



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 165 OF 2008

1. NJERU MUKUNDE
2. NYAGA MUTUMBI
3. NYAGA MWANGANGE
4. NICHOLAS N. NJERU (Suing For Themselves And As Representative of Mukere Clan of Mbeere.....PLAINTIFFS

VERSUS

1. THE ATTORNEY GENERAL
2. THE DIRECTOR OF LANDS ADJUDICATION & SETTLEMENT
3. THE CHIEF LAND REGISTRAR
4. LAMECK GICHANGI (Sued As Representative of The

Nditi Clan of Mbeere)

5. NYAGA CIATHATHI
6. MATHEW MUGO N. NGARI
7. ERASMUS IRERI NJERU
8. JAMLICK NJIRU NTHUNI.....DEFENDANTS
9. JOHN MUTITI NGACHA.....INTENDED 9TH DEFENDANT

RULING

This is the application by notice of motion dated 12/2/2013. It is brought under order 45(1)(1)(b) of the Civil Procedure Rules for review of this court's order of 19/12/2012 and for the court to allow the applicant 7th defendant's counterclaim to proceed to its final conclusion.

The main ground is that the court did not make a decision on the counter claim which should proceed to hearing. And that the appeal in the civil appeal did not touch on the counterclaim. That the order made by the court on 19/12/2012 was made without hearing parties and without any party asking for the order.

Mr. Muthama Kiome for the plaintiffs/respondents filed grounds of opposition to the application. Mr. Mutitu for the 9th defendant also filed grounds of opposition. A factual background to this matter would suffice.

This case had several parties some of whom have died. Judgment in the case was delivered on 15/3/2011 by Justice Warsame on behalf of Justice W. Karanja. In the said judgment the court found the plaintiffs' suit to lack merit and it was dismissed. The plaintiffs were dissatisfied and immediately lodged an appeal in the Court of Appeal.

This file was brought before me on 10/10/2012 for directions. I was informed by Mr. Mugo P.N. for 7th

defendant that the matter was for hearing of the 7th defendant's counterclaim. I was taken aback because there was a judgment in the file. I then requested for time to peruse the file before I could give any directions. Upon perusal of the file I gave directions on 9/12/2012 to the effect that since the plaintiffs had appealed against the judgment and considering that the 7th defendant's counterclaim was premised on the plaintiff's suit then it would be prudent that the court awaits the outcome of the appeal.

It is this order that the 7th defendant/applicant wishes to have reviewed and/or set aside. His contention is that this court must hear his counterclaim. Review under Order 45 of the Civil Procedure Rules is premised on two grounds viz:-

1. *Discovery of new and important matter or evidence which was not in the knowledge of the applicant or could be produced by him at the time the decree was passed or made*
2. *On account of a mistake or error apparent on the face of the record*
3. *Any other sufficient reason.*

In this case there is no new evidence or material brought up by the applicant.

A perusal of the record shows that my sister Judge heard the plaintiffs and defendants who all testified and she delivered a judgment. I do not even understand what Mr. Mugo means by insisting that he wants his clients case to be heard. Mr. Mugo was present when the judgment was delivered and if he had any issues with it he ought to have pointed it out and asked for a review of the same then. What he is calling upon this court to do is to rehear the 7th defendant's case and write another judgment. We can not have 2 Judgments in the same file over the same cause of action.

The Court of Appeal being the first appeal court over this matter will reconsider all the evidence adduced including the evidence of the applicant and the pleadings. Mr. Mugo will have the chance to address the said court on the issues he is raising here. This court will then abide by whatever directions the Court of Appeal will give concerning the appeal. Otherwise I see nothing new or any error on the record to make this court review the orders of 19/12/2012. The application is dismissed with costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF JUNE 2013.

H.I. ONG'UDI

JUDGE

In the presence of:-

Mr. Mugo for 7th Applicant

Njue CC