REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Environmental & Land Case 146 of 2007

GABRIEL NGARUIYA MWANIKI..PLAINTIFF

VERSUS

JOSEPH WAITIRUKA KAMAU ALIAS JOSEPH NGOCHI MWANIKI..........................DEFENDANT

RULING

1. This is the defendant's notice of motion dated 10th May 2011. The applicant prays for review of the judgment dated 25th January 2011. He seeks an amendment to incorporate into the decree an order in favour of the applicant as prayed in a suit in the subordinate court, civil suit 398 of 2007 at Thika. The latter suit was transferred and consolidated with this suit. The court in the impugned judgment dismissed the respondent's suit with costs. The applicant contends that there is an apparent error because the court did not address the claims in the suit at the subordinate court. In a synopsis, the applicant prays for judgment in terms of his prayers in the subordinate court.

2. The plaintiff contests the motion. There are grounds of opposition and a replying affidavit dated 14th June 2011. The pith of the objection is that the nature of review sought is so extensive and far reaching as to require the hearing to start *de novo.* The plaintiff contends that it does not amount to an error on the face of the record. It was submitted that the amendments sought to the decree are beyond the scope of order 45 of the Civil Procedure Rules or section 99 of the Civil Procedure Act. The gist of the entire objection is that the application is fatally flawed and should be dismissed.

3. I have heard the rival submissions. I take the following view of the matter. The present suit was instituted by a plaint dated 21st May 2007 and filed on 5th June 2007. The defendant in this suit had instituted other proceedings in the subordinate court at Thika on 26th April 2007 in CMCC 398 of 1997 Joseph *Waitiruka Kamau Vs Gabriel Ngaruiya Mwaniki*. Those are the same parties in this suit. The suit in the subordinate court prayed for 3 reliefs;

*a) **THAT** the defendant and/or his agents be forcefully evicted from land parcel Number Ngenda/Nyamangara/883.*

*b) **THAT** the defendant by himself, his agents, servants, employees and/or any other person claiming for and/or on his behalf be permanently restrained by an order of injunction from interfering with the plaintiff's possession to, enjoyment and/or in any other manner Plaintiff's quiet use of Land parcel Number Ngenda/Nyamangara/883.*

c) ***THAT*** *the plaintiff be granted costs of the suit with interest thereof.*

Prayer (a) in the suit at the High Court sought declarations relating to the same land, Ngenda/Nyamangara/883. It is common ground that on 1st November 2007, the High Court transferred and consolidated the two suits for trial at the High Court. Some interim orders granted in the subordinate court were to remain in force. The trial proceeded on 22nd November 2010 before the Honourable Justice Muchelule. On 25th January 2011 judgment was made in the following terms:

1. **THAT** the defendant is the absolute owner of the two parcels in respect of which he is registered.

2. ***THAT*** *the plaintiff's suit be and is hereby dismissed.*

3. ***THAT*** *the plaintiff do pay the defendant's costs.*

The applicant's position is that the judgment was devoted entirely to the plaintiff's suit at the High Court. There was no consideration of the defendant's claim comprised in the subordinate court. By dismissing the plaintiff's suit, the court left the defendant's claims unheard and determined. That, the applicant contends, is an error on the face of the record capable of review. In the alternative, he prays that the decree be rectified under section 99 of the Civil Procedure Act.

4. Section 80 of the Civil Procedure Act reads as follows;

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(1) is *pari materia* with section 80 and provides;

1. (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 mater 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.

From a plain and natural meaning of the words of the law, an application for review is open to a person aggrieved by a decree of this court and who is entitled to an appeal to the Court of Appeal but has not preferred such appeal or who holds a decree or order from which no appeal is allowed by the Act. It is thus a unique and special power of this court. For an application for review to succeed, it must be brought without delay, it must be on the basis of either new and important evidence not available at the time of trial, or on account of mistake or error on the face of the record, or for other sufficient cause. Those are the parameters set by the authorities. And the authorities abound including Origo & another Vs Mungala [2005] 2 KLR 307, Kisya Investments Ltd Vs Attorney General and another Civil Appeal No 31 of 1995 (unreported), Refrigeration Contractors Ltd Vs Lieta [2005] KLR 506, Kuria Vs Shah [1990] KLR 316 and M'Anthaka M'Mwoga Vs M'Boore [2006] e KLR.

5. Section 99 of the Civil Procedure Act on the other hand provides:

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties”.

Section 99 would be an inappropriate platform for the detailed review sought by the applicant. That section is devoted to clerical and arithmetical mistakes or minor errors or slips in a judgment or decree.

6. I agree with the applicant that there is an error apparent on the face of the judgment. Since the suits had been consolidated, the defendant, being the plaintiff in the subordinate court, should have been granted a clear relief. I disagree with the plaintiff that this cannot be corrected by review or that the matter must be heard *de novo*. The motion for review has been brought without undue delay. I have said that it is clear there is an error on the face of the record. The applicant has then met the threshold for grant of orders of review under section 80 of the Act and order 45 of the Civil Procedure Rules. The suit does not require to be heard afresh. The applicant’s prayers can be accommodated by a logical and straightforward review: the applicant was declared the lawful proprietor; the suit against the present plaintiff having been dismissed, it followed as a corollary, that the court should have expressly ordered that the plaintiff be evicted from the property known as Ngenda/Nyamangara/883; and a permanent injunction issued to restrain him from entering the land. That was the net effect of the dismissal order. I say so because the plaintiff in the suit had sought a declaration that he owns Ngenda/Nyamangara/883. That claim was dismissed. The applicant instead was held to be the owner. In the subordinate court, the present defendant had sought a similar declaration and an injunction. The plaintiff having lost his claim, he can no longer cling onto the land.

7. Furthermore, this court is now enjoined by articles 50 and 159 of the Constitution as well as sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. The overriding objective of the court is to utilize existing judicial and administrative resources in an efficient manner. The two suits had been consolidated to expedite justice. Evidence was led by all the parties. Judgment was delivered but fell slightly short of ring fencing the interests of the applicant pleaded in the suit in the subordinate court. Those interests can be incorporated in the judgment by review as there is a clear error on the face of the record. The order of review will bring an early closure to this old suit.

8. In the result and for all the above reasons I shall review the judgment and decree given on 25th January 2011 in the following terms:

a) That the plaintiff’s suit be and is hereby dismissed.

b) That the defendant is the absolute owner of the two parcels in respect of which he is registered.

c) That the plaintiff shall vacate forthwith the parcel of land known as Ngenda/Nyamangara/883. In default, the defendant shall be at liberty to forcefully evict him.

d) That the plaintiff, his servants, agents or employees or howsoever be and is hereby restrained by a permanent injunction from interfering with the defendant’s use or quiet possession of the parcel of land known as Ngenda/Nyamangara/883.

e) That the plaintiff do pay the defendants’ costs of this suit to be taxed and certified by the Taxing Officer.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 31st day of July 2012

G.K. KIMONDO

JUDGE

<u>Ruling read in open court in the presence of</u>

Mr. K. Njau for Ngugi for the Plaintiff/Respondent.

Mr. Kivuva for Mabili for the Defendant/Applicant