



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 598 OF 2014

MANJU NAUL.....PLAINTIFF/APPLICANT

VERSUS

GEORGE MACHEHO MUNGAI....1ST DEFENDANT/RESPONDENT

STEPHEN MUNGAI S. KAMAU....2ND DEFENDANT/RESPONDENT

OPINDER SINGH NAUL.....3RD DEFENDANT/RESPONDENT

RULING

1. The Ruling herein relates to a Notice of Motion Application dated 29th January, 2016, and brought under the provisions of Order 45 Rule 1 and Order 2 Rule 15(1) of the Civil Procedure Rules, 2010 and Section IA, IB, 3A of the Civil Procedure Act (Cap 21) of the Laws of Kenya. It is supported by the grounds thereon and an Affidavit of Manju Naul sworn on 29th January 2016 together with the annexures thereto.

2. The Applicant is seeking for orders that:-

i) That the Ruling/Order given by the Honourable Mr. Justice E.K. Ogola on 15th May 2015 be reviewed.

ii) That upon review, the 1st and 2nd Defendants' Counter-claim filed herein on 14th January, 2015 be struck out with costs to the Plaintiff for reasons that this Honourable Court has no jurisdiction to hear and determine the Counter –Claim.

iii) That in the alternative this Honourable Court do review the order condemning the Plaintiff to pay the costs of the suit and substitute thereof an order that each party shall bear its own costs in both the Plaintiff's suit and the 1st and 2nd Defendant's Counter-Claim filed herein.

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

3. The background facts as understood from the averments of the Parties and pleadings are that, the Plaintiff filed this suit against the Defendant on 18th December 2014, seeking for *inter alia*, an order of cancellation of the Title issued in favour of the 2nd Defendant, in relation to the suit property herein. The Plaintiff argues that the suit property was sold and transferred fraudulently to the 1st and 2nd Defendants by the 3rd Defendant.

4. Upon service of the summons to enter appearance, the 1st and 2nd Defendants, filed a Notice of Preliminary Objection on 14th January, 2015, objecting to the jurisdiction of the Commercial Court Division of the High Court to hear and determine the suit. The 1st and 2nd Defendants also simultaneously filed a Statement of Defence and Counter-Claim on the same date. The Defendants' Counter-Claim sought for orders, *inter alia*, that a declaration be issued that, the 2nd Defendant is the lawful owner of the suit property and an order of eviction from the suit property be issued against the Plaintiff.

5. On 12th February 2015, the Plaintiff filed a Reply to Defence and Defense to Counter-Claim and the 3rd Defendant filed a Statement of Admission and Defence to the Counter-Claim of the 1st and 2nd Defendants on 18th February 2015.

6. Subsequently, all the respective Parties filed their written submissions in respect to the Preliminary objection filed by the 1st and 2nd Defendants and as directed by the Court. The Ruling was delivered on 15th May, 2015.

7. The Ruling allowed the Preliminary objection and the Plaintiff's suit was struck out for want of Jurisdiction. The Court further ordered that the costs of the suit and the application be borne by the Plaintiff. However, according to the Applicant, the Court did not make any orders regarding the 1st and 2nd Defendants' Counter-Claim and therefore the same continues to subsist on record to-date.

8. Apparently upon the striking out of the suit, the Plaintiff immediately filed a fresh suit under certificate of urgency namely Environment and Land Court, HCCC No. 416 of 2015, to avoid being evicted from the suit property. The 1st and 2nd Defendants have filed another Counter-Claim, in that fresh suit.

9. The Applicant argues that the Counter-Claim herein ought to suffer the same fate with the Plaintiff's suit, since the Honourable Court has no jurisdiction to determine it. Therefore it constitutes an abuse of the process of the Court, in that the Defendants' Counter-Claim in the Environment and Land Court, is seeking for the same reliefs sought, in the Counter-Claim filed in this suit.

