



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**MISC. APP. NO. 79 OF 2002**

**REPUBLIC.....APPLICANT**

**VERSUS**

**FELISTUS WANJALA.....RESPONDENT**

**AND**

**ROBERT KOECH.....EX PARTE**

**RULING**

By a notice of motion dated 16th December 2003, Felistus Wanjala , the Interested Party herein seeks an order of stay of execution or implementation of the orders issued on 20th November 2003. She also seeks that the said orders be set aside and / or reviewed and that the application dated 21<sup>st</sup> May 2003 be set down for Inter parte hearing. The application is indicated to be brought under Section 3A of Civil Procedure Act, Orders L r 1, XLW r 1 and 1XB r 8 of Civil Procedure Rules and is supported by grounds on the body of the motion and an affidavit of one Isaac S. Kuloba the Counsel who is in conduct of this case on behalf of the Interested Party. Robert Koech on whose the Republic brought this judicial review opposes the application relying on his own replying affidavit and that of Hillary Chemitei the counsel who is on record as representing him.

In his submission Mr. Ongangi for the Interested Party said that on 20th November 2003 , the application which was coming up for hearing was the one dated 21st May 2003 but instead the application dated 22nd May 2003 was allowed. Mr. Ongangi added that the Counsel for the Interested Party did not attend Court on 20th November 2003 due to an error and not deliberately. He urged that the orders made on 20th November 2003 be set aside as unless they are, set aside the Interested Party will suffer an irreparable loss. It was added by Mr. Ongangi that the application which was on record on 22nd May 2003 is the one which was withdrawn. He Also contended that the claim that the applicant had surrender of title and another had been issued would not defeat the application of the Interested Party. Lastly he contended that the applicant should give the Interested Party  $\frac{1}{4}$  of an acre sold to her.

For the applicant Mr. Chemitei opposed the application contending that the application which was allowed was the one dated 21st May 2003 and that it was not true that that application had been withdrawn as claimed. According to Mr. Chemitei all parties met at the registry of this Court on 2nd October 2002 and they fixed by consent that that application was to be heard on 20th November 2003 but on that day the Interested Party's Counsel failed to attend Court. He further claimed that the said application has been overtaken by events as the plot No. 442 was no longer in existence and that the only remedy for the Interested Party is for damages. As regards this prayer for the review of the said orders Mr. Chemitei submitted that as there was no formal order or decree sought to be reviewed annexed to the application the same is defective. He also contended that it was not brought within reasonable time.

The record of this Court indicates that it is true that on 2nd October 2003 the representatives of the three parties to the application fixed its hearing for 20th November 2003 , but on that date only Mr. Chemitei appeared and sought an order allowing the orders of judicial review; which was granted. The reasons advanced for the failure of the Counsel for the Interested Party to attend Court do not appear to be clear . It is said that the clerk in the advocate's office failed to record the hearing date fixed by counsel in a diary while at the same time there is a claim that the matter which was to come up on the hearing date was an application for an amendment of statement by the applicant. Which ground is relied on ? The failure to attend Court would appear to be sheer negligence on the part of the advocate for the Interested

Party.

I note that the applicant has acted on the orders of the Court and has had the original title subdivided so that it no longer exists. To grant the application of the Interested Party would really prejudice the applicant.

I would therefore decline to exercise the discretion conferred on by the rules. The application is dismissed with costs.

**Dated and delivered this 6th May 2004.**

**B.K. TANUI**

**JUDGE**