



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
LAND AND ENVIRONMENT CASE NO. 87 OF 2012

BENJAMIN BARASA WAFULA PLAINTIFF

VERSUS

MOSES CHETAMBE AND 22 OTHERS..... DEFENDANTS

RULING

1. The applicant has filed this application for review premised on the provisions of order 45 rules 1 – 6, order 7 rules 1, 5,8,19 and 20 of the Civil Procedure Rules Cap 21. In the application he sought the following orders;

1. That this honourable court be pleased to temporarily stay the execution order of the decree awarded to the current decree holders against the current decree debtor pending the determination and ruling of this application.
2. That the unprocedural dismissal of the land and environment case no. 87 of 2012; be reviewed by the same honourable Court which dismissed it.
3. That since the parties have failed to file the replies, defence and the particulars requested for, the land and environment case no. 87 of 2012, be ruled in favour of the plaintiff herein who has complied with all requirements of this suit.
4. That the 23rd defendant herein, be charged for hiding the file of this land and environment case no. 87 of 2012, between the 20th day of February, 2014 and 4th day of March, 2014.
5. That the 1st upto 7th and 13th upto 15th as well as the 18th upto 23rd defendants herein, be charged for promoting corruption in court by wrongly moving to dismiss the undisputed land and environment case no. 87 of 2012 which they have failed complying to.
6. That the 2nd upto 7th as well as 13th upto 15th and 22nd defendants and their families, clients and agents herein be temporarily restrained from inter meddling with the intestate properties of the deceased's estate, until the determination and ruling thereof.
7. That the costs awarded to the 1st upto 7th and 13th upto 15th as well as 18th upto 23rd defendants herein, be reverted and granted to the plaintiff/applicant herein, who had complied to the requirements regarding this land and environment case no. 87 of 2012.

2. The application is supported by the nine grounds listed on the face of it and an affidavit sworn by the applicant. Some of the reasons given in the grounds inter alia are, that only the 1st and 13th defendants

filed their defence but failed to comply with request for particulars. Further that the plaintiff attempted to file some documents which though he paid for were returned to him because the court file was said to be missing. The relevant portion of his supporting affidavit is contained in paragraph 7 – 10. In paragraph 9, he deposes that he sent the 1st and 13th defendants to hold brief for him. In paragraph 10, he deposes that he reached the registry at 12.23 p.m where he was told his suit had been dismissed. In paragraph 14 he deposes thus;

“That the 23rd defendant/respondent herein must now adhere to the constitutional legality then re-instate this suit by meriting the applicant since the 2nd, 7th defendants then 14th, 15th, 18th and 23rd defendants to file the pleadings and other relevant documents have expired.

3. The application is opposed. The 2nd respondent Ms. Harriet on her behalf and on behalf of the 3rd, 4th, 5th, 6th, 7th, 14th and 20th defendants swore a replying affidavit to oppose the said application. The 2nd defendant/respondent deposes that there is no error on the face of the record or any other sufficient grounds provided under order 45 to warrant the orders of review sought. She avers that there are no particulars or medical evidence provided by the applicant of his uncle who took poison. Finally, that the file was not missing as alleged by the applicant. The 1st defendant also submitted that the applicant failed to give proper account of his absence when this matter was called out.

4. On 20th November 2013, this suit could not be heard due to time constraints on the part of the court. The case was therefore rescheduled to 5th March 2014 for hearing in the presence of all parties except the Attorney General’s representative. The applicant was thus aware of this date. On 5th March 2014 this court commenced its sitting at 9.00 a.m. and when the file was called out, the plaintiff/applicant was absent. Some of the defendants were present and responded. The court placed the file aside to deal with other matters until 10.35 a.m when this matter was called out again without any response from the plaintiff. This was the first hearing so it was to begin with the plaintiff’s case.

5. The plaintiff/applicant has admitted this fact by saying that when he came to the registry at 12.23 p.m, he was informed that his suit had been dismissed for non-attendance. It is provided under order 12 rule 3 (1) **“That if on the date fixed for hearing only the defendant attend and admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”** The case before me, the 1st defendant indicated to court that the applicant had sent him a text that he was on the way to court. The court on this account gave him (applicant) time but still he did not show up by 10.35am. This court was therefore within the law upon request made by the defendants to reach the decision dismissing the suit for non-attendance.

6. Under order 12 rule 7, there is a clear provision that the applicant can move the court to set aside or vary the order of dismissal upon such terms that are deemed just. The applicant herein has instead chosen to move the court under order 45 which deals with review and order 7 which deals with filing of pleadings and documents. None of the orders cited is of relevance to solve the applicant’s problem. To worsen the applicant’s case is the wordings of the prayers in that application. Even if this court was to rely on article 159 of the Constitution to assist the applicant, there is no prayer made seeking setting aside for non-attendance. The closest the applicant comes to this is prayer (2) where he seeks for review of **“the unprocedural dismissal of his case”**. As stated earlier, the dismissal of the suit was not unprocedural but was done in compliance with the law.

7. The provisions of order 45 sets grounds upon which review can be sought which includes;

- a). Discovery of new evidence that was not written knowledge of applicant even after exercising due diligence.
- b). Mistake or error apparent on the face of the record.
- c). any other sufficient reason.

None of these grounds have been submitted on by the applicant. The parties to a suit are bound by their pleadings and the court cannot grant what is not prayed for. In any event this is a dismissal for non-attendance which in my view does not fall under orders/decrees which can be reviewed.

8. The other prayers contained in paragraph 3, 4, 5, 6, and 7 would only be considered had the order dismissing the suit been set aside. The Applicant's approach to court as regards those prayers is as if there is no order in existence which dismissed his suit. The issue of whether this file went missing is not a matter for determination at this stage of the application. The file was available in court on the date fixed for hearing. The upshot is that the application before court is incompetent lacks merit and is a candidate for dismissal. The said application is hereby dismissed with costs to the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 14th, 15th and 20th defendants.

DATED, SIGNED and Delivered at Bungoma this 3rd day of July 2014

A. OMOLLO

JUDGE.