REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 86 of 1999

1. HANNAH WANGUI ITHEBU

2. NDAMBUKI MUSEMBI ……..…..APPELLANTS

V E R S U S

1. JOEL NGUGI MAGU

2. KAKUZI LIMITED

3. THE LAND REGISTRAR MURANGA ……...RESPONDENTS

R U L I N G

When the appeal herein came up for hearing on 14th April, 2005 there was no appearance for the 1st Respondent. The appeal was heard. Judgment was delivered on 18th May, 2005. The appeal was allowed with costs; the judgment of the lower court was set aside and the 1st Respondent's case before that court dismissed (he was the plaintiff). He had claimed against the Appellants (who were the 2nd and 3rd defendants) and the 2nd and 3rd Respondents (the 1st and 4th defendants) various reliefs in connection with land parcel L. R. No. KAKUZI/KIRIMIRI/BLOCK 9/289, including general damages and mesne profits.

The 1st Respondent has now come to court by amended notice of motion dated 17th May, 2007 seeking orders that the judgment herein of 18th May, 2005 be set aside and the appeal be reinstated for hearing *inter partes*. The application is brought under Order 41, rule 18 of the Civil Procedure Rules (the Rules). That rule provides as follows:-

"**18. Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the court to which the appeal is preferred to re-hear the appeal; and if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him."**

The application is brought upon the main ground that there was an oversight on the part of the 1st Respondent's advocate "**which made him fail to attend the hearing ….**" It is supported by the advocate's affidavit sworn on 17th April, 2007.

The Appellants have opposed the application as set out in the replying affidavit sworn by their advocate and filed on 18th June, 2007. The ground of opposition emerging from the replying affidavit, *inter alia,* is that the 1st Respondent has not given any reason or sufficient ground why the appeal should be reinstated.

I have considered the submissions of the learned counsels appearing. No authorities were cited. The 1st Respondent has not claimed that hearing notice was not duly served. He must therefore satisfy the court that he or his advocate was prevented by sufficient cause from attending the hearing. Has he done so?

It is stated in paragraph 3 of the supporting affidavit merely that on the hearing date, due to an oversight on his part in consulting his diary, the 1st Respondent's advocate did not attend the hearing. It is not explained what caused this oversight. What is he saying? Is it that he looked at the wrong date of the diary? Is it that he attended the wrong court? Is it that he did not consult his diary at all and therefore he failed to note that he had a matter in court? The 1st Respondent's advocate should have said more.

And then there is the issue of delay. The 1st Respondent's advocate conceded during arguments that the 1st Respondent learnt of the hearing of the appeal and judgment delivered at the latest on 31st May, 2005 when he lodged a notice of appeal against the judgment. He did not file the present application until 17th May, 2006, a whole year later. Why? The explanation given by the learned counsel from the bar was that he had first considered appealing against the judgment but later opted to make the present application. Could it have required a whole year to do that? I do not accept the explanation.

The parties appeared before the court (Mutungi, J) on 20th July, 2006 and the 1st Respondent was granted leave to amend the application in order to cure defects in it. It took him eleven (11) months to do so. His learned counsel's lame excuse for this further delay was that Mutungi, J did not impose any time limit within which to file the amended application. Order VIA, rule 6 of the Rules provides:-

"**6. Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period."**

There was no extension of the period, and the 1st Respondent was lucky that he was permitted to urge the amended application.

The conduct of the 1st Respondent shows an indolent litigant. He has not satisfied the court that he or his advocate was prevented by sufficient cause from appearing at the hearing of the appeal. I must therefore refuse the application. It is hereby dismissed with costs to the Appellants. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 9TH DAY OF NOVEMBER, 2007