



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 3055 OF 1996

PETER WAWERU GITHUA PLAINTIFF

VERSUS

HANNAH WAMAITHA NJIHIA & ANOTHER DEFENDANTS

RULING

On 4th November, 2003, I granted orders as per the Notice of Motion application dated 12th March 2003, filed by the 2 defendants. Hannah Wamaitha Njihia and Wanjiru Njihia.

The plaintiff's counsel Mr. Ngunjiri was not present in court, but sent an advocate who produced a note to say that Ngunjiri was not well.

In granting the orders, I said,

“I appreciate the Doctor’s letter saying that Mr. Ngunjiri is supposed to be on 5 days bed rest, but there is nothing left on his file as his client’s plaint has been dismissed, and further, the application for review of that dismissal too was dismissed”

I went on to say further,

“The records show that the plaintiff’s suit was dismissed by Rimita, J. The plaintiff made an application for review or setting aside of the order for dismissal. That application too was dismissed. As there is nothing left in this file, except the present application I proceed to grant orders in terms of prayers (a) and (b) in the application dated 12.3.2003, plus costs of the suit”.

Soon after the above orders were made the plaintiff moved the court under a Certificate of Urgency, and obtained orders ex parte for stay of execution of my orders of 4.11.2003. That application also sought a review of my same orders of 4th November 2003.

When the plaintiff's application for review came before me for hearing on 18th December, 2003, I addressed the parties telling them that I would hear both the application for Review, and the Notice of Preliminary objection which was said to be in the court file on 4th November 2003 when I granted the orders of eviction. I did this because the 2 defendants who are too old women are not represented by any advocate said that they were being greatly inconvenienced by being made to come to court so many times and incur heavy expenses. They prayed that all applications be heard at once to avoid their coming back again for another hearing. Counsel for the plaintiff did not object to this; and argued that the orders of 4th November 2003 should be reviewed as there was an error apparent on the record in that their notice of preliminary objection to the application dated 12th March 2003 was still pending for hearing.

Further, the counsel submitted that the application of 12th March 2003 was defective as the

defendants did not quote or indicate under which order of the Civil Procedure Code it was brought, and again, the supporting affidavit was not sworn in the 1st person singular as required by law.

The defendants response to this was that first they were not aware of the presence of the preliminary point of law, in the file and secondly, that they do not have law books like lawyers and thirdly that they have won the case and the plaintiff should be evicted from their land instead of continuing to drag them to court many times.

From the above submissions, I have the following point to make and that is the preliminary objection dated 14th May 2003 was not drawn to my attention on 4th November 2003, by either the advocate for the plaintiff who was present in court (Mr. Owang' for Mr. Ngunjiri) or the defendants in person. To that extent therefore, it can be said that there was a mistake on the face of the record.

Having said that, I will now proceed to consider the arguments on the preliminary objection said to have been in the court file when I granted the orders of 4.11.2003.

There are two legal points raised, as appears in the submissions of the learned counsel. The defendant's answer are also on the file.

Beginning with the point that the order was not quoted on the application, I quote the wording of Order L r 12 which reads,

“Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule”.

I find that this rule answers the first point raised by counsel for the plaintiff. I decline to strike out the application of 12th March 2003.

On the second point raised about the manner of drawing affidavits, here again I quote the provisions of Order XVIII R 7 whose footnote reads,

“Irregularity in the form of affidavit ”.

The whole rule then reads,

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defeat by misdescription of parties or otherwise in the title or other irregularity in the form thereof ” (the above underlining is mine)

. I find that the irregularity complained of by the advocate “is in the form”, of the affidavit and is taken care of by Rule 7 above.

For the points I have considered above, I find that the preliminary objection raised by the plaintiff has failed and I proceed to strike it out.

Counsel for the plaintiff submitted that there was a mistake on the face of the record because the preliminary objection was in the file when the orders of 4.11.2003 were granted, before it was heard. I have now heard the preliminary objection and struck it out as having no merit and therefore its presence in the court file cannot and indeed could not affect the orders I granted on 4.11.2003.

Those orders are valid, and are properly on record, as such I proceed to vacate the ex parte stay order granted by Nyamu, J on 14th November 2003.

The preliminary objection is struck out with costs to the 2 defendants.

Dated at Nairobi this 4th day of March 2004.

JOYCE ALUOCH

JUDGE