10. It is therefore the Plaintiff's submissions and argument that, the 1st and 2nd Defendants have two similar Counter-Claims subsisting in this suit and in Environment and Land Court HCCC No. 416 of 2015. In that regard, there is an error apparent on the face of the record herein, therefore the order of review sought for in respect of the Counter-Claim filed in this suit should be granted.

11. The Applicant argued that the 1st and 2nd Defendants have made a demand from the Plaintiff arising from the order striking out the Plaintiff's suit of substantial costs of Kshs 4,000,000. It is therefore only just, fair and reasonable that each party should bear its own costs in this suit and the Court review and grant the orders sought in this Application.

12. However, the Application was opposed on the ground that, since the making of the order sought to be reviewed herein, the 2nd Defendant is demised and as there is no substitution thereof, the cause of action as against him has abated.

13. The Respondent further argued that, the Application for review lacks merit, as it was lodged well out of time, the Ruling sought to be reviewed having been delivered on 15th May, 2015, and the review application having been made on 29th January 2016 and filed on 3rd February 2016 and no explanation has been given for the delay by the Plaintiff. That in the intervening period, the ground has materially shifted in that, as the Plaintiff has filed the exact same case as this suit, vide Environment and Land Court, HCC Case No. 416 of 2015, seeking the very same relief, she has sought for herein.

14. In that case, to review the order of the Court made on 15th May 2015, and set aside the said order would, will have the net effect of leaving the Plaintiff with two exact suits seeking exactly the same relief against the very same Parties she has sued, and running concurrently in two separate Divisions.

15. The Parties agreed to dispose of the Application by filing submissions which I have considered and find that the issue that arises for determination is whether the Applicant has met the threshold of grant of the orders sought for herein.

16. The Applicant submitted that under Order 45 Rule 1 of the Civil Procedure Rules, 2010, a party is at liberty to file an application for review on account of some error or mistake on the face of the record or for any other sufficient reason. That in this matter, the Plaintiff did not appeal against the decision of the Court but has instead filed this Application for review pursuant to the powers granted to the Court under the above Order.

17. The Applicant further submitted that under Order 7 Rule 3 of the Civil Procedure Rules, a Counter-Claim is deemed to be a separate suit which can stand on its own and the Court is supposed to pronounce a Judgment on both the original suit and the Counter-Claim. That indeed, a Defendant who has filed a Counter-Claim is at liberty to prosecute his Counter-Claim, even if the Plaintiff withdraws the Plaintiff's suit and/or if the Plaintiff is unwilling or slow in prosecuting his suit. A Counter-Claim therefore has its own life in law and it constitutes both as a shield and a sword and is subject to the Rules applicable to filing a Defense under Order 7 Rule (3) of the Civil Procedure Rules.

18. The Applicant argued that under Order 2 Rule 15(1) (d) of the Civil Procedure Rules, it is expressly stated that the Honourable Court has the power to strike out a pleading at any stage. That the Plaintiff raised this issue at paragraph 14 of its written submissions filed on 30th January, 2015, in opposition to the Preliminary objection, where they categorically submitted that, the Commercial Division of the High Court, has no jurisdiction to hear the Counter-Claim, filed by the 1st and 2nd Defendants, Therefore the Counter-Claim should also have been struck out with costs, if indeed the Judge was persuaded to agree with the submission that, it had no jurisdiction to hear the Plaintiff's suit and the Counter-Claim.

19. The Applicant reproduced the content of the said paragraph 14 of the submissions on the Preliminary object which states as follows;

“Furthermore, the 1st and 2nd Defendants have filed a comprehensive Replying Affidavit, a statement of Defence and Counter-Claim to the Plaintiff's suit. If indeed the 1st and 2nd Defendants do not acknowledge the jurisdiction of this Court, they should not have filed the Counter-Claim. By doing so, they have acknowledged and/or acquiesced to the jurisdiction of the Court. The big question is what will be the fate of the Counter-Claim if the Plaintiff's suit is struck out since the counsel for the Defendants has not made any submissions in this regard. The Counter-Claim cannot be left hanging in the air!!”

