REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 538 OF 1999

BAKARI ALI KASIRANI ....…… PLAINTIFF

VERSUS

STANLEY MUEMA WANGUYE …….. DEFENDANT

RULING

On 2nd December 1999, the Respondent herein Bakari Ali Kasivani filed plaint against the Applicant Stanley Muema Manguye praying for judgment for:

> ***(a) KShs.1,620,000/-***
>
> ***(b) Interest on (a) above from the date of filing the suit until payment in full.***
>
> ***(c) An injunction restraining the defendant, its servants or agents from alienating, selling, transferring, charging, leasing, or in any other manner dealing with the suit premises; KWALE/TUMBE/96.***
>
> ***(d) Costs of and incidental to this suit."***

That plaint, was together with summons to enter appearance duly served upon the Applicant on 18.1.2000 at 9.15 a.m. and that is not denied. In any case there is an Affidavit of service on the same which has not been challenged. No appearance nor defence was filed by the Applicant. On 31st March 2000, the Respondent filed amended plaint and removed from the same amended plaint prayer (c) which was prayer for injunction which was prayer (c) in the original plaint. Having amended and filed the same amended plaint on 31st March 2000, the Respondent did nothing about the plaint till 27th July 2000 when he requested for judgment. The request was made and was acted upon before the same amended plaint was served upon the applicant. In response to the same application for judgment, the learned Deputy Registrar did enter judgment for the Plaintiff against the Defendant (applicant) in the sum of KSh.1,620,000/- with interest thereon and costs as prayed in the amended plaint. I need to add here that the Request for judgment was also made in respect of the amended plaint and not on the original plaint. Thereafter several actions were taken on the matter in execution of the judgment and these ended with the Applicant being committed to civil jail for failure to pay the decretal amount, interest and costs.

On 7th February 2003 this application by way of Notice of Motion was filed. It is brought under Order 3 Rule 9, Order 44 Rule 1(1) of the Civil Procedure Rules as well as under Sections 43(2), 3(b) and 3A of the Civil Procedure Act and all the enabling provisions of the law. Two main orders are sought and these are prayers 3 and 4. Prayer 3 is seeking an order that the default judgment entered on the 28th July 2000 and all the consequential orders be reviewed on account of the discovery of new and important matters and evidence that the suit property is grabbed government land; that an error apparent on the face of the record that the default judgment was entered without an Affidavit of service for the amended plaint and

on other matters in the supporting affidavit. Prayer 4 is seeking that there be a stay of execution of the same decree and the applicant be released from civil jail.

There is also a prayer for costs. Same grounds are adduced in support of the same application but the main grounds are that the applicant has since discovered that the suit property was not properly obtained from the Government and so the title passed on to the Applicant was not a proper title hence no consideration should be demanded and thus the exparte interlocutory judgment should be reviewed and set aside. Second main ground is that although the exparte interlocutory judgment was based on the amended plaint, the same amended plaint was not served upon the Applicant. That matter could not be discovered with due diligence as there was no Affidavit of service on record. The Applicant has also sworn an affidavit in support of the application and there are several annextures to the same affidavit.

The Respondent opposed the application maintaining in his Replying Affidavit that the application is misconceived, an abuse of court process and is brought in bad faith, that he acquired the suit property lawfully and thus passed a valid title to the Applicant, that the Applicant has admitted the claim, that Applicant was served with the summons to enter appearance on 18th January 2000 and as such the interlocutory judgment was regularly entered as the Applicant also had agreed that he had been served; that Applicant's relatives have approached the Respondent pleading for mercy and seeking a settlement and that the court should read ill-will in this application as the Defendant is about to retire and will leave the jurisdiction before paying the balance of the debt outstanding.

During the hearing, Mr. Murima, the learned counsel for the Respondent raised certain matters which were in my mind strictly preliminary objections to the application and although he did not file any Notice of Preliminary Objection, I also feel it is fair to consider the same matters in this ruling as they were purely legal matters. These were first that the application is wrongly before the court as it is in essence seeking setting aside of the interlocutory judgment entered on 28th July 2000 and should have been brought under Order 9A rule 8 and not under Order 44 Rule 1 (1).The release of Judgment Debtor on condition of illness are two different matters and should not have been brought together as that made the application an omnibus application. Thirdly, he submitted that the application was not proper as it stated that the judgment entered on 28.7.2000 and subsequent orders be reviewed yet Applicant did not annex the other subsequent orders sought to be reviewed as well and lastly that the Affidavit in support is in breach of Order 18 and is scandalous as it depones on matters that the Applicant could not have witnessed when he was in civil jail.

