REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

MISC. CASE NO. 9 OF 2014

1. MUKITI NDOO

2. NGUI NDOO……..... APPELLANTS/APPLICANTS

VERSUS

1. ELISHA MAKAU KAIVI

2. JOEL KAVITA KAIVI …….....RESPONDENTS

RULING

Before me is an application brought by way of Notice of Motion dated 9th October 2014. The application was brought by Mukiti Ndoo and Ngui Ndoo under Section 3, 3A and 15 of the Civil Procedure Act (Cap. 21) and Order 10 rule 11 and Order 43 rule 1 (g) (k) and Order 51 Rule 1 of the Civil Procedure Rules 2010.

The prayers are as follows:-

1) THAT the application herein be certified as urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.

2) THAT this Honourable court be pleased to overturn the ruling delivered on 25th September 2014 by Honourable M. W. Murage, Resident Magistrate in Civil (land) case No. 67 of 2013 denying the applicants herein an opportunity to file their defence in the said suit and allow the applicants to defend the said suit.

3) THAT this Honourable court be please to quash the ruling delivered on 25th September by Honourable M. W. Murage Resident Magistrate in Civil (land) case No. 67 of 2013 allowing the Respondents herein to proceed with execution of judgment and decree dated 9th October 2013 and to order a stay of execution pending the hearing of this application.

4) THAT the cost of this application be in the cause.

The application has grounds on the face of the Notice of Motion. The grounds are that on 7/8/13 the respondents filed a land case against the applicants. That summons to enter appearance was not served and consequently no appearance was entered. That failure to enter appearance and serve defence was thus not deliberate. That the applicants came to know the existence of the case when they were served with Notice to show case dated 12/6/2014. That the applicants field a Notice of Motion dated 8/7/2014 seeking inter alia to set aside the interlocutory judgment which had been entered on 9/10/2013. That on 25/9/2014

the honourable court knowing very well that the subject matter of the case was land went ahead and denied the applicants a right to be heard by denying them a right to file their defence. Also that the applicants were denied an opportunity to cross-examine the process server to establish the truthfulness of his affidavit filed on 11/10/2013.

The application was filed with an affidavit sworn by Mukiti Ndoo one of the applicants on 9/10/14. The said affidavit amplifies the above grounds of the application.

The application is opposed. In this regard a replying affidavit sworn by Elisha Makau Kaivi one of the respondents was filed. It was deponed in the said affidavit inter alia that the application herein lacked merits and was a mere delaying tactic to deny the respondents enjoyment of the fruits of their judgment, as there was no pending appeal. It was also deponed that the applicants were served with summons but ignored or refused to enter appearance and file defence hence the ruling in the lower court. That the defence of the applicants annexed to the application was a mere denial. In addition, the matter having gone to formal proof hearing the case had been proved and the intended defence had thus no chance of success. The said defence raised no new evidence or matters.

At the hearing of the application Mr. Mutune appeared for the applicants, while Mr. Nzili appeared for the respondents.

Mr. Mutune submitted that the applicants brought an application at the Mwingi court requesting the court to allow them file defence after the matter had already proceeded to hearing through formal proof procedure. The learned magistrate however dismissed the application and thus denied them the opportunity to file defence.

Secondly, counsel submitted the ruling denied the applicants the opportunity to cross – examine the process server on the contents of his affidavit of service. Counsel contended that the fact was that the applicants had not been served with summons to enter appearance and file defence.

Counsel emphasized that this was an emotive land issue, in which the ruling of the learned magistrate meant that the applicants would have to be evicted. Counsel urged this court to overturn the ruling of the learned magistrate.

Mr. Nzili for the respondents opposed the application. Counsel relied on the replying affidavit. Counsel contended that this court has been moved through the wrong procedure. In counsel's view, the only way to challenge the ruling of the trial court was by way of an appeal. Counsel emphasized that the right to file an appeal was automatic and relied on Order 10 of the Civil Procedure Rules. Counsel asked the court to strike out the application.

Counsel also argued that overturning ruling of the magistrate can only be done by this court through an appeal. The applicants have also wrongly asked for quashing the decision which cannot be done through an ordinary application, but only through judicial review proceedings. Counsel submitted that prayer 3 for stay of execution had already been granted pending determination of appeal. Since an appeal had not yet been filed, it was wrong according to counsel, for this court to grant stay of execution orders.

Counsel also argued that the draft defence paragraph 7, 8 and 9 admitted jurisdiction of the court, but now the applicants were denying jurisdiction of the lower court, which is wrong. In counsel's view, it was wrong for the applicants to raise issues now, which were at variance with the issues raised in the subordinate court. Counsel submitted that the lower court had exercised its discretion judiciously.

With regard to the argument that the subject matter related to land which was an emotive subject, counsel argued that the redress to the complaints of the applicants could only be sought through the proper process, which was through an appeal, not through the present application. Counsel also submitted that no issue of eviction was raised in the draft defence.

In response, Mr. Mutune for the applicants' submitted that the spirit of the Constitution required courts to

apply substantive justice. Counsel submitted that the application should not be rejected merely because of procedural issues.

Counsel further submitted that his clients did not raise the issue of eviction in the lower court, because they were not given a chance to be heard. Counsel urged this court to grant his clients a chance to defend themselves.

I have considered the application, documents filed and the submissions of counsel on both sides.

The application under consideration arose from the ruling of the subordinate court delivered on 25/9/14. The ruling dealt with an application filed in the subordinate court dated 8/7/2014 brought by the applicants herein, for setting aside of the interlocutory judgment entered against the applicants (who were defendants in the subordinate court) entered on 9/10/2013.

The application also sought that the applicants be granted leave to file their defence. A draft defence was annexed to the application.

In dismissing the application the learned magistrate stated**:-**

> ***"as to whether the defence raised triable issues, I am inclined to believe that it is a mere denial since the defendants have not been truthful as far as service of summons to enter appearance is concerned. As such the application herein is dismissed with costs to the plaintiff. It is so ordered."***

Dissatisfied with the above ruling, the applicants filed the present application. This application was brought under Order 10 rule 11 of the Civil Procedure Rules which states as follows***:-***

> ***"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."***

In my view, the above provisions of the Civil Procedure Rules states that the court which may set aside or vary the judgment and consequential orders is the same court, that made the decision, and not the appellate or higher court. Therefore, in my view, the present application is in the wrong forum, the High Court.

In my view, also this matter should have come to this court (the High Court) through the process of appeal as provided for under Order 42 of the Civil Procedure Rules. The application for setting aside or varying judgment under Order 10 of the Civil Procedure Rules was already exhausted herein in the subordinate court and ruling delivered. As such fresh application for setting aside cannot be validly filed in this court the way the applicants have done. The proper way by the applicants to approach this court after the ruling was through the appeal procedure. This court has no jurisdiction to entertain the application herein the way it is.

I have been referred to Article 159 of the Constitution of Kenya 2010. In my view, the application cannot be served by the provision of Article 159 of the Constitution of Kenya, or even section 3 and 3A of the Civil Procedure Act (Cap. 21). This application has no place in law. An appeal is very different from an application. The documents to be filed in an application on the one hand and an appeal on the other are different. The default of the applicants herein is bringing this application instead of an appeal is a substantive departure from the requirements of the law. The consequence is that the application cannot stand. It is for striking out.

Consequently, I strike out the application with costs to the respondents.

Dated this 8th day of December, 2014

GEORGE DULU

JUDGE