



IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL, CIVIL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 25 OF 2015

ABDULKARIM SALEH MUHSIN.....PLAINTIFF/RESPONDENT

VERSUS

NEDIM MOHAMED IBRAHIM.....1ST DEFENDANT/1ST APPLICANT

SARA ABDELLA ABDUSEMED.....2ND DEFENDANT/2ND APPLICANT

ZUM ZUM INVESTMENT LIMITED.....3RD DEFENDANT/3RD APPLICANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

RULING

1. Through an application by way of Notice of Motion filed on 10th January, 2020 brought under the provisions of Articles 10 and 48 of the Constitution, Sections 1A, 1B, 3A and 80 of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 45 Rule 1(1) and Order 51 of the Civil Procedure Rules and all other enabling provisions of the law, the 1st, 2nd and 3rd defendants seek the following orders –

(i) Spent;

(ii) Spent;

(iii) That this Honourable Court be and is hereby pleased to vacate its directions and/or orders issued on the 20th December, 2019 striking out the applicant's defence and consequently entering Judgment for the plaintiff/respondent as prayed in the plaint;

(iv) That consequently, this Honourable court be and is hereby pleased to grant leave to the applicants to file their response to the respondent's application dated the 21st day of November, 2019 and set it down for hearing;

(v) That this Honourable court be pleased to give further directions or orders as it may deem fit in the circumstances; and

(vi) That costs be in the cause.

2. The application is supported by the affidavit of Nedim Mohamed Ibrahim, the 1st defendant, sworn on his own behalf and on behalf of the 2nd and 3rd defendants. On 13th February, 2020 the plaintiff filed a replying affidavit sworn on the same date.

3. In order to gain better insight as to why the present application has been brought before this court, it is prudent to outline the prayers which were sought in the application dated 21st November, 2019 and the reasons why it was allowed in a ruling signed and dated by Judge P.J. Otieno on 19th December, 2019 and delivered by Judge D. Chepkwony on 20th December, 2019. The said application had been filed by the plaintiff. It sought the following orders-

(i) That the Honourable Court be pleased to strike out the 1st, 2nd and 3rd defendants/statement of defence dated 16th February, 2015 and filed herein on the same date;

(ii) That this Honourable Court be pleased to enter Judgment as against the 1st, 2nd and 3rd defendants as prayed for in the plaint dated 16th December, 2014; and

(iii) That the costs of this application and the entire suit be borne by the defendants.

4. The proceedings indicate that when the case came up for mention on 25th November, 2019, Mr Tebino for the plaintiff attended Court but there was no appearance for the defendants. Mr. Tebino informed Judge P.J. Otieno that they had filed an application on 22nd November, 2019 seeking to strike out the defence by the 1st, 2nd and 3rd defendants. He sought a date for the (hearing) of the application. Judge P.J. Otieno directed that the defendants should be served with the said Notice of Motion for hearing on 16th December, 2019.

5. On the said date, Mr. Tebino appeared for the plaintiff but there was no appearance for the 1st, 2nd and 3rd defendants. He informed Judge P.J. Otieno that they had served the said defendants with the application dated 21st November, 2019 and that they had filed an affidavit of service. He prayed to proceed *ex parte* since the application was unopposed. The Judge allowed him to do so and Mr. Tebino proceeded to make oral submissions.

6. Judge P.J. Otieno made reference to submissions made by Mr. Tebino and this court's ruling delivered on 18th October, 2019 and allowed the application dated 21st November, 2019. He granted the following orders-

“(a) A permanent injunction directed to the 1st, 2nd 3rd & 4th defendants and restraining them from selling disposing, leasing or in any other way alienating any of the sub-division plots aggregating 570 plots and arising from title No. CR. 17051, CR No. 9750 (LAND REF NO. SUBDIVISION NO. 1067/1/MN, PLOT NO. MSA/BLOCK XXII/205, PLOT NO. MN/1/6431 AND PLOT NO. MN/1/6432.

a) An order that all the revenue emanating from the defendant be deposited in the company amount (sic) domiciled at Middle East Bank, Mombasa Branch, A/C No. 225133018 to be operated jointly between the plaintiff and the 2nd defendant.

b) The sale of the 11 plots being plot No. 7928, 7929, 7422, 7869, 8005, 8006, 8009, 7930, 7926, 7370 and 7378 without the participation of the plaintiff is declared illegal, as against the plaintiff and the company, and that the 1st and 2nd defendants to pay to the plaintiff on behalf and to the account of the 3rd defendants all the proceeds therefrom. Such value be agreed within 45 days from today and in default be assessed by a registered valuer upon application by either party to the suit. For that reason, I grant to the parties the liberty to apply.

c) I award the costs of the suit to the plaintiff to be paid by the 1st, 2nd and 4th defendants.”

