REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(*Coram: Ojwang, J.*)

CIVIL SUIT NO. 395 OF 1997

IKERE GITAU.....PLAINTIFF/ RESPONDENT

-VERSUS-

KAMAU TICHU.....DEFENDANT/ APPLICANT

RULING

After hearing the main cause, while serving at the High Court in Nairobi, I wrote the Judgment after being re-assigned duty at the Mombasa Station; and the Judgment was delivered on my behalf by the ***Hon. Lady Justice Okwengu*** in Nairobi, on ***14th July, 2010.***

In the said Judgment, I had reviewed all the evidence, and decreed as follows:

"(1) An Order for *eviction* ***shall issue against the defendant who shall be removed from L.R. No. Nyandarua/South Kinangop/431; to that intent, the Officer Commanding the Police Station in the South Kinangop area shall provide security and manage the said eviction process in an effective manner; and the Commissioner of Lands shall arrange, on the set occasion, for the District Land Surveyor with responsibility over the South Kinangop area, to be present with his or her team and to indicate the beacons separating L.R. No. Nyandarua/South Kinangop/431 from L.R. No. Nyandarua/South Kinangop/430.***

"(2) The defendant shall pay to the plaintiff *general damages* ***for wrongful entry and violation of property rights, in the sum of Kenya Shillings Five Hundred Thousand (Kshs.500,000/-).***

"(3) The defendant shall pay *mesne profits* ***to the plaintiff; the exact amount shall be determined and fixed by the Deputy Registrar in the Civil Division of the High Court, on the basis of the following***

principle: Kshs. Eight Thousand (8,000/-) per acre, for 30 acres, for 19 years – and this amount shall be paid with interest at Court rate, as from the date of this Judgment until payment in full.

"(4) The defendant shall bear the plaintiff's *costs* ***in this suit, with interest at Court rate, as from the date of filing suit, until payment in full".***

After the Judgment was delivered, the defendant filed an application, by Notice of Motion dated ***3rd August, 2010***, seeking certain Orders, as follows:

"a) THAT, there be and is hereby granted an Order for stay of execution of the Judgment of Honourable *Justice J.B. Ojwang* ***made on*** *14th July, 2010* ***pending the*** *inter partes* ***hearing of this application.***

"(b) THAT, the Judgment and Orders of Honourable *Justice J.B. Ojwang* ***of*** *14th July, 2010* ***be and are hereby reviewed, varied and/or set aside."***

The application is based on the following grounds:

(i) that, the defendant/applicant, on *19th November, 2001* ***filed an application seeking to amend his defence;***

(ii) that, the said application dated *19th November, 2001* ***and filed on the same day has not been heard and determined;***

(iii) that, to the said application dated *19th November, 2001* ***the defendant/applicant had annexed a copy of his draft statement of defence which included a counterclaim;***

(iv) that, the conclusion of this matter without considering the defendant's/applicant's application which is still pending before the Court is a travesty of justice;

(v) that it is only fair, just and equitable that this Court's Judgment of *14th July, 2010* ***be reviewed and/or set aside and a proper decision is made on the pending application dated*** *19th November, 2001***.**

In support of the application is the applicant's affidavit sworn on ***3rd August, 2010***, in which, among other things, he deposes as follows:

(a) when this case began, the deponent was represented by the firm, M/s Nyamogo & Nyamogo, Advocates;

(b) the said Advocates did file and serve a defence;

(c) thereafter, the defendant instructed the firm of M/s Khaminwa & Khaminwa, Advocates;

(d) the new Advocates found that the statement of defence required amendment;

(e) the defendant's new Advocates "did file an application dated 19th November, 2001 seeking to amend [the] defence and include a counterclaim"; and to the said application was attached a copy of the draft amended statement of defence;