I have carefully and anxiously considered the application, the grounds for the same application and annextures to the same affidavits. I have also considered the Replying Affidavits and the annextures to the same and lastly I have considered the able submissions by the learned counsel.

I do agree that the correct provision for setting aside the judgment that was entered in this matter is Order 9A Rule 10 for that judgment was clearly entered under Order 9A rule 3(1) as it was entered on the basis of the amended plaint, the which plaint as amended made a liquidated demand only. However, in this case there is more than meets the eye for apparently that the judgment was entered upon an amended plaint which was not served upon the Applicant was never discovered till the Applicant went to prison.Respondent himself states in his Affidavit that the plaint and summons to enter appearance were served upon the Applicant on 18th January 2000 and that this was the service availed to the former advocates of the Applicant and this was the service the Applicant also confirmed. That service was of the original plaint and not of the amended plaint and that is what which was used for obtaining the judgement. Indeed there is no Affidavit of service of that amended plaint in the record. Under these circumstances, an application for setting aside the judgment under Order 9A rule 10 would have still been appropriate, but one cannot state that seeking to review that judgment and setting it aside on the grounds of discovery of new facts was completely out of question as indeed the Respondent was not candid with the Applicant and with this court is that the Respondent maintains even in this court that the Applicant was served whereas the judgment was obtained on an amended plaint which was never served. Applicant was served on 18.1.2000 with original plaint. That plaint was amended on 10th March 2000 and amended plaint filed on 31.3.2000. There was no service of that amended plaint and yet the Respondent still contends even in his present affidavit that Applicant was served on 18.1.2000. One may ask, served with

what? The answer is with original plaint. Was the applicant made aware that the plaint was amended? No. Indeed his former advocates M/S Musinga & Company were told that Applicant had been served on 18.1.2000. Respondent in my humble opinion concealed the information that they were all this while proceeding on amended plaint not served upon the Applicant and so when the Applicant discovered this after execution proceedings, he was in my humble opinion in order in seeking to set the same judgment reviewed on the basis of the new discovery.

As to the submission that the application is bad because it does not annex all the consequential orders it is seeking to review; I do accept the proposals in the case of **G.M. Jivanji and Another vs. E.M. Jivanji (1930) EA 4** that the applicant for review application must annex the order/or Decree sought to be reviewed. However in this case the decree to be reviewed was the decree extracted from the judgment entered on 28.7.2000. a copy of it is in the file and I have seen it. Once that is reviewed then it goes without saying that any other consequential orders would not stand.Thus there is no need to review each and every order once the original order that "sparked" all other consequential orders is reviewed.

I have perused the Affidavit sworn by the Applicant carefully, I do agree that paragraphs 7, 9, 14 are in breach of order 18 Rules 3 of the Civil Procedure Rules as they are on matters discovered by way of information and informer is not revealed, and paragraph 10 of the same Affidavit is in breach of Order 18 rule 6 as it is scandalous. I do expunge the same paragraphs of the supporting Affidavit from the record.

I have dealt above with the Preliminary matters of law that were raised by Mr. Murima, the learned counsel for the Respondent. I will now deal with the substance of the application.

I do not have any hesitation in rejecting the allegations of what the Applicant calls land grabbing. I do reject the same because they are all mere allegations not proved at all. I do agree that at this stage, the proof need not be within the probability as is required in most of the civil matters, but even at this stage mere allegations cannot suffice. A Prima facie defence must be shown and I do not think irregular entries in the abstract of title which may very well have resulted from no more than human mistakes can be enough to have a person labeled a "land grabber." So far, he has not stated that the Government has reclaimed the suit land and he is still far from convincing anybody let alone the court that his title is threatened.