7. The above orders are the ones which gave rise to the application dated 9th January, 2020. The Counsel on record were given time to file and serve their written submissions. Highlighting of submissions was scheduled for 16th December, 2020. The Counsel for the 1st, 2nd and 3rd defendants did not appear in the virtual court. Counsel for the plaintiff represented his client and undertook to inform the Counsel for the 1st, 2nd and 3rd defendants to email their written submissions (to court) as the same were not in the court file. The application dated 9th January, 2020 was mentioned on 17th December, 2020. The plaintiff's Counsel attended the virtual court and stated that he did not wish to highlight their written submissions. There was no attendance by Counsel for the 1st, 2nd and 3rd defendants.

8. In written submissions filed on 10th December, 2021, Mr. Omari, learned Counsel for the 1st, 2nd and 3rd defendants stated that it was not by design that he failed to attend court on 25th November, 2019. He indicated that it was due to medical reasons as succinctly brought out by the medical document from Seaside Medical facility dated 16th December, 2019. He submitted that the overarching issue for the court's determination is whether a litigant should be driven away from the seat of justice for the sole reason that his Advocate on record did not attend court at the appointed time and date.

9. The said Counsel further submitted that this court is empowered under the provisions of Article 159(2)(d) of the Constitution to do justice without undue regard to technicalities. He stated that Article 50(1) of the Constitution requires that any dispute that can be resolved by the application of the law be decided in a fair and public hearing before a court. He stated that fairness in this matter would only be achieved if this court would set aside its orders delivered on 20th November, 2019 and by hearing and determining the plaintiff's application dated 21st November, 2019.

10. It was submitted for the 1st, 2nd and 3rd defendants that the orders issued against them have dire consequences on their case and it was in the interest of justice for them to be allowed to ventilate on both the plaint dated 16th December, 2014 and the plaintiff's application dated 21st November, 2019.

11. Mr. Omari relied on the case of **James Kanyita Nderitu and Another v Marios Philotas Ghikas and Another** [2017] eKLR, in urging this court to set aside the Judgment which was entered against the 1st, 2nd and 3rd defendants. He also cited the case of **Wachira Karani v Bildad Wachira** [2016] eKLR, where the court stated that the fundamental duty of the court is to do justice between the parties.

12. The case of **Martha Wangari Karua v IEBC**, Nyeri Civil Appeal No. 1 of 2017, was also relied on, where the Court of Appeal held that the rules of justice require the court not to necessarily drive any litigant away from the seat of justice without a hearing, however weak his or her case may be.

13. In urging this court to pardon his failure to attend court, Mr. Omari relied on the case of **Bank of Africa Ltd. v Put Sarajevo General Engineers Co. Ltd and 2 Others** [2018] eKLR, where the court cited with approval the case of **Philip Chemwolo and another v Augustine Kabendi** [1982-88] KLR, in which the court said that blunders will continue to be made and that a party should not suffer the

penalty of not having his case heard on merit because a mistake had been made.

14. He submitted that the statement of defence by the 1st, 2nd and 3rd defendants raises triable issues, thus the need to have the plaintiff's application of 21st November, 2019 reinstated for hearing and for the main suit to be heard. In so submitting, he relied on the case of **Desbro (Kenya) Ltd v Polypipies Limited and another** [2018] eKLR.

15. He further submitted that it was improper for the plaintiff to ask for Judgment without first setting the matter down for formal proof. Counsel for the 1st, 2nd and 3rd defendants cited the case of **Banque Indosuez v D.J Lowe and Company Limited** [2006] eKLR, where the Court of Appeal held that the Judge in that case could have entered Judgment against the appellant for the claim in the case of a liquidated demand, a final Judgment, and in the other claims, an interlocutory Judgment subject to formal proof. The Court of Appeal thus concluded that the Judgment which had been obtained by the respondent in that case was irregular.

