



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 603 OF 2001

NEW KAMWANIG GUMBA COMPANY LIMITED PLAINTIFF

VERSUS

KIAMBU COFFEE GROWERS

CO-OPERATIVE UNION.....1 ST DEFENDANT

KIAMBU THIKA SACCO SOCIETY LIMITED.....2 ND DEFENDANT

THE DISTRICT LAND REGISTRAR THIKA.....3RD DEFENDANT

RULING

1. This suit was brought by the plaintiff on 12/4/2001. Trial commenced before Honourable Justice Pauline Nyamweya on 18/6/2013. The plaintiff led evidence by Mr Mburu Mwaura. He was cross-examined and therefore the plaintiff closed its case on the same day. Subsequently, the defendants led evidence and closed their respective cases. Honourable Lady Justice Nyamweya subsequently rendered a judgment in the suit on 27/1/2015. Close to three years later, Michael Mwigii Kibe brought a notice of motion dated 7/9/2017 on behalf of the plaintiff, seeking leave for the plaintiff company to act in person. He further sought an order setting aside the judgment rendered by Justice Nyamweya. That application is the subject of this ruling.

2. The application was premised on the following verbatim grounds:

- 1. That the respondent herein has never served the applicant with documents and summons to appear before the court for the hearing.***
- 2. That if the failure of the respondent to serve the applicant with documents from Environment and Land Court in Nairobi is not considered, the applicant shall suffer great injustice in this matter.***
- 3. That the applicant only just discovered that a judgment was issued against him by the Environment and Land Court sitting in Nairobi on the 27th January 2015 in the absence of the applicant when the applicant was never served with the same yet there was never a time I had a fair hearing before the court.***
- 4. That the mistakes of the respondents/defendants should not be visited on the plaintiff/applicant.***
- 5. That the applicants advocate failed to comply with the court rules and procedures and even directions as indicated in the judgment thus causing the applicant to suffer great loss.***
- 6. That it's in the interest of justice that the applicant be heard and given a fair trial.***
- 7. That the applicant would suffer irreparable loss and damage in the event that the application is not allowed.***

3. The application was supported by an affidavit sworn on 7/9/2017 by Michael Mwigii Kibe. He did not disclose his relationship with the plaintiff company. He deposed that he was "the applicant". He added that he was not aware of the progress of the case because his advocate did not give him updates on the case. Mr Kibe further deposed that there was no service of notice upon him. He urged the court to set aside the judgment.

4. The 1st and 2nd defendants opposed the application through grounds of opposition dated 7/11/2017. They contended that Michael Mwigii Kibe was a stranger to the suit herein and lacked *locus standi* to make the application. They further contended that there was no legal basis

for setting aside an *inter-partes* judgment. Thirdly, they contended that the plaintiff's suit having been dismissed, there was nothing to stay. Lastly, they stated that the applicant was seeking to re-litigate an already adjudged case contrary to the principle of finality of court judgments and decrees.

5. This matter was listed before me for the first time on 21/2/2019. On that day, I directed Michael Kibe to file and serve written submissions within 21 days. When the matter came up for disposal of the application on 18/6/2019, Michael Kibe indicated that he was not ready to argue the application. The court reluctantly adjourned the application to 22/7/2019. Come 22/7/2019, Michael Kibe was not in court and had not filed written submissions. The 1st and 2nd respondents had filed their written submissions. Consequently, the court gave a ruling date on the application.

6. The 1st and 2nd defendants submitted that the applicant did not have *locus standi* to file the application. It was further argued that the plaintiff being a company did not have capacity to act in person. Lastly, it was submitted that this court having rendered an *inter-partes* judgment was *functus officio* and there must be an end to litigation. Reliance was placed on **Jimnah Mwangi Gichanga v Secretary TSC (2018) eKLR**

7. I have considered the application together with the grounds set in the application and in the supporting affidavit. I have also considered the grounds of opposition and the written submissions by the 1st and 2nd defendants. The single question falling for determination in this application is whether the applicant has laid a basis for setting aside the *inter-partes* judgment in this suit.

8. The judgment in this suit is an *inter-partes* judgment rendered after the plaintiff led evidence and closed its case. Through the judgment, the plaintiff lost the case. The application under consideration was brought by Michael Mwigii Kibe who signed it as "Respondent". He did not disclose his relationship with the plaintiff company. Secondly, the judgment in this suit was rendered after Mr Mburu Mwaura, a shareholder and director of the plaintiff Company from 1989 to 2004 testified. The evidence and authority of the said witness has not been impeached in any way. Thirdly, the plaintiff was duly represented by M/s Wanjama & Company Advocates during the hearing. The retainer of the said law firm has not been impeached in any way. For the above reasons, I find absolutely no basis for disturbing the *inter-partes* judgment rendered in this suit by Justice Nyamweya. Secondly, the applicant has completely failed to satisfy the court on any of the prayers made in the application.

9. I would have allowed the plea for leave for the plaintiff company to act in person had Mr Kibe disclosed in the supporting affidavit his relationship with the plaintiff company and exhibited a board resolution authorising the decision to disengage their advocates. He did not. I am therefore not satisfied that Mr Kibe has placed before the court adequate material to warrant grant of any of the orders sought in the application.

10. The result is that the notice of motion dated 7/9/2017 is found to lack merit and the same is dismissed. Mr. Michael Mwigii Kibe will bear costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF OCTOBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Court Clerk - June Nafula