



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI

ELC CASE NO.561 OF 2018

(FORMERLY HIGH COURT CIVIL SUIT NO.1205 OF 2005)

HORTICULTURAL CROPS DEVELOPMENT AUTHORITY....PLAINTIFF

-VERSUS-

SAKIR PROPERTIES LIMITED.....1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....2ND DEFENDANT

DOUBLE ESS DEVELOPMENT COMPANY LIMITED.....APPLICANT

RULING

1. Judgement in this matter was delivered on 17th September 2020.
2. The Applicant then filed the Notice of Motion application dated 26th April 2021 under Article 159 of the Constitution of Kenya 2010, Sections 1A, 1B, 3A, 63(e), 80 and 100 of the Civil Procedure Act, CAP 21, Order 40 Rule 1, Order 45 and Order 51 Rule 1 of the Civil Procedure Rules 2010 Laws of Kenya.
3. The Applicant seeks orders;
 - a. Spent
 - b. Spent
 - c. That the judgement of this Honourable Court issued/entered on 17th December,2020 be and is hereby reviewed to the effect that the said judgement together with all consequential orders be and are hereby set aside /vacated in their entirety and the Plaintiff's suit dismissed with costs.
 - d. That the Applicant is at liberty to apply for such further or other orders and /or directions as the Honourable Court may deem fit and just to grant; and
 - e. That the costs of this application be borne by the Plaintiff.
4. The application is supported by the grounds on the face of the application set out in paragraphs 1 to11.
5. The application is supported by the affidavit sworn on 26th April 2021 by Bharat Ramji, a director of the Applicant.
6. He deponed that the judgement of the court dated 17th December 2020 was obtained by the Plaintiff irregularly and through non-disclosure of material facts being that, through a consent adopted on 15th July 2011,the Plaintiff had wholly withdrawn and discontinued the suit against the Applicant(the then 3rd Defendant) who immediately ceased being a party to the suit.
7. He added that the said consent more particularly provided that; "the withdrawal of the suit as between the Plaintiff and the 3rd Defendant is in full and final settlement of issues between the Plaintiff and the 3rd Defendant."

8. He deponed that at the time of withdrawing and discontinuing the suit against the Applicant, it was well within the Plaintiff's knowledge that the suit property had passed to the Applicant and in that regard, it could not sustain a prayer for injunction against a party who was no longer a party to the suit.
9. He also deponed that the Plaintiff ought to have amended its further further amended plaint dated 8th March 2010 and in default, could only sustain prayer cc of the said further amended plaint to the effect that, "an award of damages for loss of value and use of the parcel of land presently known as L.R No.209/12490" against the 2nd Defendant.
10. He deponed that the Plaintiff having withdrawn its suit against the Applicant ought to have discontinued its suit against the Applicant (the then 3rd Defendant) as he could not maintain any adverse claim against the Applicant.
11. He further deponed that the Applicant having ceased being a party to the suit continued with development of the suit property and leased out go downs to third Parties only to learn of this court's judgement. He deponed that the judgement is also pre-judicial to the said third parties who have millions worth of investments and assets at risk of being lost. He added that the reversionary lease interest in the suit property was transferred to Pacific Royal (Management) Limited.
12. He also deponed that inclusion of Applicant as the 3rd Defendant in the judgement issued on 17th December 2020 whilst it ceased being a party constitutes an apparent error on the face of the record and which can be remedied by way of review.
13. The application is opposed by the Plaintiff vide the affidavit sworn on 17th May 2021 by Benjamin Tito; the Plaintiff's head of department.
14. He deponed that the judgement was not obtained irregularly as the 1st and 2nd Defendants were all served with hearing notices throughout the proceedings at all stages of the hearing and the court was satisfied that service was proper.
15. He added that the Applicant ceased to be a party through a voluntary and lawful exercise thus it has no locus to question a judgement of the court which emanates from the proceedings it voluntarily decided not to participate in despite knowing well that the title documents which were under challenge in the suit touched on a property it was illegally occupying.
16. He also deponed that the issue of non-disclosure does not arise as the discontinuance of the suit against the Applicant was on an understanding that the Applicant would pursue the persons who sold or illegally transferred the property to it, which happened to be the 1st Defendant for compensation while the Plaintiff was left to pursue return of property to it against the 1st and 2nd Defendants.
17. He deponed that if the Plaintiff's intention was to have the Defendants to continue owning the land without challenge of the title, the Plaintiff would have rested the matter there as there would be nothing more to pursue in the suit but the Plaintiff continued to pursue the Applicant's cancellation of title.
18. He further deponed that the court has already held and rightly so that the 1st Defendant did not have a good title to the property and as such it had nothing to pass onto the Applicant or any other party.
19. He deponed that since the Applicant was aware that the suit was ongoing, its decision to continue developing the property is an act of impunity which should not be condoned.
20. He deponed that the error on the Judgement referring to the 3rd Defendant can be corrected to the extent of removing the reference to the 3rd Defendant and not necessarily dismissal or reopening of the suit.
21. He also deponed that there is no proof that the property was transferred and multiple transfers orchestrated by the Applicant were meant to defeat justice and the Applicant cannot hide behind the doctrine of innocent purchaser for value when it failed to conduct due diligence.
22. He deponed that there is no proof of alleged loss of Millions of shillings and even if there were, the same cannot outweigh the public interest served by the Plaintiff which serves the whole country but has no land to build its headquarters due to the interest of a few people.

