REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 140 of 2005

WAWERU KAMAU…….....……PLAINTIFF

VERSUS

JOSEPH MUCHERU GICHUKI…….....……...1ST DEFENDANT

MWANGI ICHANGURU…….....…….….2ND DEFENDANT

RULING

Joseph Mucheru Gichuki and **Mwangi Ichanguru** both applicants have brought a notice of motion dated 28th March, 2006, which is expressed to be brought under *section 3A, 63(e) and 80 of the Civil Procedure Act. and Order 111 Rule 9A, and XLIV Rule 1 of the Civil Procedure Rules.*

The applicants seek for leave of this court for the notice of change of advocates by Messrs. Sheth & Wathigo Advocates to be deemed to have been filed and effective from the date of filing.

Secondly and more fundamentally, the applicants have sought for an order of review, vary and or setting aside of the orders made on 24th February, 2006.

The application is premised on the grounds that the applicants and their family are now facing an imminent eviction from the

land they have lived in and developed over the years. The eviction is as a result of a misrepresentation of facts put before the Court and finally there are some mistakes or errors apparent on the face of the record.

These grounds are further expounded in the affidavits of **Joseph Mucheru Gichuki** sworn on 28th March, 2006 and a Supplementary affidavit sworn on 18th May, 2006. The reasons given for the review is that there is new and important matter that was not available to the court, namely - the applicant had never filed an appeal, they had only filed a notice of appeal which was struck out as it was filed out of time. The other issue which was raised was to do with the history of the matter that involves a land dispute which the applicant has been in occupation for many years. The judgement of 14th March, 1994 was conditioned upon the respondents to pay compensation to the applicants for the loans that the applicants paid for the land and the developments carried out on the land before any eviction can be effected. It was thus necessary for the applicant to carry out a valuation report to determine the costs of the development thus counsel for the applicant submitted that unless his client is compensated he cannot be expected to move out of the suit premises.

As regards the order recorded by the parties by consent to the effect that the applicant should vacate suit

premises within 30 days counsel submitted that, the consent was done by the then counsel for the applicant without instructions.

On the part of the respondent, this application was opposed on the grounds that the representation of the applicant by the firm of Sheth & Wathigo & Co. Advocate was irregular. Counsel for the respondent relied on his client's replying affidavit sworn on 3rd May, 2006 and 22nd May, 2006. According to Mr. Kahiga counsel for the respondent failure by counsel for the applicant to comply with the ***Provisions of Order 111 Rule 9A of the Civil procedure*** is fatal for reasons that when Sheth and Wathigo Advocates came on record and filed the present application there was no order of the Court authorizing them to be on record.

Another issue raised by the respondents was that the application for review did not attach a copy of the decree or order of the Court that is meant to be reviewed Order 44 of the Civil Procedure Rules. The merit of the application was also challenged for reasons that the applicant should have made all their representation during the hearing of the application dated 20th January, 2006. All the information that has been presented to this Court was available to the applicants and they failed to utilize the opportunity and they cannot be allowed to come back to introduce new facts by way of an application or review.

On the issue of the error on the face of the record, that the applicant had not filed an appeal, but only a notice of appeal, it is clear that, that a notice of appeal was filed on behalf of the applicant so there was no error on the face of the record that is self evident.

On the issue of Mr. Nyaga the then counsel for the applicant not having the knowledge of facts, the respondent photocopied the hand written proceedings by court to show that the arguments were presented to court and this application is essentially an appeal.

I have carefully considered all the arguments. This is an application for review of the ruling that this court delivered on 24th February, 2006. That ruling determined the application dated 20th January, 2006 which was principally seeking for an order to set aside the ex parte orders made on 28th November, 2005 and to reinstate the application dated 23rd November, 2004.

I find the arguments advanced herein were essentially meant to advance the merits of the application dated 23rd November, 2004 which was dismissed on 28th November, 2005.

On 24th February 2006, this court delivered a ruling whereby the application dated 20th January, 2006 was dismissed. After delivery of the ruling, counsel for the applicant and respondent recorded a consent.

"By consent, the defendants are hereby given 30 days to remove, their crops building materials from the suit premise."

This application for review was also argued on the grounds that there was misrepresentation, discovery of new evidence and errors on the face of record.

According to Mr. Olola counsel for the applicant the misrepresentation made to Court, was that, there was an appeal that was filed by the applicant to challenge the judgement and decree issued on 14th March, 1994. In the affidavit of the applicant sworn on 28.3.2006 he denied that it was him who had field a notice of appeal that was struck out by the Court of appeal but stated it was the respondents.

