



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.145 OF 2008

JAMES MBURU KAMAU.....APPELLANT/RESPONDENT

-VERSUS-

PETER MWANGI MBARIRE.....1ST RESPONDENT/APPLICANT

JAMES MBURU KAMAU.....2ND RESPONDENT/AAPPLICANT

RULING

1. This is a ruling on application dated 3rd July 2019. It seeks review of judgment dated 20th June, 2019. The said judgment was in respect of appeal filed challenging ruling delivered by **Hon. S. Kingori** delivered on 14th August 2008 in CMCC No.542 of 2005.
2. Grounds on the face of the application is that the appeal focused on the ruling different from the one appealed against.
3. That the appeal was against the ruling delivered on 14th August 2008 but the judgment in substance dealt with ruling dated 28th June 2006; that there is an error apparent of the face of record.
4. The application is supported by affidavit sworn by **Naftali Rubua Ngure** counsel for the applicant. He averred that in the memorandum dated 15th September 2008, the appeal was against lower court ruling delivered on 14th August 2008.
5. He averred that the preliminary objection was based on the fact that the defendant in the lower court who is the appellant herein filed an application dated 23rd June 2008 in person when he had an Advocate on record. That the court sustained the preliminary objection and struck out the application that was irregularly filed; that the appellant proceeded to file this appeal against the said ruling.
6. He averred that if the court were to allow the appeal, the outcome would have been to reinstate the application that had been struck out and order that the same be fixed to be heard by the lower court.
7. He further averred that though an application to set aside *ex parte* judgment in the lower court, was dismissed, no appeal was filed against the same; that the application was dated 11th May 2006 and ruling was delivered on 28th June 2008 by **Hon.Mutembei**; that there was no appeal on ruling to set aside *ex parte* judgment; that the judgment has addressed the merits to set aside *ex parte* judgment as though the ruling was against ruling of 28th June 2006.
8. That there is glaring error on the face of record as there was no appeal on dismissal of application to set aside *ex parte* judgment; that the court inadvertently considered the wrong ruling. The judgment delivered is attached to the supporting affidavit.
9. In response, the respondent/appellant filed preliminary objection. Ground set out in the preliminary objection are that the Notice of Motion dated 14th July 2019 is *res judicata* and an abuse of court process; and status quo issued on 26th June 2019 stand and is enforceable.
10. That the Notice of Motion herein is incurably defective for failure to comply with **section n 35 (1) of the Advocates Act Chapter 16** by failing to disclose the name and signature of the author; further that the supporting affidavit is incurably defective by failing to comply with **Sections 4 of Stamp Duty Act,4 and 24 of the Land Control Act, Section 107 to 109 and 120 of the Evidence Act, Section1A of Civil Procedure Act, Order 9 of Civil Procedure Rules, Rule 9 of Advocates Procedure Rules**; that no consent from Land Control Board nor title deed are annexed.

ANALYSIS AND DETERMINATION

11. I have also considered arguments by the parties herein. I have also perused the judgment delivered on 20th June 2019 and memorandum of appeal filed by the appellant herein.

12. In paragraph 8 of the judgment I noted that the application dated 11th May 2006 filed by the appellant which sought to set aside exparte judgment was rejected.

13. In paragraph 9, I indicated that the appellant later filed application dated 23rd June 2008 seeking to act in person and have exparte judgment and all consequential orders set aside. Counsel of plaintiff raised preliminary objection that counsel who filed documents had not obtained leave to come on record. The preliminary objection was sustained as noted in paragraph 9 of judgement and the application found incompetent and struck out.

14. I have perused the memorandum of appeal filed and confirm it addresses the ruling of 14th day of August 2008 delivered by Hon. Kingori, SPM.

15. I do agree that the ruling delivered was on preliminary objection raised. The application by the appellant was not heard in view of the fact that the preliminary objection was sustained.

16. My finding in the judgment is that the appellant should have been given an opportunity to be heard; that the court should not have relied on procedural technicality to strike out his documents in respect to the application dated 23rd June, 2008. Appeal on ruling in respect to exparte judgment was not however before me and I was not therefore required to make any findings on it.

17. I agree that there is glaring error on the face of the judgment; my judgment should have been limited to appeal before me. I therefore set aside my orders issued on 20th day of June 2019 and make correction as hereunder:-

1. Appeal on ruling delivered on 14th August 2008 is allowed. Application dated 23rd June 2008 is reinstated.

2. Matter be placed before the trial magistrate for direction on hearing of the application and further directions.

Ruling dated, signed and delivered at Nakuru this 11th day of December, 2019.

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Court Assistants – Schola and Jeniffer

Ngure for applicant

Respondent in person