16. Mr. Omari prayed for the setting aside of the orders and directions of 20th December, 2019 and for the 1st, 2nd and 3rd defendants to be allowed to put in a response to the plaintiff's application dated 21st November, 2020 and to have the suit in this case determined on merit.

17. On 15th December, 2020 the plaintiff's Counsel filed written submissions. Mr. Muchoki, Learned Counsel for the plaintiff pointed out that in paragraph 31 of the affidavit sworn by the 1st defendant, he referred to a draft ruling but the said ruling was not availed to them. That failure to attach the said draft ruling prompted the plaintiff's Counsel to write to the 1st, 2nd and 3rd defendants' Advocates on 3rd February, 2020 to request for the said draft ruling or an order emanating from the said draft ruling. He expressed surprise that they obtained a copy of the so called draft ruling and that no explanation had been offered or given by them. This court was urged to dismiss the present application on account of failure by the 1st, 2nd and 3rd defendants to exhibit a copy of the ruling and/or order that forms the subject of the present application, as it rendered the application fatally defective. It was contended that even if the 1st, 2nd and 3rd defendants had exhibited the draft ruling, they could not have based their application on a draft ruling. Counsel for the plaintiff relied on the case of **Titus Mulandi Kitonga v BO (a minor suing through his mother and next friend SNO)** [2016] eKLR, where the Court stated that it is the duty of the party who wishes to appeal against, or apply for a review of a decree or order to move the court to draw up and issue a formal decree or order. He also stated that in the said case, it was held that failure by the respondent to extract a formal decree was fatal to the application and the same ought to have failed on that account.

18. Mr. Muchoki submitted that the substratum of the defence by the 1st, 2nd and 3rd defendants was settled through the ruling of 18th December, 2019 where this court found that the respondent was not only a director of the 3rd defendant but also a majority shareholder of the said company, and that the plaintiff ought to have been part of all decisions made by the 1st and 2nd defendants regarding the 3rd defendant. It was pointed out that the said decision stands and it had not been contested.

19. In making reference to the decision of 20th December, 2019, Counsel for the plaintiff took cognizance of the fact that there was nothing left of the defence by the 1st, 2nd and 3rd defendants to warrant a further interrogation or the hearing in the nature of a formal proof.

20. It was submitted that the said court having had regard to the issues obtaining in the case as disclosed by the pleadings on record, was under no obligation to direct that this case proceeds to formal proof and that cannot be an error apparent on the face of the record as contended by the 1st, 2nd and 3rd defendants.

21. Counsel for the plaintiff stated that the said court took the firm and correct view that having struck out the 1st, 2nd and 3rd defendants' statement of defence, the plaintiff's claim embodied in the plaint remained uncontroverted and there was no issue remaining for determination. He stated that the 1st, 2nd and 3rd defendants had not even identified any issue that should have proceeded for formal proof. He cited the case of **Esther Wambua v Mombasa Port Sacco Ltd and another** [2017] eKLR, where the court struck out a defence and stated that once it had done so, it followed that Judgment would be entered for vacant possession and it did not require a prayer for summary Judgment to make such an order, as that was the natural consequence of striking out and entry of Judgment.

22. Mr. Muchoki pointed out that Judge P.J. Otieno deemed it a matter of legal necessity to bring an end to the litigation herein, since in his reasoned view, sustaining the case would have served no better purpose than being a disservice to the plaintiff. Counsel stated that under Article 159(2)(b) of the Constitution, Courts are required to exercise judicial authority and their primary obligation is to do justice without unreasonable delay, thus the contention by the applicants that there was an error apparent on the face of the record cannot suffice. He cited the case of **Muyondi v Industrial and Commercial Development Corporation and another** [2006] EA 243, where the Court of Appeal described what constitutes of an error apparent on the face of the record. He also relied on the case of **National Bank of Kenya v Ndungu Njau** as cited in the case of **Grace Akinyi v Gladys Kemunto Obiri and Another** [2016] Eklr, on what constitutes an error apparent on the face if the record.

23. With regard to the issue of failure on the part of the Counsel for the 1st, 2nd and 3rd defendants to attend court on grounds that he fell ill on the day before the hearing of the application dated 21st November, 2019, Mr. Muchoki relied on the provisions of Order 51 rule 14(4) of the Civil Procedure Rules which is to the effect that in the absence of a response to an application, the same may be heard in the absence of the opposing party. He submitted that the 1st, 2nd and 3rd defendants had not placed any material before this court to demonstrate any improper exercise of discretion on the part of Judge P.J. Otieno in treating the application dated 21st November, 2019 as unopposed and proceeding to hear it. Counsel for the plaintiff was of the view that the Counsel for the 1st, 2nd and 3rd defendants should have sought indulgence from the plaintiff's Counsel or he could have asked another Advocate to hold his brief.

