



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 65 OF 2009

ESTATE OF SIMIYU NAWANGA

(Suing through PETER PATRICE WAFULA SIMIYU).....PLAINTIFF/RESPONDENT

VERSUS

SHEM SIYA KORORIA.....1ST DEFENDANT/APPLICANT

PETER KIMINYI.....2ND DEFENDANT/APPLICANT

RULING

(On amendment of judgment of this court delivered on 21/11/2018)

1. This is one of those cases where the Court, in striking out an Application that could be merited or probably not, is left with no option but to pity the parties to the matter for reasons of lack of due attention and keenness by either the party or his learned counsel. I have to do so because my hands are tied: tied because parties are always bound by their pleadings and the Court has to rely on them, and the ones in the instant case cannot be salvaged. In instances where the pleadings are poorly drafted thereby containing incurably defective errors which even **Article 159(2)(d)** of the **Constitution** cannot cure the Court has to, sadly, determine the Application as it is and leave it to the parties to take the next course of action. Some errors can be costly.

2. The Applicant brought under certificate of urgency a Notice of Motion dated **20/3/2021** and filed on **9/6/2021**. He invoked the provisions of **Sections 1A, 1B, 3, 3A** and **99** of the **Civil Procedure Act**, **Article 159 (2)** of the **Constitution** and all enabling provisions of the law. He sought the following orders:

1. ...spent

2. THAT this Honourable Court be pleased to amend its judgment delivered on (sic) in order to substitute Land Title Number Elgon/Kaptama/263 with Land Title Elgon/Kaptama/265 as claimed in the pleadings.

3. THAT costs of the Application be in the cause.

3. He relied on the grounds listed on the face of the Application and a supporting affidavit. The grounds were that there was an error apparent on the face of the record. By the alleged error, the Court mistakenly indicated the subject land as Land Title **Number Elgon/Kaptama /263** instead of Land Title **Number Elgon/Kaptama/265** as per the pleadings. The said error made it impossible to implement the judgment. His contention was that under **Section 99** of the **Civil Procedure Act**, clerical or arithmetic mistakes in judgments may be corrected at any time by the Court either on its own motion or on the application of any of the parties. For that reason, it was in the interest of justice that the orders sought be granted.

4. The Applicant, **Shem Siya Kororia**, swore an affidavit on his own behalf and on behalf of the **2nd** defendant on **20/3/2021** in support of the Application. He reiterated the facts contained in the grounds stated above.

Submissions

5. The Application was heard by way of written submissions. The Applicant filed his dated **18/7/2021** on **29/7/2021**. In them, learned counsel urged the Court to exercise its discretion and amend its judgment dated and delivered on **21/11/2018**.

Determination

6. This Court carefully considered the Application, the affidavit in support thereof, the submissions filed as well as the provisions of law under which the Notice of Motion was brought. It took note of its duty of facilitating the just, expeditious, proportionate and affordable resolution of disputes as provided by **Section 1 A** of the **Civil Procedure Act**. It also was alive to the law and practice that justice ought to be dispensed without undue technicalities, as provided by Article **159 (2)** of the Constitution of Kenya **2010**. At the same time, it considered the legal uncton that while performing its aforementioned duty, it is called upon to exercise its discretion cautiously, judiciously and without caprice. But what happens when, even where a matter could be merited, the pleadings have a fatal error incapable of resuscitation by any amount of oxygen pumping into it by way of all the constitutional and legal provisions? There are few options but one: denial of the prayers sought. That is what this Court was left to do in the instant Application. This I demonstrate by a summary of reasons below.

7. This is an old suit. It has been handled by three different judges. The parties changed representation by advocates several times. Judgment was delivered for the first time in favour of the Plaintiff on **12/11/2010**. It was set aside. Of relevance in this Application is that on **06/12/2013**, the firm of M/S R. E. Nyamu & Co. Advocates came on record for the Plaintiff and has represented him since, although on **26/08/2014** the said firm applied to cease acting for him but apparently did not prosecute the Application. That still left the Plaintiff being represented by the said law firm. Later, on **20/03/2018**, the firm of M/S Teti & Company Advocates came on record for the Defendants, taking the matter over from other previous advocates. It has acted for them to date.

8. On **09/06/2021** the firm of M/S Teti & Co. Advocates brought the instant Application on behalf of the Applicants. The Application appears to be titled properly but it has two fatal errors. One, it is brought by M/S. Teti & Co. Advocates on behalf of the Plaintiff/Applicant. Then it is supported by the Affidavit of, one Shem Siya Kohoria, the first Defendant. As to when the representation of the parties changed and whether that would be possible at all, it is not shown. To date the firm of M/S. Teti & Co. is on record for the Defendants and not the Plaintiff. It cannot purport to bring the Application on behalf of the Plaintiff. Whereas there could be merits in the Application about an error being on record, the Application which was brought for orders for its correction is itself irredeemably erroneous. Hypothetically putting it, what explanation could possibly be given if the Court allowed the Application and the Plaintiff stirred the waters to challenge the order by arguing that he never moved the Court but a stranger did so on his behalf? Not a plausible one.

9. Again, the Supporting Affidavit is sworn by the said Shem S. Kororia as stated before. He depones that he swore it on his own behalf and that of the **2nd** Defendant. No written authority was filed together with the Affidavit, as required by law. It renders the Affidavit incurably defective.

10. In the end, for the reasons given immediately above and in the introductory paragraph of this Ruling this Court is of the view that the Application is not one which is fit to be considered on merits and it is therefore hereby struck out with no order as to costs. The parties are at liberty to move the Court appropriately and properly.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 31ST DAY OF JANUARY, 2022

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE