



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 73 of 1996

MAINA NJOGU PLAINTIFF

VERSUS

BEATRICE WACHERA)

ELIZABETH NYACHIHI) DEFENDANTS

RULING

By a notice of motion dated 13th June 2005 the 1st Applicant Beatrice Wachera seeks orders:

“That this Honourable Court may be pleased to review an order and or ruling of an application to set aside the award in this case and any other orders and judgments which might have been passed against the applicants in their absence and the case be heard on merit.”

The application is supported by an affidavit sworn by the applicant in which she has given a history of the case, how it was referred to arbitration and an award subsequently filed. The applicant contends that she is not aware whether the award was set aside but that the case appears to have been heard in their absence. The applicant therefore prays for review so that the matter which is a land case can be heard on merit.

In a replying affidavit sworn on 7th September 2005. Maina Njogu the Respondent depones that the application is misconceived, scandalous, frivolous and an abuse of the process of the court. He depones that the arbitration award was set aside and that the case proceeded to hearing and the matter was heard ex-parte the applicant and his advocate having failed to turn up. The Respondent further deponed that the applicant has tried unsuccessfully to have the judgment set aside. Mr. Wachira who appeared for the Respondent submitted that the case was finalized, a judgment having been delivered, and an application to set it aside having been dismissed. He urged the court to dismiss the application as the same was misconceived and an abuse of the court process.

Having carefully perused the court record, it is evident that the applicant herein was formerly being represented by Mr. Maina Karingithi. On the 10th May 2000 an application for setting aside the arbitration award was argued before Hon. Juma J by Mr. Wachira and Mr. Karingithi who appeared for the Respondent.

In a ruling delivered on the 17th July 2000. Hon. Juma J set aside the arbitration award. Thereafter the suit was mutually fixed for hearing on 21st February 2001 by the parties advocate. Hearing proceeded ex-

parte on 21st February 2001 as neither Mr. Karingithi nor the applicants turned up for the hearing. Consequently judgment was entered in favour of the Respondent on 21st March 2001.

On 10th May 2001 Mr. Maina Karingithi argued an application before Juma J. to set aside the judgment delivered on 21st March 2001. This application was supported by amongst other things an affidavit sworn by the applicant herein, in which she explained why she did not attend court.

Hon. Juma J. considered this application and in a ruling delivered on 21st June 2001 dismissed the application for setting aside the judgment.

In light of the above it is evident that the applicant is misleading the court that she was not aware of the setting aside of the arbitration award when she was represented by counsel.

The applicant has also failed to reveal that she had made an application to set aside the judgment entered against her which application was dismissed by Juma J.

The orders now sought are also quite vague. It is not clear what orders are sought to be reviewed. Be that as it may this application is clearly an abuse of the process of the court.

It is also misconceived as the circumstances under which a review can be made under Order XLIV of the Civil Procedure Rules which are where there is mistake or error apparent on the face of the record, or discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge of the applicant, or for any other sufficient cause have not been established.

The applicant has not established any of the above factors to bring her application within the armpit of Order XLIV of the civil Procedure Rules.

I find that this application is incompetent, lacks merit and is also an abuse of the process of the court. It is accordingly dismissed with costs to the Respondent.

Dated signed and delivered this 4th day of April 2006

H. M. OKWENGU

JUDGE