



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**ELC NO. 240 OF 2014**

ERASTUS NDEGE MACHUKE.....1<sup>ST</sup> PLAINTIFF

SIMON KITHU MACHUKE.....2<sup>ND</sup> PLAINTIFF

BENSON NTHIGA MACHUKE.....3<sup>RD</sup> PLAINTIFF

JOHN MURIUKI MACHUKE.....4<sup>TH</sup> PLAINTIFF

**-VERSUS-**

JOHN KIURA NGARI.....1<sup>ST</sup> DEFENDANT

JOHN NJERI JULIUS.....2<sup>ND</sup> DEFENDANT

GISOVI WA MUNYI.....3<sup>RD</sup> DEFENDANT

EZEKIAH NYAGA.....4<sup>TH</sup> DEFENDANT

DAVID MWANIKI NGUKU.....5<sup>TH</sup> DEFENDANT

DANSON KIURA NGUYA.....6<sup>TH</sup> DEFENDANT

JACOB NJUE MUTEMBEL.....7<sup>TH</sup> DEFENDANT

**RULING**

1. By a notice of motion dated 2<sup>nd</sup> March, 2021 grounded upon **Section 80 of the Civil Procedure Act (Cap. 21)** and **Order 45 Rules 1 & 2 of the Civil Procedure Rules, 2010 (the Rules)**, the 1<sup>st</sup> Defendant applied for review of the judgment and decree dated 18<sup>th</sup> December, 2020 to include a judgment on his counter-claim against the Plaintiffs. The 1<sup>st</sup> Defendant also prayed for costs of the application to be provided for.

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1<sup>st</sup> Defendant on 2<sup>nd</sup> March, 2021 and the exhibits thereto. The gist of the application was that there was an error on the face of the record in the judgment in that the court had determined the Plaintiffs' claim only and omitted a determination on the 1<sup>st</sup> Defendant's counter-claim even though both the suit and counter-claim were heard together.

3. The Plaintiffs filed a replying affidavit sworn by the 1<sup>st</sup> Plaintiff Erastus Ndege Machuke on 22<sup>nd</sup> March, 2021 who swore it on his own behalf and on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs. The Plaintiffs contended that they had already filed an appeal against the decree dated 18<sup>th</sup> December, 2020 hence the 1<sup>st</sup> Defendant ought to have filed a cross-appeal instead of filing the instant application for review.

4. The 1<sup>st</sup> Plaintiff contended that he and his family members have been residing on some of the suit properties for over 60 years hence it would be prejudicial to have them evicted before his appeal is heard and determined. The Plaintiffs further contended that their appeal had high chances of success hence the instant application for review and determination of the counter-claim should be dismissed with costs.

5. It would appear that on 6<sup>th</sup> May, 2021 the parties appeared before Hon A. Kaniaru J whereby they agreed to canvass the application through written submissions. The record shows that the 1<sup>st</sup> Defendant filed his submissions on 30<sup>th</sup> June, 2021 whereas the Plaintiffs filed theirs on 7<sup>th</sup> September, 2021 after which it was directed that the application for review be placed before me for determination.

6. The court has considered the 1<sup>st</sup> Defendant's notice of motion dated 2<sup>nd</sup> March, 2021, the Defendants' replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the main issue for determination is whether or not the 1<sup>st</sup> Defendant has made out a case for review of the decree dated 13<sup>th</sup> December, 2020.

7. The statutory provisions governing applications for review are contained in **Section 80 of the Civil Procedure Act and Order 45 of the Rules. Order 45 Rules 1 & 2 of the Rules** stipulate that:

**(1) 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 hereby 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.**

**(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review.**

8. Whereas the 1<sup>st</sup> Defendant submitted that there was an error on the face of the record and that he had demonstrated a case for review of decree, the Plaintiffs contended otherwise. The Plaintiffs contended that the 1<sup>st</sup> Defendant had lost his right of review the moment they (*the Plaintiffs*) filed an appeal even though they did not cite any judicial authorities in support of that proposition. The 1<sup>st</sup> Defendant, on the other hand, relied on the case of **County Government of Kilifi v Mombasa Cement Limited [2017] eKLR, Joseph Wanyama Kibira v Board of Management St.Teresa Secondary School & Another**, and **George Kianda & Another v Judith Katumbi Kathenge & Another [2018] eKLR** in support of the application.

9. It is apparent from the material on record that apart of the Plaintiffs' suit for a declaration of trust over the suit properties, the 1<sup>st</sup> Defendant also had a counter-claim for eviction of the 1<sup>st</sup> Plaintiff who was said to be in occupation of one of the suit properties (*i.e. Parcel 3683*) as well as a counter-claim for a permanent injunction with respect to *parcels Nos. 3683 and 3684*. It is clear from the judgment dated 18<sup>th</sup> December, 2020 that the court only considered and determined the Plaintiffs' suit but made no mention or determination of the counter-claim was made.

10. The suit and counter-claim were heard together hence the judgment dated 18<sup>th</sup> December, 2020 ought to have considered and determine both of them. The court is thus satisfied that the 1<sup>st</sup> Defendant has demonstrated a classic case of error apparent on the face of the record in the instant case. The court must have omitted reference to the counter-claim purely due to inadvertence which can be corrected through review.