18. The Applicant reiterated that the failure of the Court to make any finding in respect to the above submissions, is an omission and/or error apparent on record, which can be rectified under the slip rule and the Court has jurisdiction and power to rectify the omission under the provisions of Section 80 of the Civil Procedure Act (Cap 21) and Order 45 Rule 1 of the Civil Procedure Rules.

19. The Applicant made reference to the case of; Peter Ndung'u Njenga Vs Sophia Watiri Ndung'u, Civil Appeal No. 2 of 2000; where the Court of Appeal granted orders of review after the trial Judge allegedly failed to apply the correct law, by treating a claim made under a resulting trust, as a claim made under section 17 of the Married Women's Property Act of 1882. That the Court of Appeal stated that:-

“It is clear however that the Learned Judge decided the suit on the basis of the remedy as contemplated by section 17 of the Married Women's Property Act of 1882 of England. It was clearly an error apparent on the face of the record when the learned Judge proceeded to treat a claim made under an implied or resulting trust as a claim made under section 17.

It was also an error apparent on the face of the record when the learned Judge proceeded to divide the suit lands as if he was dealing with a succession cause when the appellant is still alive. We note that all the Respondent's children, by the Appellant are adults and the issue of children's interest apparently was brought in the suit as a red herring.

It was also an error apparent on the face of the record when the learned Judge said that although there was no evidence of customary law relating to division of properties amongst spouses (there can be none when the spouses are alive) he was obliged to make a finding based on section 17 aforesaid.

The remedy of review of a Judgment or order is available to an applicant if there is a mistake or error apparent on the face of the record and as we have pointed out, the Learned Judge did fall into such manifest errors that it cannot be said that the remedy of review was improperly invoked”.

20. The Applicant reiterated that the 1st and 2nd Defendants have filed another Counter-Claim in Environment and Land a Court, HCCC No. 416 of 2015, seeking similar orders as in the Counter-Claim still pending in this suit and having two similar Counter-Claims subsisting on record in two separate suits, the 1st and 2nd Defendants are abusing the process of the Honourable Court. Consequently, the Honourable Court ought to intervene and strike out the Counter-Claim filed herein under the powers donated under Order 2 Rule 15(1) (d) of the Civil Procedure Rules.

21. It was submitted that the parties deserve equal treatment, in the eyes of the law and therefore the Plaintiff deserves to be awarded the costs of filing a Defence to the Counter-Claim filed by the 1st and 2nd Defendants in equal measure. Reliance was placed on the case of; Sapra Studio Vs Kenya National Properties Limited, Civil Appeal No. 68 of 1985; where the Court of Appeal held that, the failure of the trial Court to deal with the question of interest amounted to an accidental omission and that the omission could be corrected on review so as to deal subsequently with the issue. That the slip rule was properly applicable so as to deal with the question of interest. That the accidental slip or omission may be corrected by the Court before or after the judgment is delivered by the Court.

22. Further reliance was placed on the case of; Sadra Mohamed Vs Charan Singh Nand Singh & Another, Civil Appeal No. 51 of 1959, which held that Section 80 of the Civil Procedure Act (which is similar to Order 45 Rule 1 of the Civil Procedure Rules) confers an unfettered right to a party to apply for review in the circumstances specified in the rule and an unfettered discretion to the Court to make such orders as it thinks fit.

23. Finally, the case of; Northumberland Compensation Appeal Tribunal Exparte Shaw; was cited, where the court held that, the remedy for review would be granted where an error of law appears on the face of the record. The Applicant prayed that the Application be allowed as prayed, in the interests of justice.

24. However the Respondents submitted that the plain reading of paragraph 58 of the 1st and 2nd Defendants Defence, clearly shows that there is no Counter-Claim. That the Plaintiff is seeking to interpret the meaning and import of a purported Counter Claim in a suit that has been struck out, and that is not an issue of fact. The Court of Appeal in the case of, Pancras T. Swai VS Kenya Breweries Limited (2014) Eklr held that:

“The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence.