On the question of discovery that the Applicant was not served with the amended Plaint, I have already stated as can be concluded from the above remarks that this is a valid point. The learned counsel for the Respondent's stand is that once the Applicant had been served with the original plaint and as he did not enter appearance, the Respondent needed not serve him with amended plaint. His second contention is that as the amended plaint did not change cause of action, the Plaintiff could proceed with it without service to the Applicant. In my feeling these arguments ignore the fact that no civil proceedings should proceed by way of an ambush upon any party. The original plaint as it stood before amendment could not have attracted judgment under Order 9A rule 3(1). Judgment on it could have only proceeded under Order 9A rule 3(2) in which case costs would have awaited judgment upon the other claim. That being the case, under Section 94 of the Civil procedure Act, no execution would have proceeded without court's leave. It will be only too clear that the omission to serve the Applicant with the amended plaint clearly prejudiced the applicant seriously as it ended up on judgment being entered against the Applicant under Order 9A Rule 3(1) and hence the execution proceeded against him and he ended in jail all because he was not aware that the plaint served upon him against which he did not enter appearance nor file defence had been abandoned and amended plaint filed. I thus cannot see any merit in the argument that once a Defendant fails to enter appearance against a plaint served upon him then that plaint can be amended and action taken on it without any further service. I do feel that approach would, if accepted end up in gross injustice to litigants for one may file a plaint that is of no serious consequence and serve it and then wait to see if no appearance is entered and then amend it substantially and proceed on the amended plaint without the knowledge of the Defendant. That would clearly be unjust. The second point is clearly wrong as far as this suit is concerned and I have demonstrated above how the amended plaint changed cause of action and the effect of the same.

Having said all the above, is the Applicant entitled to a review? In my feeling even if the Applicant were

to be found to have brought this application under wrong procedur, I would have still set aside the judgment entered on 28.7.2000 under my inherent powers. I believe it is wrong for any court to ignore a clear breach of the law simply because of the need to follow technicalities. I do agree that parties to a suit should at all times accept that rules must be complied with so as to ensure some order in the legal matters as well as the relationship of litigants but I am also aware that technicalities can sometimes be bad masters. In this case, the Respondent clearly ignored the required rules and obtained a judgment upon an amended plaint without serving the same upon the Applicant. He purposely amended the plaint to obtain the same judgment and to avoid the law that would have been applied if the plaint was not amended. He then proceeded to use the same judgment obtained to subject the Applicant to execution proceedings which have ended in his being jailed all this while as a result of a pleading that was not served. I cannot be doing justice by burying my head in the sand on the face of such flagrant non-compliance with the rules of justice.

I do review the judgement entered in this case on 28.7.2000 and upon reasons stated herein above I set it aside and with that order all consequential orders are set aside. Applicant may file Defence to the suit within ten (1)) days of the date hereof. I have not made any comment on the Respondent's counsel's submission that the Defendant has no defence because that bridge had not been reached. The first thing I had to consider was whether the judgement was regular or not. I have found that it was irregular and that argument will only be gone into when Defence is filed. At this stage it could only have been considered if I had found that the judgment was regular. I do agree with Ringera J. in his observations in the case of ***Abraham Kiptanui vs. Delphis Bank Ltd & Another, HCCC No.1864 of 1999 (AC Milimani Commercial Court)*** where he states as follows:

> ***"As the court cannot countenance an irregular judgment on its record, the same is for setting aside ex debito justitiae. In my view, it matters not that the defendant is guilty of inordinate delay in presenting the application for setting aside such a judgment or that he may not have a defence on the merits. Once it is established that a judgment on record is irregular it must be set aside as of right.***
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> ***There are no two ways about it. The same is not susceptible to any variation. It's only fate is vacation from the record. Such a judgment is not set aside as a matter of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself."***

From what I have said above, it will be clear that the Applicant has had part of his affidavit expunged from the record; that he had made certain unwarranted allegations about the respondent; that his bringing the matter under Order 44 (1) was not the best and also that there was no need for him to incorporate Section 43 unless merely to widen his net in the entire case. I will not grant him costs. Each party will bear its own costs. I need not say that Order for committal to civil jail, being consequential order is also set aside and the Applicant is released forthwith. Orders accordingly.

Dated and Delivered at Mombasa this 25th Day of February 2003.

J.W. ONYANGO OTIENO

JUDGE