Othieno v Muchai & Partners & another (Environment & Land Case 353 of 2013) [2023] KEELC 17493 (KLR) (23 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17493 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 353 OF 2013

OA ANGOTE, J

MAY 23, 2023

BETWEEN

DR DELANO. A. ODONGO OTHIENO .... PLAINTIFF

AND

MUCHAI & PARTNERS .... 1ST DEFENDANT

LUCKY SUMMER ESTATE CO LTD .... 2ND DEFENDANT

RULING

Background

1. Before this Court for determination is the Plaintiff's/Applicant's Notice of Motion application dated 29th October, 2021 brought pursuant to the provisions of Section 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 45 Rule 1 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010* seeking the following reliefs;

    i. That the Honourable Court be pleased to review and/or set aside the orders/ directions issued on the 29th September, 2021.

    ii. That this Honourable Court be pleased to issue orders re-opening the Plaintiff/Applicants case closed on the 11th December, 2017 and allowing the Plaintiff to be examined in chief and to produce as exhibits the documents filed in his list of documents dated the 13th May, 2o21.

    iii. That this Honourable Court be pleased to issue orders re-opening the 1st Defendants case closed on the 18th April, 2018 if they so wish.

    iv. That the costs of this Application be provided for.

2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Erick O Orende, who deponed that vide an application dated 3rd June, 2019, and filed on 4th June, 2021, the Plaintiff sought leave to amend his Plaint, which application was allowed on 17th February, 2021, with the Defendants being granted leave to amend their Defences.

3. It was deposed that on 15th March, 2021, the matter was mentioned before the Deputy Registrar where it was confirmed that the Plaintiff had filed its Amended Plaint but sought for more time to file its bundle of documents together with witness statements and that the matter was set for another mention on 17th May, 2021 where parties were directed to comply ahead of the pre-trial conference scheduled for 26th July, 2021.

4. According to the Plaintiff, on 26th July, 2021, when the matter came up before the Deputy Registrar, the 1st Defendant indicated that he had filed his Amended Defence and Counterclaim and requested that the matter be certified ready for hearing and that when the matter came up before the Court, the court directed that the proceedings be typed and the matter proceed from where Eboso J had stopped.

5. It is the Plaintiff's case that the aforesaid directions were issued despite the fact that the Amended Plaint had been allowed and the 1st Defendant filed its Amended Defence respectively; that the aforesaid orders have the effect of rendering the exercise of amending the Plaint and the 1st Defendant's Defence a waste of time as it did not clarify how the Plaintiff's list of documents would be admitted by the Court and that having been allowed to amend its Plaint, it is only logical that the Plaintiff and the 1st Defendant's case be re-opened.

6. In response, the 1st Defendant, through its counsel, submitted that the application lacks merit; that an application for review must be grounded on the reasons set out in Order 45 Rule 1 of the *Civil Procedure Rules*; that whereas the Plaintiff filed an application for amendment which was allowed, he was aware that the matter had proceeded and was awaiting the 2nd Defendant's evidence and that applicant is seeking for the re-opening of the case 2 years after filing the application to amend the Plaint which constitutes unreasonable delay.

7. It was deposed that the Plaintiff has not established any of the parameters for the grant of the review orders sought, being the discovery of new matters, error on the face of the record and sufficient cause; that it is trite that Courts should not re-open matters when the re-opening was borne out of the Plaintiff's actions and that the new evidence being a certificate of search and a building plan are documents that the Plaintiff ought to have produced.

8. According to the Defendant, the new causes of action revolve around fraud and breach which were not initially pleaded and the Plaintiff is attempting to seal the holes in its case and that the Plaintiff having closed his case and listened to the 1st Defendant's case now seeks a second bite at the cherry. The parties filed submissions which I have considered.

Analysis and Determination

9. Having considered the Motion, responses and submissions, the issues that arise for determination are:

    i. Whether the prayer for Review is merited?

    ii. Whether the Plaintiff has met the threshold for the grant of the prayer of re-opening the case?