(f) the deponent believes to be true the advice of his current Advocates, M/s B.G. Njugi & Co; Advocates, that the previous advocates *had supposed* ***that the said application to amend defence had been granted and, on that basis, had taken certain pre-trial steps, such as: receiving a statement of trial issues from the plaintiff (on*** *3rd December, 2003****); filing an amended statement of issues on*** *12th March, 2004* ***and serving the same on the plaintiff's Advocate on*** *23rd March, 2001****[?]; filing the defendant's bundle of documents on*** *14th May, 2004****;***

(g) the deponent avers: "I am advised by my Advocates on record, specifically *Mr. Njugi B. Gachogu****, which advice I verily believe to be true that, on perusal of the Court file herein*** *he formed the incontrovertible opinion* ***that the said application to amend defence together with the draft amended defence annexed thereto had been duly served on the plaintiff's counsel";***

(h) the deponent avers: "*I am advised by my present Advocates on record, which advice I verily believe to be true, that, based on his perusal of the Court record herein he* ***formed the opinion*** *that the plaintiff/respondent was well aware at all material times of the existence of the draft amended statement of defence and could not have suffered any prejudice at all****";***

(i) the deponent deposes that *his current Advocate believes to be true a representation from a previous Advocate* ***– and so he, the deponent, too,*** *believes the same to be true* ***– that "when this matter came up for hearing on*** *21st April, 2005* ***on instructions from my then Advocates …, he did point out to the Court that the said application dated*** *19th November, 2001* ***was still pending before the Honourable Court and he requested that it be heard before the matter could proceed to hearing";***

(j) the deponent avers: "I am further advised by my Advocates on record, which advice I verily believe to be true, that despite informing the Court of the same, and tendering a copy of the said application both to the Court and the plaintiff's counsel, the Court perused the Court file and informed my said Advocate that there was no such application on file";

(k) the deponent deposes: "THAT subsequent thereto the matter did proceed for hearing and my then Advocates …. *proceeded under the presumption that the said amended statement of defence had been duly filed"****;***

(l) the deponent avers: "THAT pursuant to this state of affairs, the Honourable Court *duly proceeded to write Judgment based on the pleadings that were before it and the evidence adduced by the parties****";***

(m) the deponent avers that he believes it to be true, as he has learnt from his Advocates, that this Court deliberated upon the issues now being raised, and ruled that: "*The justice of the case must come from a hearing of the merits of the main suit* ***….";***

(n) the deponent believes to be true his Advocate's advice, that "though the application dated *19th November, 2001* ***had been duly filed, the Court copy thereof*** *seems to have been misplaced and was not available to the Court at the time when the same was required****";***

(o) the deponent avers that his said application, as advised by his present Advocate, "was very fundamental to my case as it intended to introduce a counterclaim which I have already substantiated by way of evidence before this Honourable Court";

(p) the deponent alludes to the fact of *his case having throughout been conducted by learned counsel****, by thus averring: "though I was represented by able counsel during the hearing of this matter it is clear that the said Advocates made an*** *honest and legitimate mistake****, I believe,*** *in failing to ascertain whether the said application dated 19th November, 2001 had been heard and determined****";***

(q) the deponent further avers: "*as a result of such mistake it appears that this Honourable Court did not consider the issues raised in my amended defence and counterclaim****";***

(r) the deponent believes to be true the advice of his Advocate, that there is justification in the instant application as "an integral part of this Honourable Court's record and ought not to be ignored until a decision is made whether to allow or reject the said application";

(s) the deponent believes to be true the advice of his Advocate that: "*established legal practice is that prior to the hearing of any matter and concluding the same, all interlocutory applications ought to be first heard and determined****"; "****in the instant case, the said application dated* ***19th November, 2001*** *is still pending before this Honourable Court but there is now in place a Judgment delivered on* ***14th July, 2010"; "****this constitutes an error apparent on the face of the record and a sufficient reason to warrant the review and setting aside of the said Judgment****";***

