



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL SUIT NO. 7 OF 1996

BONIFACE NJIRU.....PLAINTIFF/APPLICANT

VERSUS

STEPHEN NJUGUNA GITHURI.....1ST DEFENDANT/RESPONDENT

GATONYE KARIUKI.....2ND DEFENDANT/RESPONDENT

RULING

1. On 27.05.2021, one Bernard Mucungu Nthiga through the firm of Onkangi Onkangi & Associates Advocates filed an application dated 27.05.2021 and wherein he basically sought for orders that he be substituted in the place of the plaintiff herein, for interim orders of injunction restraining the respondents from trespassing LR Mbeti/Gachuriri/306 and further for the orders that this court do review its judgment of 15.05.2001. The application was premised on the grounds on its face and further supported by the affidavit sworn by the said Bernard Mucungu Nthiga.
2. When the application came up for hearing (on 1.07.2021), the applicant and/or his advocate did not appear and the application was dismissed for non-attendance.
3. What followed is the instant application and which was filed on 2.07.2021 under certificate of urgency and wherein the applicant seeks for orders that this court be pleased to vary, set aside and/or vacate the said dismissal orders of 1.07.2021 and that the dismissed application be reinstated for hearing. The applicant further prayed for orders that this court does not have jurisdiction to hear and determine the dispute and for the costs of the application.
4. The application is premised on the grounds on the face of it and further on the depositions on the supporting affidavit sworn by Bernard Mucungu Nthiga. The applicant's case is that his advocates on record had agreed with the respondents' advocates on record on the mode of proceeding with the application (by way of written submissions). That however, the counsel for the respondent proceeded to have the application dismissed without informing the court as to the agreement between the counsels. That his advocate on record tried to access the court through the virtual link but he was not successful. Further that this court does not have jurisdiction over the matter herein as there is a special court which has been set up to determine land disputes. As such the orders of 1.07.2021 ought to be set aside and the application dated 27.05.2021 reinstated for hearing.
5. The application is opposed by way of a replying affidavit sworn by Mr. Antony Mbaji an advocate of the High Court of Kenya and wherein he denied the contents of the affidavit sworn in support of the application by the applicant and deposed that the same contained lies, contradictions, fabrications and material non-disclosure calculated to mislead the court. In a nutshell, the respondent's advocate deposed that he did not agree with the applicant's advocate as to the mode of disposal of the application (by way of written submissions) and further that if there was such an agreement, then the applicant's advocate ought to have appeared to inform the court of the same. As such, in absence of the counsel for the applicant, the respondent's advocate was proper to ask the court to dismiss the application for non-attendance.
6. Further that the link that the applicant's counsel attempted to log in with, was not the right link and that the matter was never listed to proceed in open court so as to allow the applicant's advocate to be physically present in court. Further that this court does not have jurisdiction to transfer the suit herein to the Environment and Land Court under section 18 of the Civil Procedure Act.
7. The application was canvassed by way of written submissions and wherein both parties filed submissions in support of their rival positions.
8. On behalf of the applicant, it was submitted that the applicant is entitled to the orders sought for the reasons that non-attendance was not deliberate but was due to inadvertence and reasons beyond his advocate's control. Further that the application was made without undue delay; that the applicant's case is meritorious with high chances of success. Reliance was made on the case of **CMC Holdings Ltd vs-**

Nzioki [2004] KLR 173. Further that the applicant stands to suffer irreparably if the application fails and that the interest of justice demands the application be allowed.

9. The respondent submitted that the applicant did not provide sufficient cause to warrant reinstatement of the application as the reason that the applicant's counsel did not have the correct virtual link was not genuine since the link was available online. Reliance was placed on the case of **Jaldesa Tuke Dabelo –vs- IEBC & Another (2015) eKLR** and Order 12 Rule 3 of the Civil Procedure Rules 2010. That the applicant owed a duty to himself to ensure that the matter was not dismissed for non-attendance and further to pursue his advocate so that the case may be prosecuted. Reliance was made on the case of **Mathews Sankok Shompa –vs- Kenya Commercial Bank Limited & another Civil Appeal No. 529 of 2004** quoted with approval in **Latifa M. Ramadhan –vs- Omar M. Ramadhan & another (2021) eKLR**.

10. Further that this court cannot transfer the instant matter to the Environment and Land Court as section 18 of the Civil Procedure Act makes it illegal for the High Court to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction. Reliance was placed on the case of **Equity Bank Limited –vs- Bruce Mutie Mutuku T/A Diana Tour & Travels (2016) eKLR** and **Abraham Mwangi Wamigwi –vs- Simon Mbiriri Wanjiku & Another (2012) eKLR**.

11. I have considered the instant application, the response thereto and the rival submissions by the parties. The main issue for determination is whether this court ought to set aside the dismissal orders of 1.07.2021 and reinstate the application for hearing. However, I note that the applicant deposed that this court does not have jurisdiction over the subject matter herein and that the same ought to be heard by the specialized court established under the law.

12. It is trite that a court cannot exercise jurisdiction over matters not within its jurisdiction and where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law should down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing as jurisdiction must be acquired before judgement is given. (See the case of **Owners of the Motor Vessel “Lillian S -vs- Caltex Oil (Kenya) Ltd [1989] eKLR**).

13. The Supreme Court in the case of **In the Matter of the Interim Independent Electoral Commission, Constitutional Application Number 2 of 2011** stated that where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.

