



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 247 OF 2013

KANGAITA TEA FACTORY COMPANY LTD..... PLAINTIFF/APPLICANT

VERSUS

MOHAMMED NJIRU NJAGI 1ST DEFENDANT/RESPONDENT

GILBERT KAGOMBE NJAGI 2ND DEFENDANT/RESPONDENT

ISAACK MUCHIRI KAMURI..... 3RD DEFENDANT/RESPONDENT

SAMSON MUNYI KAMURI..... 4TH DEFENDANT/RESPONDENT

DAVID NJERU KAMURI 5TH DEFENDANT/RESPONDENT

FAITH WANJA NJAGI 6TH DEFENDANT/RESPONDENT

BANCY CERE KAMURI 7TH DEFENDANT/RESPONDENT

RHODA WAMBU NJAGI 8TH DEFENDANT/RESPONDENT

RULING

This is in respect to the plaintiff's applicant's Notice of Motion dated 20th February 2013 brought under **Order 45 Rule 1 of the Civil Procedure Rules** seeking a review of the ruling and order of Hon. Lady Justice H.I. Ong'udi delivered on 8th November 2012.

On 28th November 2013, it was directed that the same be canvassed by way of written submissions with the plaintiff/applicant filing their submissions within two weeks and the defendants/respondents filing theirs in the following two weeks after service.

The matter was thereafter to be mentioned on 15th January 2014 to confirm compliance and fix a date for ruling. However, by the time the matter came up before me for mention on 17th June 2014, only the plaintiff/applicant had filed and served their submissions. As there was no appearance by the defendants/applicants nor any explanation as to why they had not filed their submissions, I fixed a ruling date for 30th July 2014.

As stated above, the application before me is premised under **Order 45 Rule 1 of the Civil Procedure Rules** and seeks a review of the ruling of Ong'udi J. delivered on 8th November 2012. In his

affidavit in support of the said application, FESTUS KIRUGA KABURI the plaintiff/applicant's Factory Unit Manager has deponed that there is a mistake on record in the said ruling since there is no defence and so summary judgment ought to have been entered as sought in the plaintiff/applicant's earlier application dated 24th July 2012. He depones further that there is need to review the said orders of 8th November 2012 as there are expensive tree seedlings which are over-growing on the nursery bed on the land.

The ruling of Ong'udi J. dated 8th November 2012 and which the plaintiff/applicant seeks to review arose out of an earlier application by the plaintiff/applicant dated 24th July 2012 which sought the following two main prayers against the defendant/respondent being:-

1. ***A temporary injunction barring the defendants/respondents their agents or servants from preventing the plaintiff/applicant from working on or fencing L.R NTHAWA/RIANDU/3174 3175 3176 3177 and 3178 or interfering whatsoever with the plaintiff/applicant's utilization of the said land parcel***
2. ***That the Honourable Court be pleased to order striking out the defendants/respondents statement of defence and thereafter enter summary judgment against the defendants as prayed in the plaint.***

Having considered counsel's submissions, Ong'udi J. in her ruling subject of this application rendered herself as follows in her final orders:-

1. ***"The defendants/respondents shall be restrained from interfering with that exercise on the uncontroverted portions***
2. ***The defence filed herein on 15th June 2012 and the reply to defence filed on 6th July 2012 are both struck out"***

The above orders have given rise to the application for review now before me in which the plaintiff/applicant seeks the following main prayer:

"That the Court be pleased to review the ruling and order of Hon. Lady Justice H.I. ONG'UDI delivered on 8th November 2012 and thereafter make an order allowing the application dated 24th July 2012"

Order 45 (i) of the Civil Procedure Rules provides that a party can apply for the review of an order or decree

"----- upon 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 -----"

(emphasis mine)

The applicant's case as I understand it, is that Ong'udi J. having struck out the defendants' defence in her ruling dated 8th November 2012 should have proceeded to enter judgment against the defendants as prayed in the application dated 24th July 2012.

A Court considering a review application such as the one now before me must act cautiously so as not to appear to be sitting as an appellate Court. This is especially so where the application for review, as in the present case, is in respect of a decision of another Court of equal jurisdiction.

As stated above, the basis of the applicant's application for review is that Ong'udi J. having struck

out the defendant's defence, the Judge ought to have entered judgment against the defendants which was one of the prayers sought in the plaintiff/applicant's Notice of Motion dated 24th July 2012 which application was, inter alia, founded upon the provisions of **Order 36 Rule 1 (b) of the Civil Procedure Rules**. It is therefore the applicant's case that by not entering judgment against the defendants as prayed, there is an error on the face of the ruling of Ong'udi J. dated 18th November 2012.

What is an error on the face of the record? In **NYAMOGO AND NYAMOGO ADVOCATES VS KOGO 2001 I E.A 173 (C.A.K)**, the Court of Appeal described such an error in the following terms:-

“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 a 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 options, 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 point where there may conceivably be two options, can hardly be said to be an error apparent on the face of the record”

The Court went on to quote **CHITALEY AND RAO 's COMMENTARIES ON THE CODE OF CIVIL PROCEDURE VOLUME 3 at page 3227** as follows:-

“A point which may be a good ground of appeal may not be a ground for an application for review. Thus an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal”

Applying the above principles in the present application, I am satisfied that it is meritorious and that there is indeed an error or mistake in the ruling of Ong'udi J. dated 8th November 2012 which ought to be reviewed.

As stated above, Ong'udi J's ruling dated 8th November 2012 was the result of an application dated 24th July 2012 seeking, inter alia, the striking out of the defendants defence and the entry of summary judgment against them as prayed in the plaint. In her ruling, the Judge made several observations. At page 3, the Judge said a defence filed out of time and without leave is no defence and must be struck out. At page 5 of the same ruling, the Judge made a comment that this is not the kind of matter that would proceed by way of summary procedure under **Order 36 Rule 1 of the Civil Procedure Rules**. However, at the end of her ruling, the Judge made an order striking out the defence. Therefore, notwithstanding the oscillating views that she expressed in her ruling, the final order of the Judge was to strike out the defendant's defence. Having made that firm decision, it was incumbent upon the Judge to enter judgment against the defendants as prayed in the plaintiff's application dated 24th July 2014. She did not do so. That, in my view, was an error apparent on the face of the record and which necessitates a review of the said ruling and Order. The plaintiff/applicant had in its plaint sought the eviction of the defendants from some parcels of land. The defence having been struck out, there was really no defence and so this was a proper case for entry of summary judgment under **Order 36 Rule 1 (b) of the Civil Procedure Rules** which was one of the remedies sought in the plaintiff/applicant's application dated 24th July 2014.

That being my view of the matter, I allow the application and review the orders of Ong'udi J. and enter summary judgment against the defendants as sought in the plaintiff/applicant's application dated 24th July 2014. As the error was caused by the Court, there shall be no order as to costs.

B.N. OLAO

JUDGE

30TH JULY, 2014

30/7/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Njiru for Mugambi for Applicant – present

No appearance for Respondents

COURT: Ruling delivered this 30th day of July 2014 in open Court.

Mr. Njiru for Mugambi for Plaintiff/Applicant – present

No appearance for Defendants/Respondents.

B.N. OLAO

JUDGE

30TH JULY, 2014