The Applicant's submissions

23. They are dated 22nd July 2021 and they address the following issues:-

- a. Whether there is an error apparent on the face of the record.**
- b. Whether there was non-disclosure of material facts by the Plaintiff/Respondent herein.**
- c. Whether the Applicant's application dated 26th April 2021 is merited.**
- d. What are the appropriate relief in the circumstances?**
- e. Who bears costs?**

24. The Applicant relied on the case of **Flora Wasike v Destimo Wamboka [1980] 1 KAR** to submit that a consent is contractual in nature thus upon effective adoption of the consent herein, the Plaintiff marked a full and final settlement of all the issues between the Plaintiff and the 3rd Defendant in relation to the suit and could not sustain a claim against it.

25. It further submitted that order granted by the court to a non-existent party constitutes an error apparent on the face of the record which is an error that does not require elaborate arguments to support. It relied on the case of **James Kiiru Mwangi v Gibson Kimani Mwangi & Another [2012] e KLR** which cited with approval the case of **Muyodi v Industrial & Commercial Development Corporation & Another [2006] 1 EA 243**.

26. The Applicant also submitted that the consent order also estopped the Plaintiff from having any claim against the Applicant. It put forward the case of **Carol Construction Engineers Limited & Another v National Bank of Kenya [2020] e KLR** and added that the mere fact that the Applicant filed a detailed defence and counterclaim cannot form a basis for the Plaintiff to assert that the Applicant abandoned its claim to the suit land. It further submitted that the Plaintiff's contention that the Applicant's ownership was subject to challenge cannot stand as the case against the Defendant was settled wholly by the consent.

27. It was also the Applicant's submission non-disclosure of material facts is taken as a grave omission and a court of law will not hesitate to discharge an injunction/order obtained through such non-disclosure. It relied on the case of **Gotv Kenya Ltd vs royal Media Services Limited & 2 others [2015] e KLR** and further submitted that had the court been prompted by the Plaintiff that the Applicant was no longer a party and that its further amended plaint was misleading for failure to amend, the court would have reached a different conclusion.

28. On the Plaintiff's contention that the Applicant had no locus to seek a review of the judgement of the court on grounds that the Applicant is not a party to the suit and that it voluntarily decided not to participate, it submitted that its locus stems from the fact that the impugned judgment adversely affects it as it lists it as the 3rd Defendant notwithstanding that it is no longer a party to the proceedings. It further submitted that Section 80 of the Civil Procedure Act as read with Order 45 of the civil procedure rules provide that any person who considers himself aggrieved by the decision of the court has an opportunity to apply for review.

