



Ngome v Muyaka & another; Kenya Commercial Bank (Interested Party) (Environment & Land Case E008 of 2022) [2023] KEELC 16611 (KLR) (29 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16611 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E008 OF 2022
EC CHERONO, J
MARCH 29, 2023**

BETWEEN

CHARLES KIBANANI NGOME PLAINTIFF

AND

CHRISTINE NASIMIYU MUYAKA 1ST DEFENDANT

STEPHENE WANGUSI FEDHA 2ND DEFENDANT

AND

KENYA COMMERCIAL BANK INTERESTED PARTY

RULING

1. The Plaintiff/Applicant, Charles Kibanani Ngome, *vide* a Notice of Motion application dated January 16, 2023 seeks the following orders;
 1. (Spent)
 2. That this Honourable Court be pleased to review its ruling dated December 20, 2022 with regard to the finding that the plaintiff's application dated September 5, 2022 does not disclose a prima facie case
 3. That the costs of this application be in the cause.
2. The application is based on grounds apparent on the face of the said application and the affidavit of the applicant sworn the same date. The application is opposed by the interested party *vide* grounds of opposition dated February 10, 2023 and filed in court on February 14, 2023. The 1st and 2nd Respondents *vide* a Replying affidavit sworn by Stephene Wangusi Fedha also opposed the application.



Applicant's Summary Of Facts

3. In his supporting affidavit, the applicant deposed that he only learnt on January 5, 2023, after more than two weeks, when the Auctioneer suddenly descended him, that without prior notice contrary to the court's earlier direction that it would deliver the ruling on Notice, that the Honourable Court had on December 20, 2022 delivered the ruling in the absence of his Counsel whereupon it dismissed his application dated September 5, 2022 on account of inter-alia, that the application did not disclose *prima facie* case.
4. The applicant stated that his advocate on record has advised him that it is trite law that what constitutes *prima facie* case is what the Court of Appeal defined in the case of *Mrao Ltd v First American Bank of Kenya and 2 Others* (2003) KLR 123. He further stated that the principles set out in the aforementioned case laid down his case against the two Defendants/Respondents herein. The applicant further stated that the same had to await the defendants' reply for Court's consideration and therefore the court made a fundamental mistake/or error apparent on the face of record in view of or by disregarding the 2nd Defendant's impeccable and precise Reply to the said averment at paragraph 10 of his Replying affidavit sworn on September 12, 2022.
5. The applicant deposed that in light of the foregoing, it is evident that the honourable court made a serious Error and/or mistake apparent on the face of record in arriving at the mistaken finding that the plaintiff entered into the sale Agreement with the wrong entity/person; for it overlooked the foregoing 2nd Defendant's averments in his sworn affidavit at paragraphs 10, 9, and 7; and further applicant's corroborated averments at paragraphs 2, 3,4 and uncorroborated averments at paragraph 11 of his replying affidavit.
6. He deposed that he entered into Sale agreement with the 1st and 2nd Defendants as is apparent from the record of the affidavits and further that the 2nd Defendant has sworn that he is indeed still willing to transfer the property to him on account of the said Sale Agreement. He stated that the Court's finding that the application did not disclose *prima facie* case, and which finding was premised on fundamental mistake and/or error apparent on record as demonstrated is so prejudicial to him and the entire suit that the court is urged to review the same in the interest of justice and the administration of the instant dispute.

1st Respondent's Summary Of Facts

7. The 1st Respondent stated that the plaintiff/applicant should not be allowed to appeal the Ruling delivered on December 20, 2022 through the back door. He deposed that he has been advised by his advocate on record which advice he believes to be true that the award of an injunction is discretionary and the court rightfully exercised its role by dismissing the plaintiff's/applicant's application dated September 5, 2022 as it was unmerited. He stated that having breached the contract dated November 8, 2017 and even forcing him to seek for alternative finance, the plaintiff/applicant soiled his hands in equity and lost his right to injunction.
8. The 1st respondent further stated that he has been advised by his advocate on record and he believes the same to be true that the applicant's application does not reveal any ground for review but for appeal, if any. He said that instead of making the payments and or setting the matter down for hearing, the applicant has resorted to forum shopping where he is now using the police in Webuye to intimidate him while knowing that he is in breach of the contract signed on November 8, 2017 and that he is the author o this misfortune.



9. When the said application filed under certificate was placed before the duty Judge Justice D.O Ohungo sitting at the ELC Kakamega on January 18, 2023, He directed the application be canvassed by way of written submissions.

Legal Analysis And Determination

10. I have considered the Notice of Motion application dated January 16, 2023 and the supporting affidavit of Charles Kibanani Ngome, the replying affidavit by Stephen Wangusi Fedha and the grounds apparent on the face of the said application as well as the Grounds of opposition by the Interested party herein. I have also considered the rival submissions by the parties.
11. The gist of this application is a ruling delivered by this Honourable court on December 20, 2022. The said Ruling arose from an application by the applicant herein which had sought for orders inter-alia a temporary injunction which is a discretionary order. In its ruling, this honourable court declined to grant the equitable orders on grounds that the applicant failed to establish prima facie case. That Ruling has provoked the present application for review under Section 80 CPA as read together with Order 45 Rule 1 CPR.
12. The issue for determination by this Honourable Court is whether the plaintiff/applicant raised sufficient grounds to warrant the court review its decision sought to be impeached. According to the plaintiff/applicant, there is an error apparent on the face of the Court record which should be reviewed by setting aside the dismissal of the Notice of Motion application dated September 5, 2022 for lacking in merit. The principles guiding this court in determining whether or not to review a decision on the ground that there is an error apparent on the face of the record were restated in the case of *Muyodi v Industrial and Commercial Development Corporation & Anor* (2006) 1 EA 243 where the Court of Appeal at page 246 held;

“ In *Nyamogo and Nyamogo v Kogo* (2001) EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

13. In the case of *National Bank of Kenya v Ndungu Njau* (1997) eKLR, the Court of Appeal also held as follows;

“ The error or omission must be Self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review”.



14. I agree entirely with the two decisions by the Court of Appeal which are binding on me. I also note that an injunction is an equitable remedy issued at the discretion of a court of equity and not as a matter of right as was held in the case of *Siteyia v Gitome & 3 Others* (2015) KLR where it was held;

“---Moreover, the award of a temporary injunction by Courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the applicant. The award or withholding of the injunction is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and third parties, according as they may be affected by the granting or withholding of the injunction. There must be greater convenience in granting than refusing the injunction and equally efficacious relief must not be obtainable by any other usual mode of proceeding.

In considering all these matters, the court must act on the usual principles of equity. Accordingly the Court will ensure that the applicant’s conduct is such as not to disentitle him to the Court’s assistance; the applicant must be fair and honest, and, in particular, there must be no acquiescence or delay. Thus, the Court will act on the well-known principles of equity, that he who seeks equity must do equity, and that he who comes into equity must come with clean hands. The applicant must come with equitable conditions generally imposed upon parties asking equitable relief.”

15. Having gone through the ruling of this Honourable court delivered on December 20, 2022, I find the Notice of Motion application dated January 16, 2023 does not show any error apparent on the face of record or any new matter or evidence which was not within his knowledge at the time of the hearing or any other sufficient grounds to warrant the orders sought.
16. The upshot of my finding is that the Notice of Motion application dated January 16, 2023 is devoid of merit and the same is hereby dismissed with costs.

Orders accordingly.

READ, SIGNED and DELIVERED in the open Court at Bungoma this 29/03/2023.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Applicant/Advocate –absent
2. Respondent/Advocate - absent
3. C/A Lusweti