(t) the deponent "*verily [believes] that no prejudice will be caused to any of the parties herein by this Honourable Court granting the ….. application****"; and he exhorts: "****it is fair, just and equitable that time-honoured principles and practices of the law are followed and upheld in all instances****";***

(u) the deponent thus declares his apprehensions: "*in the event that the Judgment dated* ***14th July, 2010*** *is allowed to remain and execution of the same commences it shall be greatly prejudicial to the defendant herein****"***

In the replying affidavit dated ***10th August, 2010*** the plaintiff/decree-holder, who is the respondent herein, averred (for the material part) as follows:

(i) he had not at any time, whether by himself or through his Advocates, been served with the application of *19th November, 2001* ***alleged to have been filed by the defendant/applicant seeking leave for an amendment to pleadings;***

(ii) the deponent avers that he was himself in Court on *21st April, 2005* ***when the issue of a pending application by the defendant came up; and the deponent's advocate,*** *Mr. Mungata,* ***on that occasion confirmed to the Court that he had not been served with the said application, and "****no copy of the application was tendered to the Court or my advocate****";***

(iii) on that occasion, on *21st April, 2005* ***the Court considered the statement made on behalf of the defendant, and "proceeded to pronounce itself on the issue, as the proceedings of*** *21st April, 2005* ***will confirm";***

(iv) on *8th June, 2005* ***when the matter came up for further directions,*** *Ms. Oyangi****, Advocate, who appeared for the defendant, "confirmed to the Court that the application dated*** *19th November, 2001* ***was*** *not on the Court record****";***

(v) on *8th June, 2005* ***the Court "****specifically directed that the case proceeds for further hearing as no pending application had been demonstrated to be on the record"****;***

(vi) the defendant did not challenge the Court's Orders given on *24th April, 2005* ***and*** *8th June, 2005****;***

(vii) the defendant had *not prosecuted the application for 10 years* ***since the same was purportedly filed;***

(viii) the defendant, "*in spite of the numerous occasions on which the issue of the amendment came up, did not seize the opportunity to amend his pleadings****";***

(ix) the deponent believes it to be true, as advised by his Advocate, that "*the [Court] considered and analyzed the merits of all the evidence tendered [by both the plaintiff and the defendant] before arriving at the Judgment****";***

(x) this suit was commenced in *1995****, "****and to allow the application to review or set aside would re-open unfairly this very old matter to [the deponent's] great prejudice****";***

(xi) in contempt of the Judgment and decree, the defendant on *5th August, 2010* ***started cultivating and planting on the deponent's land – thus continuing to exploit the suit land and denying the decree-holder the use thereof".***

Learned counsel ***Mr. Njugi***, who had obviously considered the content of his client's application, and had had the opportunity to read the depositions from both sides, urged before this Court that:

"The gist of the application is that the applicant herein was condemned to a Judgment founded on one finding of this Court which, ***though erroneous***, went on to gravely prejudice the applicant's position in this cause".

Counsel urged that this Court's "***said error ought to be corrected, and that pursuant to such correction, the applicant should be admitted to the position he would have been at, [had] that error not …. been made".***

Mr. Njugi urged that his client's application of ***19th November, 2001*** was on record; and so ***the Court wrongly found*** (pp. 30 – 32 of the Judgment) ***that the application was not on record***.

Counsel submitted that *"the said Judgment must be reviewed and set aside to enable the applicant [to be*

in] the position he would have been at, had this Honourable Court maintained his application in issue as intended".
Mr. Njugi went on to urge:

"Once an error is revealed on its judgment, no sense of shame or infallibility complex should obsess this Honourable Court or dissuade it from the anxiety to be ultimately right, not consistently wrong".

And for that proposition, counsel invoked case authorities: ***Said v. Maitha [2000]*** 2 E.A. 505 (CAK); ***Njoroge & 104 others v. Savings and Loan Kenya Limited & Another*** [1990] KLR78; ***Charles Mwarita Mwangome v. