



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 140 of 2005

WAWERU KAMAU.....PLAINTIFF

VERSUS

JOSEPH MUCHERU GICHUKI)

**MWANGI ICHANGURU).....
DEFENDANTS**

RULING

The application by way of Chamber Summons which is dated 20th January, 2006, is brought by the Defendants/Applicants. This application is brought under the provisions of Order L Rule 17, XXI Rule 22(1) IX(B) Rule 8 of the Civil Procedure Rules and Section 3A of Cap 21. The Applicants have sought for two principal orders to wit:-

Ø That the court do set aside the *exparte* orders made on 28th November, 2005, and all subsequent orders and that the application dated 23rd November, 2004, be heard afresh interparties.

Ø That pending the hearing of the instant application inter-parties there be a stay of execution of the orders made on 28th November, 2005.

This application is premised on the grounds stipulated in the body of the application and more specifically expounded in the supporting affidavit of Joseph Munene Gichuru.

The gist of the matters deposed to in the said affidavit sworn were further highlighted during the hearing by Counsel for the Defendants/Applicants.

It was contended that the application dated 23rd November, 2004, was scheduled for hearing on 28th November, 2005 but due to an inadvertent mistake on the part of the Counsel, he did not attend Court and the matter was dismissed for non attendance.

Counsel explained that on the material date i.e. on 28th November, 2005, his client attended Court but was informed that the matter had been taken out of the hearing list and fresh dates would be fixed in the Registry. This prompted him to call Counsel whose vehicle had broken down and therefore Counsel made a decision to return to Nairobi. Thus he urged the Court not

to visit his mistake upon his innocent client the litigant herein.

Pursuant to the orders made on 28.11.2005, whereby the Applicant's application which seeks to review and set aside a Judgment by this Court on 14th March, 1994, the Respondents have evicted the applicants from the suit premises. This is a suit premises that the Applicant has been in occupation for many years.

According to Counsel for the Applicant the eviction is irregular as the same Judgment of 14th March, 1994 ordered that the Defendants be compensated for the monies paid to the Settlement Fund Trustees on behalf of the Plaintiff and the developments on the land, besides, it was submitted that the said Judgment was obtained through fraud and forgery of vital documents.

On the part of the Respondent, Counsel raised a preliminary point of law which was argued alongside the reply to this application.

Firstly, the application which is by way of Chamber Summons is fatally defective as it invokes the Provisions of Order L of the Civil Procedure Rules which clearly stipulates that all applications should be by way of Notice of Motion. On the same point, all the provisions cited under this application have no application. Order XXI Rule 22(1) has no relevance and Order IX(B)8 of the Civil Procedure deals with a situation where a Judgment has been entered or a suit has been dismissed not on application.

On the substantive prayers Counsel for the Respondent submitted that there was no material placed before the Court by the applicant either by an affidavit of the Court Clerk who informed him his matter was taken out of the cause list for the day. Thus the court cannot exercise its discretion in favour of the Applicant without any justification.

On the issue of the merit of the application that was dismissed, Counsel invited this Court to look at the history of this matter that was filed in 1987, culminating with a Judgment of March, 1994, after all the parties were heard. An appeal was filed against that Judgment and the same was dismissed.

An appeal having been dismissed the Plaintiff cannot purport to seek for a review under Order 44 of the Civil Procedure Rules.

Several decided cases were put forward by the Counsel for the Applicant and Respondent and indeed I am grateful for their industry. I have taken into consideration all the submissions and I have gone through the records of this long standing dispute carefully.

Firstly, I agree with Counsel for the Respondent that this application is generally brought under the wrong provisions of the law. Order L Rule 17, XXI Rule 22(1) have no relevance to prayers sought. Similarly Order IXB Rule 8 deals with Judgments and not Orders originating out of an application that was dismissed for non attendance.

Secondly, the nature of the orders sought certainly invoke the exercise of inherent discretion vested in this court to avoid injustice or hardship due to an accident or inadvertence. This discretion should therefore not be used to assist a party who has deliberately sought to obstruct or delay the course of justice.

In this regard I have examined the Applicant's application dated 23rd November, 2004 which sought to review the Judgment of March, 1994. I have also taken note that the Applicant had Appealed against the same Judgment. Order XLIV Rule(1) is explicit of when a party can invoke its provisions as follows:-

1(1) Any person considering himself aggrieved;

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred;

My humble understanding of the above provisions is that if a party chooses to appeal then the provisions for review are not available.

The upshot of the above is that the Applicant's application should fail for being both bad in law and for lacking merit. Costs of this application to the Respondent.

Ruling read and Signed on 24.2.2006.

MARTHA KOOME

JUDGE

24TH FEBRUARY, 2006.