REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

Civil Suit 48 of 2000

WILLIAM KIPLANGAT CHIRCHIR …….. PLAINTIFF

VERSUS

SAMWEL TESOT TANGUS …… 1ST DEFENDANT

EDNA CHERONO MISIONGI…….. 2ND DEFENDANT

RULING

The defendants have made an application under the provisions of ***Order XLIV Rule I*** and ***Order III rule 9A*** of the ***Civil Procedure Rules*** seeking the orders of this court to review its ruling delivered on the 11th March, 2005. The application is based on the grounds that there was an error apparent on the face of record which error made the defendants to be aggrieved and prejudiced by the said ruling of this court. The application is supported by the annexed affidavit of Ken Kilele, advocate. The application is opposed. William Kiplangat Chirchir, the Plaintiff has sworn a lengthy affidavit in opposition of the application. In the said affidavit, the Plaintiff conceded that the court was in error in finding that the counsel for the defendants was improperly on record. He however deponed that the said finding by the court did not or could not affect the decision of the court which was made after the court had considered the facts of the case on merit. The Plaintiff further deponed that the defendant's application had been overtaken by events as the Plaintiff had already evicted the defendant pursuant to eviction order issued by this court; it would not serve any useful purpose if the application is allowed.

I heard the submissions made by Mr. Kilele, Learned Counsel for the defendants and Mr. Rono, Learned Counsel for the Plaintiff. Mr. Kilele submitted that this court had erred in ruling that the pleadings filed by the advocate for the defendants were improperly filed due to the fact that the said advocate had not sought the leave of the court to come on record for the defendants after judgment had been entered. The defendants argued that by the time the firm of Lel & Associates Advocates come on record, the previous advocates who acted for the defendant had ceased to act for the defendants. The defendants were thus unrepresented and therefore there was no requirement for the advocates, now on record on behalf of the defendant, to seek the leave of the court. The defendants urged this court to review its said ruling due to the fact the said decision was reached by the court without putting into consideration the arguments put forward by the defendants.

Mr. Rono, Learned Counsel for the Plaintiff conceded to the submission made by the defendants that this court erred in ruling that the said firm of Advocates were improperly on record. He however submitted that the outcome of the application would not be any different because the same was arrived at after this court had considered the merits of the application. Learned Counsel submitted that even if

this court were to review its finding on the point of representation, the fact remains that the exparte judgment entered on record against the defendants was neither set aside nor appealed against. The Plaintiff argued that the defendants could not therefore have resisted his claim to have them evicted from the suit land. The Plaintiff urged this court to dismiss the application with costs.

I have carefully considered the application now before me and also evaluated the rival submission made by the counsel for the defendants and counsel for the Plaintiff. The issues for determination by this court are two fold; firstly, did this court err in ruling that the advocate for the defendants were improperly on record" Secondly, if this court finds in favour of the defendants on the first point, would this court alter its ruling delivered on the 11th of March, 2005" On the first issue, this court concedes that it made an error when it ruled that the firm of Lel & Associates Advocates were improperly on record. Having perused the proceedings and the pleading filed in by the parties to this application, it is clear that the firm of Oboso, Orina & Co. Advocates had ceased to act for the defendants by the time the firm of Lel & Associates Advocates came on record. It is therefore true that by the time the said firm of Lel & Associates Advocates came on record, the defendants were acting in person. There was therefore no need for the said firm of Advocates to seek the leave of this court as required by ***Order III rule 9A*** of the ***Civil Procedure Rules.*** This rule is only applicable where there is an advocate on record when the said change of advocates is sought to be made. In the circumstances therefore the ruling of this court dated the 11th of March, 2005 is reviewed to the extend that its said finding is set aside. The firm of Lel & Associates Advocates were properly on record on behalf of the defendants.

Having reached the finding as regards the first issue, would the pleadings filed by the defendants and the submissions made on behalf of defendant by Mr. Kilele have altered the ultimate finding reached by the court" In my humble view, it could not. Judgment was entered against the defendants after they had failed to file a defence within the requisite period. Muga Apondi, J at page 2 of his judgment held that,

"Though the defendants were duly served on the 16th of August, 2000 they never filed any defence. Oboso, Orina Advocates only entered appearance but did not have any further instructions. Subsequently, on 27th November, 2003 the firm was allowed to withdraw from acting for the defendants. A perusal of the above clearly show that the Plaintiff's evidence was not controverted in any manner. The Plaintiff has proved as a fact that the exchange of land had not been presented to the relevant Land Control Board for consent. That means that the exchange of land was null and void. It was also obvious that the 1st defendant never had any valid title that he could pass the Plaintiff in Narok"

Pursuant to the said judgment, the Plaintiff made an application to this court seeking eviction orders against the defendants from the suit land. The defendants objected to the said application. However by the time the said application was filed, the defendants had not sought to set aside the judgment of this court or to appeal against the said judgment. The defendant's objection to the application by the plaintiff to have them evicted from the suit land was therefore irrelevant. The substantive orders issued by this court having not been challenged, the defendants could not resist the Plaintiff's application for eviction orders.

It is therefore the finding of this court that whether or not this court considered the arguments put forward by the defendants in the said application, the finding of this court reached would not have been any significantly different. It was submitted by the Plaintiff that the orders of eviction issued by this court had already been effected and the defendants evicted from the suit land. It would serve no useful purpose if the said order of eviction is reviewed and set aside. This court is not inclined to review its order dated the 11th of March, 2005 as it would have substantially arrived at the same decision with or without considering the pleadings filed by the defendants in opposition to the said application.

In the premises therefore, the application for review filed by the defendants is hereby dismissed with costs. The interim orders granted are hereby vacated. It is so ordered.

Dated at Kericho this 1st day of December, 2005

L. KIMARU

JUDGE