



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC NO.183 OF 2011

DICKSON OPOLA OKUMUPLAINTIFF

VERSUS

TOM ODHIAMBO ODARI

JOHN OWIRO ODARI.....DEFENDANTS

R U L I N G

1. This ruling follows interpartes hearing of the application filed here on 17/9/2013 and dated the same. The application is, in substance, one for review and what is sought for review is this Court's ruling dated 27/6/2013 and delivered on the same date.
2. Essentially, the ruling was on an application for restraining orders filed earlier on 27/10/2011. The Court allowed the application for reasons, inter alia, that a replying affidavit intimated to have been filed by the respondent – who is now the applicant here – was not in the court file and the court had not had the benefit of looking at it.
3. Following that ruling, the plaintiff/Applicant in that earlier application – who is the respondent here – extracted an order and the applicant herein felt aggrieved by that order. He then made this application for review.
4. It also emerged that the applicant's counsel, Mr. Mwamu, in his bid to make the next move, applied for the ruling made and was at first availed a ruling with mixed contents, which even referred to a different parcel of land. It was only later that the correct ruling was availed which corresponded with the court's hand written ruling.
5. All these impelled the applicant to feel justified to make an application for review, hence this application.
6. The plaintiff/respondent opposed the application vide grounds of opposition filed on 14/10/2013. The grounds term the application as misconceived and an abuse of the Court process. The grounds advanced in the application cannot, it was said, afford the applicant the orders sought and the application was said to offend the provisions of Order 45 of Civil Procedure rules, 2010, and Sections 2 and 80 of Civil Procedure Act (Cap 21). The respondent reads bad faith on the part of the applicant and his view is that the application is unmerited, frivolous and vexatious.
7. This Court heard the application interpartes on 28/11/2013 with Mwamu for the applicant reiterating more or less what the application contains. Oyuko for the respondent made a response that was a bit technical. To him, it behoved the other side to extract an order first. That that was not done makes the

application run counter to provisions of Section 2 and 80 of Civil Procedure Act. The need to extract such order was underscored in the decided case of **UHURU HIGHWAY DEVELOPMENT LIMITED VS CENTRAL BANK OF KENYA & 2 OTHERS HCC NO.29/95, NAIROBI**.

8. It was also Oyuko's position that the applicant herein should have gone on appeal. For this, the decided case of **NATIONAL BANK OF KENYA LIMITED VS NDUNGU NJAU: CA NO.211/1996, NAIROBI**, was availed. Mwamu attacked the decisions availed by Oyuko on the ground that they were made before the new Constitutional dispensation. It seems to me that Mwamu views the decision as representing the rigidity of the old judicial order or dispensation.

9. I have considered the application, the grounds of opposition filed in response, and the representations of each side during interpartes hearing.

10. When I made my earlier ruling, the replying affidavit to the application then being ruled on, was not in the court file. That replying affidavit is still not in the court file as I write this ruling. What is in the court file is a copy of that replying affidavit availed as an annexure (annexture T001B) by the applicant's side.

11. But I am now persuaded that the applicant had actually filed it. It would appear however that the affidavit has never found its way into the court file.

12. I am also persuaded that Mwamu for the applicant got a ruling with mixed contents at first. He availed that ruling and that is the way it appears. (Please see annexure TOO – 2, particularly page 3).

13. It is true that one of the reasons why the ruling went against the applicant here was because the replying affidavit was not available. Whether that alone informed the direction and outcome of the ruling is not something I can say at this stage. What I need to point out is that that any material laid before the court ought to be considered and given its place.

14. When a party, like the applicant herein, has done all that should be done to have such material considered, a shortcoming in our court system that leads to such material not entering the court file should not be visited on him. The problem seems to become even more compounded for the applicant herein when his counsel, in attempting to find out what was happening, got a ruling with mixed, and therefore wrong, contents.

15. According to Oyuko, the applicant should have gone on appeal. And the replying affidavit, he said, was not there. According to him, the authorities he availed (Supra) should lead the court to reject the application.

16. I differ. The authorities availed, as pointed by Mwamu, are old decisions that are now out of sync with the new constitutional dispensation. They predate the enactment of Sections 1A and 1B of Civil Procedure Act, Sections 3 and 19 of Environment and Land Court Act (No.19 of 2011) and article 159 of Kenya Constitution, 2010.

17. All these provisions enjoin an embrace of a new approach, a new thinking. Our court decisions now should not be narrowly grammatical or technicality oriented. They should be flexible, adaptive and focused on substantive justice arrived at on merits rather than technical shortcuts.

18. I consider that it would be wrong for me, having been persuaded that a replying affidavit had indeed been filed, to dismiss this application on the grounds advanced by Mr. Oyuko. I therefore allow the application.

I order that the earlier application be argued afresh. Costs in the cause.

A.K. KANIARU – JUDGE

7/10/2014

7/10/2014

A.K. Kaniaru – Judge

Dianga G. - Court Clerk

No party present

No counsels present

Interpretation – English/Kiswahili

COURT: Notice to deliver the ruling herein was given on 18/9/2014 to both counsels on record. Ruling on application filed on 17/9/2013 read and delivered in open **COURT.**

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

7/10/2014

AKK/vaa