



REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 25 of 2006

IDDI BARAKA

SALIM BILALI.....APPELLANTS

SULEIMAN MUHAMMED

VERSUS

HAMISI ALI

ZUBERI SHOGOBE T/A MUSLIM MOSQUE COMMITTEE.....RESPONDENTS

J U D G M E N T

The appeal herein is premised on the following grounds:-

“1. That the learned magistrate erred in law and fact in holding that the new evidence which had been discovered could be dealt in a different forum.

2. The learned magistrate erred in law and fact in not finding that there was new and important evidence, which had been discovered.

3. The learned magistrate erred in law and fact in holding that he could not review his ruling as it will amount to sitting on appeal and yet the law allows him to do so.”

The Chamber Summons application dated 31.8.05 was filed simultaneously with the Plaint. The application sought orders that pending the hearing of the main suit, an interim order of injunction do issue restraining the respondent/defendant whether acting by himself, his agents, his servants, his assignees and/or in any manner whatsoever from levying distress for rent, on the applicants/plaintiffs goods, properties presently lying at their premises and/or in any manner whatsoever deal with the applicants quiet possession of the rented premises situate at the isolated plot No. 56 and plot No. Maragoli/Bugonda/2187 within Vihiga Municipal (Mbale Town) pending the hearing and determination of this application.

The application was heard and a ruling delivered on 24.1.06.

The appellants subsequently filed a Notice of Motion application dated 26.1.06 seeking orders that the court orders dated 24.1.06 be reviewed and or varied to the extent that the Respondents/Defendants are restrained from interfering with the Applicant’s quiet possession of the premises on land parcel number **KAKAMEGA/BUGONDA/2187.**

The application was dismissed with costs, thereby provoking the appeal.

Mr. Momanyi advocate appeared for the appellants while Mr. Kundu advocate appeared for the respondents. Both counsels filed written submissions which I have duly considered.

I have considered the provisions of Order 45 rule 1 and 2 Civil Procedure Rules.

In an application for review, the applicant has to show the following:-

- That there has been discovery of a new and important matter or evidence which, after a exercise of due diligence, was not within his knowledge or could not be produced at the time the decree was passed or order made, or
- On account of some mistake or error on the face of the record, or
- For any other sufficient reason desires to obtain a review of the decree or order.

It is clear from the record that the application was based on the discovery of new and crucial evidence which had not been discovered at the time the application was heard. The appellants' contention according to his affidavit sworn on 26.1.06 is that the title to **L.P. NO. KAKAMEGA/BUGONDA/2187** where the premises stood had been recalled by the land registrar for correction. That the entry in the register reflecting the name of the respondent (MBALE MUSLLIM MOSQUE COMMITTEE) as the registered proprietor was deleted, leaving the name of Kakamega County Council as the registered proprietor of the suit property but the land was reserved for use by the Muslim Community Centre.

What was the import of this turn of events on the landlord/tenant relationship? A party does not need to have a title to a property to create a Landlord and tenant relationship. The authority for this position is found in HANSBURY's Laws of England, 3rd Edition, Vol. 15 para 455 and 456 where it is stated:

“Estopped binds Lessor and Lessee. The relationship of Landlord and tenant may be brought into being even though the landlord has no title for the land of which he has purported to create a tenancy.”

The purported new evidence was therefore of no help to the appellants. I call it purported new evidence because it is not clear from the copy of the green card (annexure “ID1”) when the entry in question was deleted. The green card was certified as a true copy of the register on 26.1.06. The ruling complained of was delivered on 24.1.06 only two days later.

The upshot is that the appeal fails with costs to the respondents.

DELIVERED, DATED AND SIGNED AT KAKAMEG THIS 10TH DAY OF OCTOBER, 2012

B. THURANIRA JADEN

J U D G E