Order 50 rule 10 provides**:***

"***Any judge or magistrate may adjourn into court an application made to him at chambers which he deems more convenient to be considered in court."***

It can be seen that no application is to be defeated by use of wrong procedural mode and the judge has the discretion to hear it either in court or in chambers".

The Appellant's objection therefore to the Respondent's application having been brought under Notice of Motion is therefore rejected.

The Appellant also faulted the application for having been brought without complying with *Order L Rule 15(2).* That rule requires that every motion and summons will bear the following words:

"If any party served does not appear at the time and place above-mentioned such order will be made and proceedings taken as the court may think just and expedient."

In response to that argument I would state that that rule would render an application to be incompetent if the Respondent on being served fails to attend Court where the motion or the summons failed to alert such a Respondent of those words in *Order L Rule 15(2)*. In this case the Appellant did attend and therefore there was no mischief that was occasioned. The Court therefore rejects that argument. In further opposition the Appellant argued that the application is incompetent because the Applicant had failed to attach the order, which was the subject of the review. Indeed it is correct that when a party seeks review such a party should attach the order, which is sought to be reviewed. But in this case the Applicant's application is really one seeking to set aside the judgment rather than to review. I therefore also reject that argument for it is not necessary for a party to attach a copy of the order they seek to set aside.

The Appellant further argued that the affidavit in support of the Applicant's application was sworn after the filing of the same. I also reject that argument that such dating makes the application to be incompetent. It is after all possible that if an affidavit is filed without a date, a party can always be allowed to date it any time before the hearing of the matter. See also *Order XVIII Rule 9,* which provides that an affidavit should not be rejected solely because it was sworn before the filing of the suit. It is therefore possible that that was the scenario in this matter. Considering the application and the opposition raised by the Appellant I am of the view that the orders sought by the Applicant are merited since indeed the Applicant has succeeded to show that it was the advocate who failed to attend court when the appeal was heard. I therefore grant the following orders:

1. That the judgment of 27th June 2002 is hereby set aside.

2. That the costs of the Chamber Summons dated 2nd April 2003 shall be in cause.

Dated and delivered at Nyeri this 27th day of July 2007.

MARY KASANGO

JUDGE