Rioreta v Rengono (Land Case 70 of 2018) [2024] KEELC 3635 (KLR) (4 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3635 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE 70 OF 2018

FO NYAGAKA, J

APRIL 4, 2024

BETWEEN

SOLOMON PEITUM RIORETA ..... PLAINTIFF

AND

TOPEMUK RENGONO ..... DEFENDANT

RULING

1. Before me is an application dated 18th September 2023. It was filed by the plaintiff, on 19th September 2023. It was brought under Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* and all enabling provisions of the law. It sought the following orders:-

    1. ...Spent.

    2. That the honourable Court, be pleased to set aside the ex parte judgment dated 26th July 2022, together with all its consequential orders.

    3. That thereafter this honorable could be pleased to reopen the hearing of this matter and the plaintiff applicant be allowed to adduce further evidence.

    4. ...Spent

    5. Costs be provided for.

2. It was based on three grounds, the first one being that the applicant was represented by a learned counsel who failed to advise him to avail witnesses; that the witnesses who failed to testify were crucial and their evidence would shed more light on the dispute, and that the applicant has been prejudiced by the failure to the witnesses.

3. The application was supported by the affidavit of the plaintiff sworn on 18th September 2023. In it, he deposed that the judgment herein was delivered on 26th of July 2022. That in his List of Witnesses dated 23rd July 2018 he listed two other witnesses who were to testify on his behalf. The two witnesses

handled the dispute between himself and the defendant at the elders' level and were conversant with the matter.

4. That the reasons given in the judgment was that he had sued the wrong party. But the two witnesses knew the defendant very well and they were aware that he had sued the right party. They were crucial in his case. That he had been unduly prejudiced by failure to avail them. He was represented by counsel who failed to advise him to avail the witnesses.

5. The application was opposed by the defendant through his replying Affidavit he swore on 8th October, 2023. He deponed that the court had found that the Respondent was the wrong party sued in this matter, and that he was not the defendant the applicant had served upon. Further, that the application dated 18 September 2023 was incompetent and lacked basis.

6. On the provisions of law cited by the applicant the Respondent contended that they were not applicable to the facts of this case. That the Court having found and held that the plaintiff had filed his case against the wrong party it was an abuse of the process of the court, still trying to enjoin him in the instant application.

7. That the Application was filed by a firm of advocates who were not properly on record since the judgment herein was not an exparte one. It was read after the plaintiff testified and he was even recalled to produce an exhibit which had been marked for identification and he was cross-examined. That the applicant's learned counsel applied voluntarily to close his case. That the applicant never intimated that he had any witnesses to call. He could have done better if he had any. He had information of the witnesses to be witness called by the plaintiff and he could have not closed his case. That the present application was belated since judgment was read over a year before moving the court. It was only meant to arrest the lawful execution process hence it amounted to an abuse of the process of the court.

8. The application was disposed of by written submissions. Only the defendant respondent filed submissions in the matter while the applicant opted not to. The applicant in his submissions first of all summarized the contents of the application. Then he set forth one issue for the court to determine which was whether the application had met the threshold of setting aside a judgement. He relied on Order 9 Rule 9 of the *Civil Procedure Rules* to argue that the application was filed by learned counsel who was not properly on record.

9. He also relied on Order 12 Rules 17 of the *Civil Procedure Rules*. Regarding the power to set aside or vary a judgment which he stated, was discretionary but should be exercised judiciously to ensure justice is done to all parties, he relied on decision he referred to as *Jomo Kenyatta University of Agriculture and Technology versus Mussa Ezekiel or Oebah* [2014] EKLR. He then summarized that in the instant case the suit was heard and the plaintiff and defendant closed their cases and judgements was delivered on 26th of July 2022. Further that the instant application was brought after a notice to show cause why execution should not issue was served on the plaintiff/applicant and a warrant of arrest issued thereafter. The plaintiff was present when his case was closed voluntarily. He posed a question as to whether the plaintiff did not know that he was supposed to call two more witnesses and/or whether he was not interested in calling them. That what the plaintiff would have done had it not been that Noticed to Show Cause had been issued to him.

10. He summed the argument by stating that other than blaming his advocate for failing to advise him to call witnesses the plaintiff had not demonstrated what he did to ensure that his case was fully heard timeously. Further, that the applicant had an obligation to inform his advocate early enough of the witnesses he intended to call. Thus, he submitted that that the applicant had not demonstrated that there was an inadvertent or executable mistake to warrant the exercise of this course discretion. Further,

that the court had already made a finding that the respondent was not the right party sued and it would be a waste of the court's time to once more engage the parties in a misplaced suit.

11. I have considered the application, the law and the submissions by the respondent. Three issues commend themselves for me for determination. These are, whether the instant application is properly before the Court, and secondly, whether the instant application is merited, and lastly, who should bear the costs of this application.

12. I start with the analysis of the first issue. The argument before me is that the application was brought improperly before the court. On this, the Respondent contends that the application was filed by learned counsel, after delivery of judgment yet learned counsel was not the one on record at the time of the delivery of the judgment.

13. The law regarding applications made or other steps taken after judgment has been delivered in a matter is Order 9 Rule 9 of the *Civil Procedure Rules*, 2010. It provides that where judgment has been delivered and a party instructs learned counsel to come on record on his or her behalf or where the party having been represented by counsel wishes to act in person, unless the judgment has been set aside, the incoming counsel or party should either file an application (and it be determined) to come on record or file a consent signed by him and the outgoing counsel to that effect. Thereafter the subsequent counsel will file a notice of change and serve on all parties or the party now acting in person will file a Notice to Act in Person and serve. From then on learned counsel or the party is properly on record and can file any applications or take any steps as may be legally permissible.