10. The law governing the framework of review is set out in Section 80 of the *Civil Procedure Act*, and Order 45, Rule 1(1) of the *Civil Procedure Rules, 2010*. Section 80 of the Act provides as follows:

> " 80. Any person who considers himself aggrieved-
>
> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgment to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

11. Order 45 Rule 1 of the *Civil Procedure Rules, 2010* provides as follows:

> " Rule 1 (1) Any person considering himself aggrieved-
>
> (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay."

12. This position was restated by the Court of Appeal in *Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR where the court observed that;

> " In the High court, both the *Civil Procedure Act* in section 80 and the *Civil Procedure Rules* in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review."

13. A reading of the above provisions makes it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders of review, Order 45 of the *Civil Procedure Rules* sets out the jurisdiction and scope of review by limiting review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

14. The power to review an order or decree is not absolute and is hedged in by the restrictions indicated in Order 45 of the *Civil Procedure Rules*. The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made.

15. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can

be exercised only for correction of a patent error of law or fact which stares one in the face without any elaborate argument being needed for stabling it.

16. Briefly, the background to this matter is that sometime in June 2019, the Plaintiff filed an application for leave to amend his Plaint, which application was allowed. The Defendants were granted corresponding leave to file their amended Defences, which the 1st Defendant duly filed. The matter proceeded for mention before the Deputy Registrar where the Plaintiff and the 1st Defendant confirmed having filed their amended pleadings.

17. When the matter came up for pre-trial directions on 26th July, 2021, the same was certified ready for hearing and the Deputy Registrar directed that it would be mentioned before this Court for directions on the hearing. On 29th September, 2021, this Court made the following directions:

    i. Proceedings in the matter be typed;

    ii. The matter to proceed from where Justice Eboso had stopped; and

    iii. Hearing of the 2nd Defendants case on 22nd March, 2022.

18. The directions aforesaid form the subject of the review application herein. The first consideration in an application for review is whether the same has been brought without unreasonable delay. As expressed by the Court in [*Francis Origo & another v Jacob Kumali Mungala*] [2005] eKLR:

> "...most importantly, the applicant must make the application for review without unreasonable delay."

19. It is trite that what constitutes inordinate delay is a matter of fact dependent on the circumstances of the case. In the present case, the directions sought to be reviewed were issued on 29th September, 2021. Whereas the present application is dated 29th October, 2021, it was admittedly filed on 17th February, 2022. This constitutes a 5 months period between the issuance of the directions and the filing of the application. So why the delay?

20. The Plaintiff has stated that the delay was occasioned by the difficulty in extracting the orders of 29th September, 2021 from the Registry, which forced him to file the application without the orders as they were running out of time ahead of the hearing date that had been slated for 22nd March 2022.

21. The Plaintiff has adduced into evidence the letter dated 7th October, 2021 requesting for certified copies of the Ruling by the Deputy Registrar delivered on 17th February, 2021 and the impugned directions as well as an extract of the fees receipt for the aforesaid letter dated 8th October, 2021. The Plaintiff has therefore satisfactorily explained the delay in filing the current application.

22. Having regard to the instant application, it is apparent that the same is premised on the grounds of error on the face of the record and any other sufficient reason. What constitutes an error on the face of the record was considered by the Court of Appeal in [*Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs)*] [2019] eKLR where the Court referred to its various decisions as follows;

> "This Court in *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243 described an error on the face of the record as follows:
>
> > "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."

23. According to the Plaintiff, the error herein is the fact that despite having admitted the Amended Pleadings on record, the Court directed that the matter proceeds for hearing of the 2nd Defendant's case whereas logically, the matter ought to have been re-opened to allow the Plaintiff and the 1st Defendant to adduce further evidence.

24. In response, the 1st Defendant states that whereas the Plaintiff indeed sought to amend their Plaint and file additional documents, which was allowed, they did not seek leave to re-open the case and as such, their application is unmerited.