29. The Applicant submitted that the appropriate relief is provided for under Section 80 of the Civil Procedure Act having shown that there was an error apparent on the face of the record. It relied on the cases of **Republic v. Public Procurement Administrative Review Board & 2 Others [2018] e KLR** and **National Bank of Kenya Ltd V Ndungu Njau [1997] e KLR**. The Applicant also urged the court to award it costs of the application.

The Plaintiff's /Respondent's submissions

30. They are dated 8th October 2021 and the Plaintiff addressed the following issues:-

a. Whether there exists an error apparent on the face of the record.

b. Whether the Plaintiff failed to disclose material facts.

31. The Plaintiff submitted that the Applicant's prayer in its application cannot be said to seek correction of an error apparent on the face of the record as no error was pointed out to the court but instead the Applicant has gone deep and argued the merits of the suit.

32. It further submitted that courts have held that review must be confined to error apparent on the face of the record and not re-appraisal of the entire evidence or how the judge applied or interpreted the law or exercised his discretion as doing so would amount to exercise of appellate jurisdiction which is not permissible. It relied on the case of **Sabera Makena & 2 Others v Daniel Bariu [2021] e KLR**.

33. On the issue whether the Plaintiff withheld material facts, it submitted that the consent referred to is on record and a court record cannot be said to be in the exclusive knowledge of one party. It added that the issue which arose during trial oscillated around the process of acquisition of title by the 1st Defendant and the 2nd Defendant agreed on the Plaintiff's position on the illegality of the title procured by the 1st Defendant.

34. It submitted that even before the title went to the Applicant, it had been procured illegally thus the Plaintiff called for cancellation. It added that parties cannot consent on an illegality and especially now that the suit land is public land and Article 40 (6) of the Constitution does not defend titles which were obtained illegally.

35. It also submitted that it would be an affront to the rule of law and judicial precedents for this court to dismiss the suit on account of misjoinder and non-joinder of the Applicant as the issue of joinder or misjoinder is a point of law and cannot be a point of review.

36. It also asked the court to be slow to consider the third Parties whom the Applicant claims to have leased the suit land to as they have not sought to be enjoined in this suit nor do they appear aggrieved by this court's judgement and doing so would amount to clothing an illegality with this court's discretion. It relied on the case of **Mary Wambui Njuguna v William Ole Nabala & 9 Others [2018] e KLR**.

37. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavit and the rival submissions. The issues for determination are:-

i. Whether the Applicant has made out a good case to warrant the grant of orders of review.

ii. Who should bear costs of this application?

38. Section 80 of the Civil Procedure act and Order 45 rule 1 of the Civil Procedure Rules provides as follows:-

Section 80 of the Civil Procedure Act provides that:-

“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.”**

Order 45 rule 1 of the Civil Procedure Rules provides that:-

(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.

(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 the review.

39. The gist of this application is the consent order dated 6th October 2011. The same is worded as follows:-

“ORDER

Upon reading the consent filed in this court on 15th July 2011 duly signed by the advocate for the Plaintiff and the advocate for the Third Defendant.

It is hereby ordered by consent:

- 1. That the Plaintiff’s suit against the Third Defendant M/S Double Ess Development Limited be and is hereby withdrawn pursuant to order 25 rule 1.**
- 2. That the withdrawal of the suit as between the Plaintiff and the Third Defendant is in full and final settlement of all issues between the Plaintiff and the Third Defendant.**
- 3. That there be no orders as to costs.**

Issued on 6th October 2011.

Signed

Deputy Registrar

High Court of Kenya at Nairobi”

40. It is not clear whether the Plaintiff thereafter amended its plaint to reflect the above position.

41. Pursuant to an order issued on 19th December 2019, the Plaintiff was allowed to serve the 1st and 2nd Defendants by way of substituted service by advertisement in the daily newspapers. There is an advertisement in the Daily Nation on 7th July 2020. The same confirms that only (1) Sakir Properties Limited (1st Defendant) and (2) Honourable Attorney General (2nd Defendant) were listed on the said advertisement.

42. The Plaintiff in its submissions appears to deny the existence of the consent. I have gone through the court file and confirm that such consent exists. The same is duly signed by B. M. Musyoki Advocate for the Plaintiff.