The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to.”

25. The Respondent submitted that, the Applicant will not suffer any prejudice, if the Application for review is dismissed, as indeed she has already filed the other suit; Environment and Land Court HCC Case No. 416 of 2015, and will be heard on the basis of what she seeks.

26. Finally the Respondent submitted that, as regards the costs, the Plaintiff elected to proceed to Environment and Land Court immediately after the Ruling impugned was delivered. Since the 1st and 2nd Defendants succeeded on their Preliminary objection, they are entitled to an award of costs and that, costs follow the event.. That to date, there is no taxation proceedings, lodged by the 1st and 2nd Defendants against which this Court can issue an order of review.

27. I have considered the submissions and I find that, the issue for consideration as aforesaid is whether, the legal requirement for review of orders has been met, and whether the Court should review the subject order and/or order for the striking out of the 1st and 2nd Defendants/Respondents Counter-Claim and whether there is indeed a Counter Claim on record.

28. The Provisions of Section 80 of the Civil Procedure Act gives the Court the Power to review a Judgment or an order made by it, where an appeal has not been preferred against the order and make such order as it thinks fit. In furtherance of these Provisions, Order 45 Rule 1 and 2

of the Civil Procedure Rules, 2010, states that:

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 a review of judgment to the court which passed the decree or made the order without unreasonable delay. (emphasis mine)

29. The exercise of the discretion as to whether or not **to vary, set aside or review earlier orders is a judicial discretion, which should only be invoked if to do so, will serve useful purpose.** (See *Nuh Nassir Abdi v. Ali Wario & 2 others (2013) e KLR EP No.6 of 2013*)

30. In the case of; *Cole -v- Howlett [2015] EWHC 1697*, Mr Justice Peter Smith considered in detail the power of the Court to grant orders to review and set aside orders already made. The key points from the decision are that:

- a) *The Court has discretion to review an earlier order.*
- b) *That power is entirely discretionary and not prescribed by any rules or restrictions.*
- c) *The court will not consider a review merely to re-run the previous hearing on the same material.*
- d) *The court is less favourably inclined to consider a review of a final decision.*
- e) *The court will generally require a change of circumstances or a misleading of the judge in the first instance.*
- f) *The court must consider all the circumstances of the case.*

31. I have perused the Court record and I note that on 14th January 2015, the 1st and 2nd Respondents filed a statement described as a “Joint Defence” dated the same date. That document runs up to paragraph 67 of the said Statement of Defence and at the end of paragraph 58, the 1st and 2nd Defendants’ pleads as follows:-

“without validating the Plaintiff’s suit in any way, and had this Honourable Court been closed with Constitutionally in the said jurisdiction, the 2nd Defendant would have set up a Counter claim against the Plaintiff and the 3rd Defendant in terms averred herein below, which is only stated herein on a without prejudice basis, and to demonstrate that the 1st and 2nd Defendants’ response to the Plaintiff’s claim herein made is based on 1st and 2nd Defendants’ legally sound basis and is not frivolous”.

32. The Defendants then proceeded and set out what is described as a “a Counter claim” whereby the 2nd Defendant herein is named as the Counter Claimant and the Plaintiff and the 3rd Defendant herein are named as Respondents. At paragraph 67, of the joint defence, the counter claimant sets out five (5) prayers which are sought under the Counter –Claim.

33. What is, a Counter-claim? It is a claim by a Defendant opposing the claim of the Plaintiff and seeking some relief or orders from the Plaintiff for the Defendant. It contains assertions that the Defendant could have made, by starting a suit, if the Plaintiff had not already began the action. It is governed by the same rules that regulate the same claims made by a Plaintiff; save that it is a part of the answer that the Defendant produces in response to the Plaintiff’s claim.

34. A Defendant cannot make a Counter-Claim if it is not possible to make the same claim by starting a suit. Thus a Counter claim is a cross-claim brought by the Defendant in the civil proceedings but it is not a Defense to the claim made by the Plaintiff but asserts an independent cause of action against him.