11. In the case of **National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR**, an error apparent on the face of the record was described as follows:

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established...”**

12. The court has noted that the Plaintiffs have submitted that there was undue delay on the part of the 1<sup>st</sup> Defendant in filing the instant application. It was contended that there was a delay of 3 months in filing it. The court has noted that the judgment sought to be reviewed was delivered on 18<sup>th</sup> December, 2020. The court is aware that the period between 21<sup>st</sup> December, 2020 and 9<sup>th</sup> January, 2021 is not to be reckoned in the computation of time under the Rules. (See **Order 50 Rule 4 of the Rules**). So, the actual period of delay is between 9<sup>th</sup> January, 2021 to 1<sup>st</sup> March, 2021 which comes to about 1 month and 2 weeks. The court does not consider the same to constitute unreasonably delay for purpose of **Order 45 of the Rules**.

13. The court is thus inclined to allow the Defendant's application for review. Since the 1<sup>st</sup> Defendant is seeking for judgment on his counter-claim, the court shall consider the merits of the counter-claim herein instead of preparing a separate judgment. The pleadings and the Plaintiffs' evidence on record show that the Plaintiffs were claiming the various suit properties on the basis of trust hence the reason they sought a declaration, and determination, of the alleged trust.

14. The 1<sup>st</sup> Defendant's counter-claim, on the other hand, was straightforward. He sought the following orders in the amended defence and counter-claim:

*(i) That the 1<sup>st</sup> Plaintiff Erastus Ndege Machuke do remove himself, his family members, servants, agent and/or properties from Land Parcel Number Mbeere/Kirima/3683 within 30 days from the date of judgment and in default the 1<sup>st</sup> Plaintiff, his family members and properties be evicted and/or forcefully removed from Land parcel Number Mbeere/Kirima/3683.*

(ii) *The Plaintiffs jointly and severally and specifically the 1<sup>st</sup> Plaintiff by themselves, their servant, agents, family members or anybody acting under their instructions be permanently restrained from entering upon, utilizing, occupying, cultivating, preventing the 1<sup>st</sup> Defendant from utilizing or in any other way interfering with the 1<sup>st</sup> Defendant use, occupation and exercise of his proprietary rights over Land Parcel Number Mbeere/Kirima/3683 and 3684.*

(iii) *That the Defendants be awarded costs of the suit and the 1<sup>st</sup> Defendant further be awarded costs of the counter-claim against the 1<sup>st</sup> Plaintiff.*

15. The 1<sup>st</sup> Defendant sought an eviction order and injunction against the 1<sup>st</sup> Plaintiff on the basis that he was the registered proprietor of **Parcels Nos. 3683 and 3684**. There is adequate evidence on record to demonstrate that the 1<sup>st</sup> Defendant is the registered proprietor of the two properties. In fact, the Plaintiffs conceded as much in the plaint and evidence at the trial. The Plaintiffs' contention was that the 1<sup>st</sup> Defendant was registered as such in trust for them. The court having found in the judgment that the Plaintiffs had failed to demonstrate the existence of the alleged trust and having dismissed their claim, it would follow that the 1<sup>st</sup> Defendant's counter-claim for eviction ought to succeed. The court is consequently inclined to allow prayer (a) of the counter-claim.

15. The court has considered the pleadings and evidence on prayer (b) seeking a permanent injunction to restrain the 1<sup>st</sup> Plaintiff from entering, utilizing, occupying, cultivating or interfering with the 1<sup>st</sup> Defendant's use or occupation of **Parcel 3684**. The court has noted that there was no averment in the amended defence and counter-claim that the 1<sup>st</sup> Plaintiff was intending to enter, occupy, utilize, cultivate, or interfere with **Parcel 3684**. The evidence on record only shows that the 1<sup>st</sup> Plaintiff was occupying and utilizing **Parcel 3683**. The court is of the opinion that since the 1<sup>st</sup> Defendant is already occupying **Parcel 3683** the only effective remedy available to the 1<sup>st</sup> Defendant is an eviction order for removal of the 1<sup>st</sup> Plaintiff and not an injunction. There was no evidence at the trial to demonstrate that the Plaintiffs had threatened to interfere with the 1<sup>st</sup> Defendant's proprietary rights over **Parcel No. 3684**. Accordingly, the court is not inclined to grant a permanent injunction with respect to either **Parcel 3683** or **3684** since it would not serve any useful purpose at this juncture.

16. The upshot of the foregoing is that the court finds merit in the 1<sup>st</sup> Defendant's application for review and makes the following orders for disposal thereof.

**(a) The 1<sup>st</sup> Defendant's notice of motion dated 2<sup>nd</sup> March, 2021 for review is hereby allowed.**

**(b) The judgment dated 18<sup>th</sup> December, 2020 is hereby reviewed by allowing the 1<sup>st</sup> Defendant's counter-claim in the following terms only:**

**(i) The 1<sup>st</sup> Plaintiff, Erastus Ndege Machuke, shall remove himself, his family members, servants, agent and properties from Title No. Mbeere/Kirima/3683 within 30 days from the date hereof in default of which he and his family members, servants and properties shall be forcibly removed therefrom.**

**(ii) The prayer for a permanent injunction with respect to Titles No. Mbeere/Kirima/ 3683 and 3684 is hereby declined.**

**(iii) The 1<sup>st</sup> Defendant is hereby awarded costs of the counter-claim against the 1<sup>st</sup> Plaintiff only.**

**(iv) An amended decree shall issue incorporating the counter-claim.**

**(c) There shall be no order as to costs of the application for review since the error was occasioned by the court.**

**Ruling dated and signed in Chambers at Nyahururu this 16<sup>th</sup> day of February, 2022 and delivered via Microsoft Teams platform.**

**In the presence of:**

Ms. Nzekele holding brief for Mr. Okwaro for the Defendants

No appearance for the Plaintiffs

CA - Carol

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**Y. M. ANGIMA**

**JUDGE**