

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 260 of 2003

SHEIKH ALI TAIB PLAINTIFF

VERSUS

GEORGE ELLAM WEKESADEFENDANT

SELINA WEKESA.....INTERESTED PARTY

RULING

The interested party herein, Selina Wekesa, applied to this court to stay the order issued on 22nd April 2005. This prayer is contained in a motion taken out pursuant to Order XLIV rules 1, 2 and 3 of the Civil Procedure Rules. The Interested Party filed an affidavit to support the motion. On the other hand, Sheikh Ali Taib, the Plaintiff herein filed a replying affidavit he swore plus a notice of Preliminary Objection to oppose the motion.

On 22nd April 2005, this court set aside the exparte judgment entered against the Interested Party herein made on 30th July 2004 on condition that the interested party would file a bankers guarantee in the sum of kshs. 2.5million within 30 days. In effect the interested party was given 14 days to file a defence on that condition. The Interested Party now claims that she is unable to obtain the bank guarantee hence she will be unable to defend the suit. She now applies to this court to review that order by staying and subsequently setting it aside so that she will be able to defend the suit. It is her submission that the condition will unfairly lock her out from participating in the proceedings. It is also her argument that she has discovered that the property i.e Mombasa/Block x/97 has not been registered in the Plaintiff's name. She annexed to her affidavit a copy of an official search showing that there was a prohibitory order by 2-1-2001 hence no transactions took place. The Plaintiff dismissed these assertions by giving the version of this side of the story. The Plaintiff argued this court to reject the motion because the interested party does not intend to obey the court order. The Plaintiff also annexed to his affidavit copies of the title deeds showing that he was the registered proprietor of the property in dispute. My understanding of the Interested Party's argument is that she has discovered a new and important evidence that the property has not been transferred. Her argument also is that it would be unfair to lock her out of these proceedings. Let me start with the first point. It is clear that the Plaintiff has not controverted the interested party's new evidence. The Interested Party has not seen it fit to file an affidavit to contest the fact that a title deed has been issued to the Plaintiff. On the second issue, I am of the considered view that the Interested Party's inability to raise the banker's guarantee cannot be a ground this court can use to review its ruling. This court properly exercised its discretion when making the order. Let the Interested Party comply with the order so that she can defend the suit. In the end I find that there is no sufficient ground to review the order. Consequently the motion is ordered dismissed with costs to the Plaintiff.

Dated and delivered this 19th day of October 2006

J. K. SERGON

JUDGE

In open court in the absence of the parties.