35. The question that arises is: Is there a Counter- Claim herein. In my considered opinion the answer is in the Affirmative. There are words herein of a Counter-Claim and a Counter-Claimant. If the case proceeded to hearing, what would the Court do with the filed Counter-Claim? Does the fact that it was on a “without prejudice” basis diminish the legal understanding of it, in law, as a Counter- Claim?

36. I have perused the Ruling delivered by the Court on 15th May 2016, and I find that it purely addressed the issues raised in the Preliminary Objection dated 14th January 2015, which was basically to strike out the suit, on the ground that the Commercial & Admiralty Division of the High Court has no jurisdiction to hear and determine the suit involving matters of ownership and/or use of land. The Notice of Motion Application dated 18th December 2015 was filed alongside the suit, and the Application was not dealing with the striking out of the Counter Claim, as there was no prayer for the same.

37. In that regard the Applicant cannot argue that he brought the issue of striking out of the Counter-Claim to the Court’s knowledge through the submission he filed on the Preliminary objection.

38. The Applicant is relying on the ground that, there is an error of law apparent on the face of the record. Indeed a Court will intervene and review an order on this ground, if the record of the proceedings before the Court contains legal mistakes on its face and without the need to resort to any other supporting evidence. What is the error herein?

39. In this matter, the Applicant is seeking that, the orders made on 15th May 2015, be reviewed and upon review, the Counter Claim filed herein be struck out with costs. In the alternative the Court reviews the order condemning the Plaintiff to pay costs and order that each Party meets its costs and the costs of this Application be provided for.

40. First and foremost, I find that there is no error apparent on the face of the Court record. This is informed by the fact that, the Court addressed itself to the issues raised in the Preliminary objection and could not and did not make orders affecting the Counter-Claim as there was no prayer for the same. In that case, there is no basis for review of that order.

41. However, there is indeed a Counter claim on the record, which has been brought to the knowledge of the Court and whose continued existence serves no purpose. This is informed by the fact that, if the Defendants/Respondents challenged the jurisdiction of the Court to hear the Plaintiff's suit, and the Court upheld the objection, then it follows, that legally and naturally, the Court has no jurisdiction to entertain the Counter Claim whether filed on a "without prejudice basis" or otherwise and in that case the Counter-claim herein appearing in the joint statement of defence, filed by the 1st and 2nd Defendant, be and is hereby struck out for want of jurisdiction by the Court.

42. As to the issue of costs, I find that costs follow the cause and there is no basis to interfere with the order made by the Court on 15th May 2015, as it was made upon the Court upholding the Preliminary objection and it is informed by the fact that, it is the 1st and 2nd Defendants/Respondents who raised the issue of the Court's jurisdiction through the Statement of Defence and the Preliminary objection. The Preliminary Objection was fully canvassed culminating in the filing of submissions thereto and the subject Ruling. They were entitled to the costs.

43. However, the Court finds no basis to order for costs in favor of the Plaintiff in this Application for two reasons: first, the Plaintiff was well aware that this Court had no jurisdiction and filed the suit and with the Notice of Motion Application. Had they filed this suit in the Court with competent jurisdiction in the first place, the issue of striking out the Counter Claim herein would not have arisen. Secondly, the Defendants have clearly indicated in their joint statement of Defence that, the Counter Claim is filed on a "without prejudice basis" and as a response to the claim, had it been filed in competent Court, therefore the filing thereof, was a cautionary measure. They cannot be condemned for playing in an arena set by the Plaintiff/Applicant.

44. In relation to this application, I order that each party meets its own costs and proceed with the matter in the Environmental and Land Court.

45. Those are the Orders of the Court.

Dated, delivered and signed in open Court this 14th December 2017.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Mirie holding brief for Mr. Kang'ethe for the Plaintiff/Applicant

Mr. Kinyanjui Harrison for the 1st and 2nd Defendant/Respondent

No Appearance for the 3rd Defendant/Respondent

Teresia.....Court Assistant