25. Looking at the circumstances of the case, the Plaintiff was duly granted leave to file their Amended Plaint by the Deputy Registrar on 17th February, 2021 and the matter proceeded for pre-trial directions, which were concluded on 26th July, 2021, after which the matter was referred to this Court for directions on the hearing.

26. As at the time the aforesaid leave was granted, the Plaintiff and the 1st Defendant had long testified and closed their cases. When the matter came before the Court for directions on the hearing, the Court was unaware of this development and to that end directed that the matter proceeds from where it had last concluded. Indeed, none of the parties informed the court that the pleadings having been amended, the matter ought to commence de novo.

27. The admission of the amended pleadings can only have meant that the parties would be granted an opportunity to present their respective cases afresh, and produce the additional documents. In view of the foregoing, the Court is persuaded that the impugned directions constituted a mistake and an error on the face of the record.

28. The Plaintiff also relies on the ground of "any other sufficient reasons" for the review of the orders of this court. The scope of this ground has been a subject of different interpretations by the courts. There are two schools of thought, the first being that the "sufficient reason" alluded to must be analogous to the grounds pertaining to discovery of new evidence or error on the face of the record and second being that the "sufficient reason" need not be analogous to the previous grounds.

29. The position that "the sufficient reason" ought to be analogous to the grounds of discovery of new and important evidence and error apparent on the face of the record was embraced by the court in *Nasibwa Wakenya Moses v University of Nairobi & another* [2019] eKLR, where Mativo J observed as follows:

> " An application for review may be allowed on any other "sufficient reason." The phrase 'sufficient reason' within the meaning of the above rule means analogous or *ejusdem generis* to the other reasons stipulated in Order 45 Rule 1. This position was illuminated in *Sadar*

Mohamed v Charan Singh and another [13] where the court held that: -"Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."

Mulla in the *Code of Civil Procedure* [14] (writing on Order 47 Rule 1 of the *Civil Procedure Code* of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in the rules, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgment. Perhaps it is worth citing *Evan Bwire v Andrew Nginda* [15] where the court held that 'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh."

30. However, the Court of Appeal in *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR was of a contrary view and adopted the position that "sufficient reasons" need not be analogous to the other two grounds:

> " As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In *Sarder Mohamed v Charan Singh Nand Singh and another* (1959) EA 793, the High Court correctly held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. In *Shanzu Investments Limited v Commissioner for Lands* (Civil Appeal No 100 of 1993) this Court with respect, correctly invoked and applied its earlier decision in *Wangechi Kimata & another v Charan Singh* (C.A. No 80 of 1985) (unreported) wherein this Court held that:
>
> > "any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."

31. The court adopts the position that "any sufficient reason" must not be analogous to the grounds of discovery of new evidence and/or error apparent on the face of the record as posited by the Court of Appeal in the *Pancras T. Swai case* (*supra*).

32. As to whether the Plaintiff has satisfied this limb, the court finds in the affirmative. The Plaintiff having successfully sought to have its pleadings amended, it would be absurd, a travesty of justice and indeed run contrary to the principles of natural justice and the right to fair hearing to hold that having not specifically sought the re-opening of the case, the amendment was of no value.

33. What that means is that the orders allowing the amendment were issued in vain. That could never have been the intention of the court when it allowed the parties to amend their pleadings, which they did.

34. For those reasons, the Court finds that the Plaintiff has established sufficient reasons warranting the prayers sought. The Notice of Motion dated 29th October, 2021 is allowed in the following terms:

    a. The directions issued on 29th September, 2021 be and are hereby set aside.

b. The Court hereby directs the re-opening of the Plaintiff's and Defendants' cases.

c. The matter to begin *de novo*.

d. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF MAY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Muhia for Defendant

Mr. Omogi for Plaintiff/Applicant

Mr. Ngatia for Ngenyi for 2nd Defendant

Court Assistant - Tracy