



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 952 OF 2011

(Before D.K.N. Marete)

PETER GIKARIA WAMBUGU.....CLAIMANT

Versus

MUHOTETU FARMERS CO.OP SOCIETY.....RESPONDENT

RULING

This is an application by way of Notice of Motion dated 27th February, 2012 and brought to court under a certificate of urgency of the same date. The applicant prays for orders as follows;

1. THAT this Application be certified urgent and be heard *ex parte* in the first instance.
2. THAT this Honourable Court be pleased to re-open the matter for Hearing of the Respondent's evidence and to review its Judgment delivered on 7th February, 2013.
3. THAT pending the hearing and determination of this Application, this Honourable Court be pleased to grant a stay of execution of its Judgment delivered on 7th February, 2013.
4. THAT the costs of this Application be costs in the cause.

The application is supported by the affidavit of Samuel Kagiri, the respondent's chairman.

The claimant/respondent opposes the application for want of principles for granting the prayers sought and therefore submits that it is not merited. That the allegations of collusion are in bad faith, an afterthought and not acted upon. That the applicant is in bad faith and an abuse of the process of court and that he should not pay for the errors and omissions of others.

The matter came for hearing variously until 24th February, 2014 wherein the parties agreed to dispose of the application through written submissions.

In her written submissions, the respondent/applicant reiterates his case and call for the ends of justice by a grant of the prayers sought. She submits that an application for review can be brought to court on grounds not of discovery of new evidence or error on the face of record but also for any other sufficient reason. She states that in the present case the court was misdirected by counsel at the time of closure of the defense case and therefore this anomaly which he sought to be cured by this application. She relies on the authority of **Romanus Okongo Ojiambo – vs - Henerico Ochiengi Kisumu HCC No. 15 of 2006** which held as follows:

“The court takes notice that the applicant is a victim of his counsel's negligence and/or ignorance and technicalities of procedure. The purpose of the recent amendments to the Civil Procedure Act, namely Sections 1A and B was to enhance the powers of the Court to facilitate just expeditious, proportionate and affordable resolution of disputes. Although the overriding objective has several aims, the principle aim is for the Court to act justly in every situation either where interpreting the law or exercising its powers.”

She prays for re-opening of the matter to enable therein tendering of a defence and therefore meet the ends of justice.

The claimant/respondent submits that this court has no jurisdiction to grant the main prayer sought as number 2 of the application. He

further submits that the allegations by the respondent that the judgement of court caught him by surprise is an attempt to misled the court. He at all times participated in the proceedings of the suit and concedes that he was present at the close when her counsel indeed closed the matter. Litigation must come to a close as indeed happened on pronouncement of judgement in this case.

The claimant/respondent sought to rely on the authority of *Musiara – vs – Ntimama [2004] 2 KLR 172 where the Court of Appeal held as follows;*

“Where an issue has been determined by a decision of the court, that decision should definitely determine the issue as between those who are party to the litigation. The reason of this general approach is that public policy demands that outcome of litigation should be final and that litigation should not unnecessarily be prolonged. This is the reason why limits have been placed on the rights of citizens to open or reopen disputes.”

and also,

“We reiterate that this court has always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this rule would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of this court on the basis of arguments thought for long after the judgement or ruling was delivered or made. It matters not whether the judgement or ruling has been perfected or not.”

Secondly, the claimant/respondent submits that this application is a negation of the overriding objectives of this court and to unjustly and without any reasonable cause obstruct the cause of justice. The counsel and representative of the applicant was always in court even at the date of oral hearing and therefore the application is a mischief and not true. Collusion is not supported by evidence and this claim is intended to malign counsel and others and should be dismissed.

The application does not fall within the grounds for review and seeks to reopen disputes which have been heard and determined to fruition. This should not be allowed and would be a waste of judicial time if not *in toto* an abuse of the process of court. It is not supported by the authority of **Musiara vs Ntimama** (Supra) and should therefore fail and be dismissed.

Further, ignorance as pleaded and submitted is a red herring intended to wit the sympathy of the court, or altogether hoodwink the court. It should be ignored. The submission on the financial resources of the respondent/applicant is not relevant as this is misplaced. It should have been adduced at the hearing of the suit. Moreover, judgement has been entered against the respondent/applicant and she is bound to meet the same.

The issue for determination therefore is whether the application is a deserving case for review. It is not. The claimant/respondent’s case is all convincing. A grant of the orders sought would be dare devil. It would open floodgates and create dangerous precedent where loosing parties would look for every excuse to re-clothe and appear through the back door. This would confuse the operations of court and endanger the philosophy of bringing litigation to an end. It would frustrate and defeat the ends of justice.

I am therefore inclined to dismiss this application with costs to the claimant/respondent.

Delivered, dated and signed the 24th day of April, 2014.

D.K.Njagi Marete

JUDGE

Appearances:

1. Mr. Nderitu Komu instructed by Nderitu Komu & Company Advocates for the claimant/respondent.
2. Mr. Robert Githaiga instructed by Robert Githaiga & Company Advocates for the respondent/applicant.