In the ruling of 24th February, 2006 this court considered the merit of the application dated 23rd November, 2004 amongst other issues that were raised. In that context this court noted that the applicant had filed an appeal against the judgement and decree issued on 14th March, 1994. The court therefore held the applicant who choose to pursue an appeal had no good case for review.

The applicant now seems to argue it is the respondent who had filed an application in the Court of

appeal. I am not satisfied that this is a matter for review as I do not see any error on the face of the record. The Court held that under Order 44 of the Civil Procedure Rules a party cannot seek for review of an order where an appeal has been preferred. This court may be wrong on this view but is it appropriate for this court to review its own ruling on the above ground.

In this case, the appropriate procedure for the applicant was an appeal because asking this court to revisit its own mistakes is tantamount to sitting on its own appeal. ***In the case of Eastern and Southern African Development Bank –Vs- African Green Fields Ltd. and others E.A.L.R. [2002]2 E.A. 371 it was held.***

"An order cannot be reviewed because it is shown that the Judge decided the matter on a foundation of incorrect procedure and/or that his decision revealed a misapprehension of the laws or that he exercised his discretion wrongly in the case.

Further it could not be reviewed on the ground that other Judge of Co-ordinate jurisdiction and even the Judge whose order is sought to be reviewed have subsequently arrived at different decisions on the issue.

The proper way to correct a Judge alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error he apparent on the face of the record and therefore requires no elaborate argument to expose."

I should also comment on the issue of new material that was not presented to the court.

Counsel for the respondent has annexed the copies of the proceedings to show that the applicant had an opportunity to present all his client's case. The court of appeal in the case of: ***POP IN [KENYA] LTD. AND 3 OTHERS –VS- HABIB BANK AG ZURICH C.A. NO. 80 OF 1988.***

The court of appeal while reiterating the decision in the case of: *YAT TUNG INVESTMENTS CO. LTD. –VS- DAO HENRY BANK LTD. 1975 AL 581 HELD:*

"***Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not*** *[except under special circumstances]* ***permit the same parties to open the same litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of*** *res-judicata* ***applies, except in special cases, not only to a point upon which the court was actually required by the parties to form an opinion and pronounce judgement but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable dispense might have brought forward."***

I have looked at the above authority in the context of the powers of this court to review its own decree or order if the applicant has discovered a new or 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 of the decree.

What is new, in the present application which was not brought in the previous application, was that the counsel for the applicant Mr. Njenga is said not to have been versed with the matter and especially the fact that the applicant had not filed an appeal and the discovery that the suit premises is not registered in the name of the applicant. As stated elsewhere the matter of the applicant having filed an appeal cannot be said to be new. Moreover the applicant had duty to brief own counsel. Even the discovery of the fact that the suit premises is not registered in the name of the plaintiff is information that the applicant could have obtained with due diligence since 1994 or in 1987 when the suit against him was filed.

Before ending this judgement two technical issues of law were raised by the respondent regarding the

legal appropriateness of the present application. I would not have dismissed this application solely on this technical issue but for the other reasons. However since they were raised it is important to comment on them. The representation of the applicant by the firm of Sheth Wathigo and Co. Advocates who filed the present application before complying with the provisions of ***Order III Rule 9(a) of the Civil Procedure Rules*** was raised.

It would seem the said advocates circumvented this technicality by filing a consent on 22nd May, 2006 signed by the themselves and the previous advocates for the defendant allowing them to come on record as per the notice of change of advocates which was filed on 28th March, 2006. Bearing in mind that the obvious mischief that ***Rule Order III rule 9(a)*** was meant to cure was to prevent advocates from irregularly taking over matters after judgement without notice to previous counsel and the fact that the previous counsel endorsed the new advocate one may overlook this technically.

However, this consent ought to have been done before 28th March, 2006 when the Sheth and Wathigo took over the conduct of this matter and they ought to have sought the endorsement of the court over the consent and also to have notified the other party. As I stated earlier this is perhaps a procedural error. On the issue of the applicant's failure to annex a copy of the decree or order sought to be reviewed. It is now a settled principle stemming from the *Provisions of Order 44 of the Civil procedure Rules* that a party seeking a review of a judgement or ruling should present the review application together with a formal decree or order a grieving him. Failure to do so is fatal. (***see the case of Gulam Hussein Jivay & Another –Vs Ebrahim Fivanhi & Another [****1930****] E.A.LA. 41***

The upshot of the above analysis is that the applicant's application for review fails with costs to the respondents.

It is so ordered.

Ruling read and signed on 21st July, 2006.

MARTHA KOOME

JUDGE