



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NUMBER 46 OF 2003

ESTHER WACHIEKE JOSEPH1ST PLAINTIFF

JOSEPH NGUNJIRI THENYA2ND PLAINTIFF

VERSUS

FRANCIS CHERUIYOT KEMEI.....DEFENDANT

RULING

The Defendant, Francis Cheruiyot Kemei, has made an application under **order XLIV Rule 1 of the Civil Procedure Rules and section 3 and section 3A of the Civil Procedure Act** seeking the orders of this Court to review its orders dated the 6th of August, 2003. The Application is based on the ground that Defendant had discovered a new and important matter or evidence which was not within the knowledge of the Defendant or could not be produced by him when the said order was made. The Application is supported by the affidavit sworn by the Defendant. He has also sworn a further affidavit dated the 9th of February, 2004. The Application is opposed. The Plaintiffs have sworn a replying affidavit in opposition to the Defendants application.

Miss Aketch Learned Counsel for the Defendant submitted that this Court should review its order dated the 6th of August 2003 as the same was issued after the Plaintiff had given false information to the Court. The Defendant contended that the said order was issued by false pretences. Miss Aketch urged this Court to allow the application.

Mr. Akinyi, learned counsel for the Plaintiffs opposed the application. He submitted that the Defendant had not proved that the Plaintiffs were obtaining rent from the parcel of land known as Block "H" No. 18 Kipsigis Tugen Farm Enterprises Ltd. The Plaintiff further submitted that the issues that were being raised by the Defendant in the application were the very same issues that were raised before this Court when the application sought to be reviewed was heard. The Plaintiffs submitted that all the aspects of the matters raised by the Defendant in this application were considered by the Court and a ruling given. The Plaintiffs further submitted that no reasons had been advanced to enable this Court exercise its discretion in favour of the Defendant. Counsel urged this Court to disallow the application.

I have considered the rival submissions made by the counsel for the Defendant and the counsel for the Plaintiffs. I have also read the pleadings that the parties to this application have filed.

The Defendant is seeking to have the order issued by this Court on the 6th August, 2003 reviewed. The material part of the said ruling, delivered by Lady Justice Jessie Lesiit states at page 3 as follows:

“The Plaintiffs have shown that in exchange of their three parcels of plots of land in Kericho, the Defendant gave them occupation of the plot in Nakuru in 1993 but to date not even given

them the L.R. number of the said plot. The Respondent (Defendant) does not deny that the plot does not exist even as of the date of the hearing of the Application by admitting that the survey plans are yet to be approved means that the alleged plot does not exist. He was not in a position to give its L.R. number except to say that rates for the plot have been paid by the applicants to date. In their plaint, the Plaintiffs are seeking inter alia, an order restricting their three plots in Kericho, the suit land to themselves. I do find that the Plaintiffs have shown that they have a prima facie case with a probability of success..... The Court's duty is to maintain the status of the plots as they were before the suit was filed as much as possible. The issue is not so much to restrain the Defendant/Respondent from constructing on the suit land as to maintain the suit land as it is now until the suit is heard and determined given the circumstances of the case".

The Defendant has averred in the affidavit in support of the application that the Plaintiffs, in effect, misled the Court into granting the said injunctive orders against him. The Defendant averred that Plot No. Block H No.18 at Kipsigis Tugen Farm Enterprises Ltd existed and further that the Plaintiffs were in physical possession of the said Parcel of Land. The Defendant further averred that the Plaintiffs were collecting rent from the said property. The Defendant further averred that one of the Plaintiffs had even been charged for giving false information to a public officer involving another parcel of land owned by the Defendant. The said case was still pending before the Chief Magistrate's Court Nakuru. The thrust of the Defendant's argument is that the above information was a new and important matter which if the Court were made aware of the court would not have granted the orders of injunction sought by the Plaintiff.

I have considered the argument presented by the Defendant. While the said argument may have some merit, the facts stated in support of the Application were not new and important matter or evidence which was not within the knowledge of the Defendant at the time the application for injunction was argued. My understanding of the order issued by Lady Justice Jessie Lesiit is that the Court ordered the status quo in respect of the three parcels of land to be maintained pending the hearing and determination of the suit. The order was made to preserve the suit properties pending the hearing of the suit filed by the Plaintiffs after they had established that the Defendant had not given them any document of title in respect of the exchanged Parcel of Land. **Order XLIV Rule 1 of the Civil Procedure Rules** provides that any person aggrieved by a decree or order, and who had discovered a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not have been produced by him at the time the decree or order made, to apply for the said decree or order to be reviewed.

As stated earlier in this ruling I do not find that the averments made by the Defendant in this application constitute new evidence. The Defendant is in effect seeking to re-argue his case after a ruling has been delivered against him. The Defendant is seeking to have a second bite of the cherry by making this application for review. The Defendant being aggrieved by the order of the Court issued instead of appealing against it has sought to re-argue the same before a Court of concurrent jurisdiction. That cannot be. I do find the Defendant's application to be mischievous. In the said application, the Learned Judge heard the parties, considered the application and made a conscious decision. If the Defendant was dissatisfied with the said decision, he ought to have appealed and not an application for review.

In the circumstances therefore I do not find merit in the application for review filed by the Defendant. The said application is consequently dismissed with costs.

DATED at KERICHO this 29th day of October 2004

L. KIMARU

AG. JUDGE.