24. Mr. Muchoki relied on the decision in **Gideon Setelu Konchellah v Julius Iekakeny Ole Sunkuli and 2 Others** [2018] eKLR and **Kipyator Nicholas Kiprono Biwott v George Mbuggus & Another** [2000] eKLR, where courts defined the significance of a replying affidavit in court proceedings and where courts found that failure to file affidavits in response was fatal to their cases. It was thus submitted

that failure by the 1st, 2nd and 3rd defendants to file a response to the application dated 21st November, 2019 was not a mere technicality to be overlooked by the court but was a glaring failure to comply with the express provisions of the law as enshrined in Order 51 rule 14(1) of the Civil Procedure Rules. It was submitted that as a consequence of that deliberate disregard of the law and the fact that the substratum of their defence had been extinguished on account of the ruling dated 18th October, 2019, orders were made which did not favour them.

25. In concluding his submissions, the plaintiff's Counsel indicated that this suit was filed because of the fact that the 1st defendant and his wife, the 2nd defendant, were illegally disposing of the assets of the company (3rd defendant), without any involvement of the plaintiff, as the director and majority shareholder of the 3rd defendant. It was contended that the illegalities complained of by the plaintiff had continued unabated during the pendency of this suit with the illegal disposal of additional properties being sold despite caveats having been registered on the titles, a fact which the 1st, 2nd and 3rd defendants had not controverted.

26. Mr. Muchoki stated that the conduct to the 1st, 2nd and 3rd defendants show that they were determined to strip the plaintiff of his entitlement in the company and were underserving of any equitable interventions from this court. He pointed out that on 19th December, 2019 the court directed the parties to agree on a value within 45 days in relation to the properties illegally sold by the 1st, 2nd and 3rd defendants, but that had not happened.

27. The plaintiff's Counsel urged this court to alleviate the injustice suffered by the plaintiff in the hands of the 1st, 2nd and 3rd defendants who wanted to continue scheming on how to carry on with their illegal activities to the detriment of the plaintiff. He prayed for the present application to be dismissed with costs to the plaintiff and for this court to direct the 1st, 2nd and 3rd defendants to comply with the orders of the ruling delivered on 20th December, 2019.

ANALYSIS AND DETERMINATION

28. The issue for determination is if the orders and directions made on 20th December, 2019 should be vacated and the application dated 21st November, 2019 be reinstated for hearing.

29. The explanation given by Nedim Mohamed Ibrahim, the 1st defendant, in his affidavit filed on 10th January, 2020 was that his Counsel was taken ill on 15th and 16th of December, 2019 at Seaside Medical Facility and he was ordered to take a bed rest. That on 19th December, 2019 the said Counsel filed an urgent application seeking to arrest the delivery of the ruling in issue but it was marked as overtaken by events after Lady Judge D. Chepkwony delivered the ruling on 20th December, 2019.

30. This Court has looked at the treatment notes given to Mr. Omari, Counsel for the 1st, 2nd and 3rd defendants. They are dated 16th December, 2019. From the letter head, Seaside Medical Facility is located between Ganjoni Primary School and Mombasa Sports Club along Makarios Road in Mombasa. The treatment notes indicate that the said Counsel was attended to at the said facility on 15th December, 2019 at 11:00p.m. The said notes also indicate that after a diagnosis was made, he was put under observation and intravenous fluids of normal saline were administered to him. He was then advised to continue with medication and have a bed rest for 2 days.

31. In the affidavit in support of the application dated 9th January, 2020 not even a feeble attempt was made to explain if the said Counsel called any Advocate and requested him to hold his brief or if he sent a text message to any Advocate requesting him/her to hold his brief on the morning of 16th December, 2020. Since Mr. Omari was in Mombasa, he could have asked an Advocate in the said town to hold his brief. As was stated by Mr. Muchoki, the Counsel for the 1st, 2nd and 3rd defendants could as well have sought the indulgence of the plaintiff's Counsel to have the application slated for hearing on 16th December, 2019 rescheduled to another date. The treatment notes exhibited in their affidavit and marked as NM1 do not indicate that the said Counsel was either admitted to the Intensive Care Unit (ICU) or the High Dependency Unit (HDU) for this court to deduce that he was so badly off that he was incapable of looking for an Advocate to hold his brief on the morning of 16th December, 2019 or to communicate to the plaintiff's Counsel about his illness. Even supposing that this court was to excuse him for failing to look for an Advocate to hold his brief, another problem arises.