14. In the instant suit the judgment hearing was delivered on 26th of July 2022. By that time the Plaintiff was represented by the firm of Simiyu Wafula & Co. Advocates. After the delivery of judgment, the applicant filed neither an application nor a consent regarding another learned counsel's instructions.

15. Order 9 Rule 9 of the *Civil Procedure Rules* which has been cited, is mandatory. It was formulated and enacted for good reason. And it is not one of those provisions which when breached a party may argue that it is a mere technicality. It therefore ought to be complied with.

16. Indeed, courts have hitherto held, and it is straight, that it is not one of those provisions made in vain, hence it ought to be obeyed. Rules of procedure are not supposed to be mistresses but handmaidens of substantive justice. But the end should not justify means. Procedural justice is just as important as substantive justice if the rule of law is to function in any given society. And the rule of law is one of the basic principles of our democratic country, as entrenched in Article 10(2) of *the Constitution* of Kenya. It is important to note that the purpose of law is to bring orderliness certainty, social justice and transformation. Hence it is important that it is obeyed by all irrespective of status in society.

17. It is for these reason that I am of the view that the instant application having been filed contrary to the law it is improperly before the court. I therefore agree with the Respondent's submissions that the application having been filed without complying with the Order 9 Rule 9 of the *Civil Procedure Rules* it is improperly before court, and I would strike it out on that account, with costs to the Respondent. And that being done would I need not consider the merits of the application.

18. However, I note that on the one hand, the applicant argues that he was not called a given chance to call two witnesses to identify or proof that the plaintiff's identity as the right person he sued. On the other, he argues, in his grounds in support of the application, that the two alleged witnesses he intends to call if the application is granted would shed more light on the dispute. First, it is my view that the issues he raises cannot constitute those that merit the basis of an application to set aside a judgment but an appeal. He did not appeal the judgment. Secondly, the applicant waited until all the execution process began only for him to 'wake up' from slumber to apply to set aside the judgment after a Notice

to Show Cause had been served on him. He was aware throughout the year after the delivery of the judgment, and even way before the conclusion of the matter, that he had witnesses who were crucial but voluntarily and willingly elected not to call them.

19. Blaming an advocate for failure to advise or take a step in a matter is not sufficient. Such has been a practice of litigants before which has caused courts to grant orders against innocent and diligent parties to their detriment. In this era where advocates even take out practising certificates only upon taking out insurance covers or policies for their practice, it is timelessly important for parties to direct their claims to the right persons, that is to say, to where the buck stops. That means the party should lay the blame squarely on the advocate and ask for a remedy. That is when the truth can come out. This, the applicant has not done.

20. Thus, to the extent that the advocate blamed hereinabove has not owned to the fact that he/she misadvised a party or failed to take a certain step inadvertently or otherwise, the claim by a party that what happened as alleged by the applicant, that it was the advocate's mistake, remains conjecture and a figment of imagination. A mere allegation, misdirected to an innocent Respondent whose fruits of judgment should not be denied. It is neither here nor there and should be dismissed with the contempt it deserves.

21. In any event, how does a client who has walked out on his/her advocate think the previous advocate feels when he is maligned by the former client in his absence and with no recourse for clearing his name? How does he feel when his practise and even future career in other professional development are put at stake or jeopardy by the said client swearing or putting it on oath that indeed the said advocate failed in his/duty yet the advocate is not given opportunity to defend his position? Where did we as court lose it but moving away from the rules of natural justice that a party should not be condemned unheard? Or should professionals be condemned unheard and we claim that the courts are just? I think not. It is an absurdity which ought to be corrected forthwith: the former advocate should not be condemned unheard. He/ she should be given opportunity to put on oath his position regarding the allegations against him/her. I wish that in future, no party should make such unbacked or wild allegations before any court of law and the court accepts them. Far be it from happening, at least in this Court.

22. That said, proof of one's identity is a simple singular issue. It does not require numerous individuals to attend court to point out to another or the Court that indeed that individual is he. Even at the time when Jesus was about to be arrested, (for those who believe in the Holy Bible), he asked them, "whom do you seek?'. And when they answered "Jesus of Nazareth", he answered, "I am he." The issue was solved at once at that. So, it is with the instant matter, it only requires (d) for one to avail himself with his/her national identity card or other legally admissible document such as a passport to show that, indeed, the person referred to was he and not another. Thus, even if a party were to call a million people to point out to somebody that it is him, yet he is not, it does not change the identity of that person. Only what is attributed to the individual may change or be found different, but the identity of the individual remains. The Court is of the view that any other evidence by any other party about the Defendant's identity would amount to nothing.

23. In any event, the plaintiff was given opportunity at the hearing to prove that the defendant was the right person whom he sued. He provided evidence which in his assessment was sufficient at time. After that the Court weighed the evidence and found that it was insufficient. Is this a matter the Court should go over again? I think not. To do so would be to give the applicant a second bite at the cherry, that is to say, giving him a second go at the litigation over this issue. For the sweetness to remain, cherries are eaten only once. Therefore, I find it no merit in the application. I dismiss it with costs to the respondent.

24. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 4TH DAY OF APRIL, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.