14. In the instant case, the main suit before the court involved a question as to the ownership of the suit land. The matter was commenced by way of Originating Summons filed on 23.11.1995 under Order XXXVI Rule 3D of the old Civil Procedure Rules and the plaintiff was advancing a case that he is entitled to the suit land by way of adverse possession. At the time the suit was filed, this court had jurisdiction to determine issues to do with ownership of land/entitlement to land. This was pursuant to the provisions of section 38 of the **Limitation of Actions Act** which provided the High Court as the court before which a person who claims to have become entitled to land by adverse possession could seek an order that he be registered as the proprietor of the land. The enabling law was Order XXXVI Rule 3D of the old Civil Procedure Rules and currently **Order 37 of the Civil Procedure Rules 2010**. As such, at the time of the judgement which the applicant seeks to review and/or setting aside, this court had jurisdiction over the same. However, pursuant to the provisions of the Environment and Land Court Act of 2012 (more so section 13), the said jurisdiction was taken away and bestowed upon the Environment and Land Court.

15. As I have already pointed out, the application which was dismissed for non- attendance basically sought for orders that the applicant therein (Bernard Mucungu Nthiga) be substituted in place of the plaintiff herein (Boniface Njiru) and for the review of the judgment delivered on 15.05.2001. The impugned judgment was delivered by this court while it had jurisdiction over the issues to do with adverse possession. What this means is that the said orders can only be reviewed by this court. I am guided by the provisions of section 80 of the Civil Procedure Act Cap 21 of the Laws of Kenya which provides that any person who considers himself aggrieved by a decree or order from which an appeal is allowed by the Act, but from which no appeal has been preferred; or by a decree or order from which no appeal is allowed by the Act may apply for a review of judgment **to the court which passed the decree or made the order**, and the court may make such order thereon as it thinks fit.

16. Further, Order 45 of the Civil Procedure Rules provides that any person may apply for a review of judgment to **the court which passed the decree or made the order** without unreasonable delay if he considers himself aggrieved by the said decree or order or if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason he desires to obtain a review of the decree or order.

17. The effect of the above provisions is that one can only seek review of a judgment from the court which made the orders or from the court which passed the decree.

18. In the instant case, the court which made the orders or judgment whose review is sought is this court and wherein it acted within the jurisdiction bestowed upon it. It therefore means that this court is the only court which can review the said orders/judgment/decreed. It would be improper for this court to down its tools and in so doing decline the invitation to review its orders which were made within its jurisdiction. In my view, the only instance when this court can be said to be bereft of jurisdiction is where it is invited to determine the main substratum of the suit. As such, the assertion that this court has no jurisdiction is unfounded in law.

19. The question which needs to be answered, therefore, is whether the applicant deserves the grant of the orders sought in the application dated 2,07.2021 to wit that this court be pleased to vary, set aside and/or vacate the said dismissal orders of 1.07.2021 and that the dismissed application be reinstated for hearing.

20. A crucial point to note is that what was dismissed was a notice of motion and which was coming up for hearing on the day when it was dismissed. The applicable law in that respect is Order 51 Rule 15 of the Civil Procedure Rules 2010. The said order provides that "the court may set aside an order made ex parte."

21. The above provision of the Civil Procedure Rules clearly provides for setting aside ex-parte orders. The orders sought to be set aside were made in absence of the applicant (in the said application) and thus ex-parte. The exercise of the power to set aside ex-parte orders is as thus, discretionary.

22. I am alive to the fact that in exercise of the discretion and in doing substantive justice, the courts have no limits or restrictions except that it should be exercised judiciously and not arbitrarily. What the court ought to consider is whether the applicant has given sufficient reasons why he failed to attend court when the orders were made.

23. The applicant's advocate in support of the application herein deposed that he was unable to log in using the link that was provided by the court. I note that the said advocate logged in later and made an oral application to have the orders which had been made ex parte set aside but the court directed that he files a formal application. I find that the reason is valid. The respondents' advocate deposed that the link that the applicant attached was the wrong link. In my view, that is a valid reason to explain why he was unable to address the court.

24. The advocate having explained why he did not join the virtual court, I find that the said explanation is sufficient. As such, I allow the application herein. However, since the applicant necessitated the instant application, they ought to bear the costs of the application.

25. In *obiter*, the respondent raised an issue as to this court not having jurisdiction to transfer the suit herein to the Environment and Land Court as section 18 of the Civil Procedure Act makes it illegal for the High Court to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and relied on the case of Equity Bank Limited vs- Bruce Mutie Mutuku T/A Diana Tour & Travels (2016) eKLR and Abraham Mwangi Wamigwi –vs- Simon Mbiriri Wanjiku & Another (2012) eKLR.

26. However in the instant case, and as I have noted elsewhere, the matter was initially filed in this court while it had jurisdiction over the issues. Further, the transfer, if any, to the Environment & Land Court is not in exercise of the powers under section 18 of the Civil Procedure Act. As such, the facts and circumstances in Abraham Mwangi Wamigwi's case are different from the facts in this case. The suit cannot be said to be a nullity and not transferrable.

27. I therefore make the following orders;-

1. *That the orders of 1.07.2021 be and are hereby set aside and the application dated 27.05.2021 be and is hereby reinstated for hearing.*
2. *The application dated 27/05/2021 be prosecuted within 45 days failing which it shall stand dismissed.*
3. *The respondent is awarded Kshs.10,000/= as throw away costs.*

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF NOVEMBER, 2021.

L. NJUGUNA

JUDGE

.....**FOR THE APPLICANT**

.....**FOR THE RESPONDENT**