32. The 1st, 2nd and 3rd defendants were totally silent about their failure to file a replying affidavit to the application dated 21st November, 2019. In the said circumstances, this court can only conclude that they had nothing to offer to controvert the depositions in the affidavit made by the plaintiff, who had moved the court in the said application.

33. When a party fails to oppose an application and then moves to Court seeking an order to set aside a ruling delivered by a Court of competent jurisdiction, such a party would be expected to offer a plausible explanation on why he/she/it defaulted in filing a replying affidavit to oppose the application in issue.

34. What is apparent from the proceedings that were conducted before Judge P.J. Otieno is that the Counsel for 1st, 2nd and 3rd defendants failed to attend court on two occasions without giving an explanation as to his absence. The last non-attendance led to the hearing of the application dated 21st November, 2019 in his absence.

35. In order for this court to vacate the orders of Judge P.J. Otieno, it must be shown that there was an error apparent on the face of the ruling of 20th December, 2019 whereby the court struck out the 1st, 2nd and 3rd defendants' statement of defence and allowed the plaintiff's prayers in the application, without making an order for formal proof to be done.

36. Section 80 of the Civil Procedure Act provides as follows on the issue of review-

“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.”

37. Order 45 Rule 1(1) of the Civil Procedure Rules provides as follows on the issue of review-

“(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 appealed or the order made, or on account of some mistake or error apparent on the face of the record, or any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of Judgment to the court which passed the decree or order without unreasonable delay.” (emphasis added).

38. This court’s understanding of the provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1(1) of the Civil Procedure Rules is that a review is limited to –

(a) discovery of a new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order made or;

(b) on account of some mistake or error apparent on the face of the record; or

(c) for any other sufficient reason; and

(d) an application for review on any of the above grounds must be made without unreasonable delay.

39. Having read the ruling that forms the subject of this application. I cannot say that the alleged failure by Judge P.J. Otieno to give directions in the nature of formal proof was an error apparent on the face of the record. As has been held in numerous decisions, an error or omission that can be subjected to review must be self-evident and should not require deep interrogation.

40. The Court of Appeal in the case of **Muyodi v Industrial and Commercial Development Corporation & Another** [2006] 1 EA 243 stated as follows on what constitutes an error apparent on the face of the record-

“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.” (emphasis added).

41. In the case of **National Bank of Kenya Limited v Ndungu Njau** [1997] eKLR, the Court of Appeal stated thus on the issue of review of a Court decision-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omissions on the part of the court. 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 the law. Misconstruing a statute or other provisions of the law cannot be a ground for review.” (emphasis added).

42. The ruling delivered on 20th December, 2019 by Judge P.J. Otieno states as follows-

“[7]. On the basis that the defence filed remains upset and there is nothing to controvert that fact, it not being said that the ruling has been challenged, I do find that the statement of defence dated 16th February, 2015 now discloses no defence at all for which reason struck it out (sic).

[8]. Having so struck out the defence, the plaint remains uncontroverted and undefended. Being so undefended no issue remains to be determined by the court hence I do enter Judgment for the plaintiff as prayed in the plaint”.

43. In this court’s view, there was no ambiguity, error or omission in the ruling of 20th December, 2019. I find nothing to review in the said ruling. The said parties had the right to appeal against the said decision but they opted not to exercise their right of appeal but moved this Court by way of review but they have fallen short of meeting the statutory requirements of Section 80 of the Civil Procedure Act and Order 45 rule 1(1) of the Civil Procedure Rules.

44. In the said circumstances, I find the application dated 9th January, 2020 to be without merit. It is dismissed with costs to the plaintiff.

DATED, SIGNED and DELIVERED at MOMBASA on this 31st day of May, 2021. Ruling delivered through Microsoft Teams Online Platform due to the outbreak of the Covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of-

Ms Wangui Mungai holding brief for Mr. Muchoki for the plaintiff

No appearance for the defendants

Ms Bancy Karimi - Court Assistant.