REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 137 OF 2000(OS)

CLEMENT WAMALWA ….....…..PLAINTIFF

VERSUS

GETRUDE N. TSUMA ..... DEFENDANT

R U L I N G

The Defendant/Applicant Getrude N. Tsuma brought a Notice of Motion under the provisions of Section 1A and Section 80 of the Civil Procedure Act and Order 45 Rule (1) of the Civil Procedure Rules seeking an order that the judgment of 19/01/2012 be reviewed an order made allowing the Applicant's counterclaim for the eviction of the Plaintiff/Respondent from LR No. 6670. The Applicant had filed Eldoret HCCC No. 55 of 1997 against the Respondent herein and another. The case was later transferred to Kitale High Court where it became Kitale HCCC No. 77 of 1997. The Respondent filed a defence and counterclaim to the Applicant's suit. The Respondent later withdrew the counterclaim that he had filed in the suit. The Respondent subsequently filed Kitale HCCC No. 137 of 2000 (OS). This suit was consolidated with Kitale HCCC No. 77 of 1997. Directions were taken to the effect that Applicant's claim in Kitale HCCC No. 77 of 1997 was to be treated as defence and counterclaim in Kitale HCCC No. 137 of 2000 (OS). The parties were to proceed by viva voce evidence.

After the conclusion of the hearing, there was a judgment delivered by Justice Martha Koome as she then was in which she dismissed the Respondent's claim with costs. She did not however make any finding on the Applicant's counterclaim. The Applicant therefore contends that there is an error apparent on the face of the record in that the judge did not consider the Applicant's counterclaim.

The application was opposed by the Respondent based on grounds of opposition filed in Court on 01/07/2013 in which the Respondent contends that there are no sufficient grounds warranting a review of the Court's judgment. The Respondent also contends that the Applicant should have preferred an appeal against the judgment instead of coming up with an application for review.

I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have looked at the judgment which is being sought to be reviewed. It is clear from the first page of the judgment that the judge appreciated that the Plaint in Kitale HCCC No. 77 of 1997 was to be deemed as defence and counterclaim to the originating summons in Kitale HCCC No. 137 of 2000. In her judgment, she went ahead to dismiss the Respondent's suit but made no finding on the Applicant's counterclaim. The issue which then arises for determination is whether the omission amounts to error apparent on the face of the recored to warrant a review.

An error on the face of the record can only be determined on the facts of each case. For an error of law on the face of the record to form a ground for review, it must be of a kind that stares one in the face and which there could reasonably be no two opinions. In the case of Nyamogo & Nyamogo

Advocates Vs Kogo [2001] 1 EA 174, the Court of Appeal judges had this to say:-

> ***"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness 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 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".***

In the present case, it is clear that the Applicant had sought orders of eviction in her Plaint which formed basis of her defence and counterclaim to the Respondent's suit which was claiming ownership to her land by virtue of adverse possession. The Respondent's claim was dismissed with costs. It follows that had the judge not overlooked her counterclaim, the result wold have been grant of the eviction orders, the Respondent's suit having been dismissed. There was no any other way to go other than allowing the eviction orders as prayed in the counterclaim. This was clearly an error staring one in the face.

The overriding objective in Section 1 A of the Civil Procedure Act is to facilitate a just quick and cheap resolution of the real issues in proceedings. This is why the word error should not be given a narrow interpretation. I find that there is an error apparent on the face of the record. The grant of the orders being sought will ensure that the actual intention of the judge is carried out. The judge had in her elaborate judgment found that the Respondent's claim to the land based on adverse possession had not been proved. If this is the position, his remainder on the suit land will not be justified or has no basis. The only logical conclusion will be that he should not continue to remain on the land and therefore he should be evicted. I accordingly review the judgment and make an order allowing the Applicant's counterclaim. There is hereby issued an order of eviction against the Respondent from the suit land. The Applicant shall have costs for this application.

It is so ordered.

Dated, signed and delivered in Open Court on this 19th day of August, 2013.

E. OBAGA

JUDGE

In the presence of Mr. Ndarwa for Mr. Kiarie for Defendant and M/S. Munialo for M/S Arunga for Plaintiff.

Court Clerk: Pauline.

E. OBAGA

JUDGE

19/08/2013