43. On the 17th December 2020 the court delivered judgment and granted the Plaintiff the following reliefs:-

“a. That a declaration is hereby issued that the grant to the 1st defendant by the 2nd defendant and a subsequent transfer to the 3rd defendant was fraudulent, null and void and that the plaintiff is the bonafide allottee of the parcel of land Known as LR NO. 209/12490.

b. That a permanent injunction is hereby issued restraining the 1st defendant or 3rd defendant either by itself, servants and/or agents from developing, wasting, disposing of, alienating and or in any way dealing with all that parcel of land known as LR No. 209/12490

c. That a mandatory injunction is hereby issued compelling the 2nd defendant to order the chief Land Registrar Nairobi to cancel the Grant to the 1st defendant and transfer to the 3rd defendant and the parcel revert back to the plaintiff.

d. That the plaintiff shall have costs of the suit.

44. I agree with the Applicant’s submissions that as a result of the Plaintiff’s failure to amend its further further amended plaint dated 8th March 2020, the Applicant was included as the 3rd Defendant despite having ceased being a party in these proceedings. I also agree with the Applicant’s submissions that upon adoption of the consent order on 6th October 2011 it marked as full and final settlement of all the issues between the Plaintiff and the 3rd Defendant in relation to the suit property.

45. The inclusion therefore of the 3rd Defendant (Applicant) in the final judgment constitutes an error apparent on the face of the record. The Court of Appeal in the case of **James Kiiru Mwangi vs Gibson Kimaru Mwangi & Another [2021] eKLR** which cited with approval the case of **Muyodi vs Industrial and Commercial Development Corporation & Another [2006] 1 EA 243** which rendered itself thus:-

“In Nyamogo and Nyamogo vs 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.”

46. It appears from 6th October 2011, the applicant stopped participating in these proceedings. The Plaintiff was fully aware of this fact as at 2019 as, it only served the 1st and 2nd Defendants through advertisement on the Daily Nation Newspaper of 7th July 2020.

47. The Plaintiff’s witness testified on 10th February 2020 and closed its case. He sought orders as per the Further Further Amended Plaint dated 8th March 2020 without disclosing that the 3rd Defendant (Applicant) had ceased to be a party. The Applicant has relied on the cited case of **GO tv Kenya Ltd vs Royal Media Services Ltd & 2 Others [2015] eKLR** where it was stated that:-

“One of the known orders for discharging an exparte order is concealment of material facts or material non-disclosure”.

I am guided by the above authority.

48. I find that the Applicant herein has locus standi to seek a review of the judgment dated 17th December 2020 as it is adversely affected by it despite the fact that it had ceased to be a party. I disagree with the Plaintiff/Respondent’s submissions that the Applicant opted to remain out of the case while it was aware that the initial title to the property was under challenge.

49. In the case of **National Bank of Kenya Ltd vs Ndungu Njau [1997] eKLR** it was held that:-

“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. 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 law. Misconstruing a statute or other provision of law cannot be a ground for review.”

50. As sated earlier the inclusion of the 3rd Defendant (Applicant) in the final order when it had ceased to be a party constitutes an error apparent on the face of the record.

51. The upshot of the matter is that this application meets the conditions set out under order 45 rule 1 of the Civil Procedure Rules. I find that the same is merited.

52. The Applicant prays that upon allowing this application the Plaintiff’s suit ought to be dismissed with costs. I disagree, I am of the view that the Plaintiff still has a chance to decide on how to proceed with its case.

53. In conclusion, I find merit in this application and I grant the orders sought namely:-

a. That the Judgment of this honourable court entered on 17th December 2020 is hereby reviewed to the effect that the said judgment together with all the consequential orders are hereby set aside and/or vacated in their entirety.

b. That each party do bear own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 10TH FEBRUARY, 2022

.....

L. KOMINGOI

JUDGE

In the presence of:-

Ms Rotich for the Plaintiffs

No appearance for the 1st and 2nd Defendants

No appearance for the Applicant

Steve - Court Assistant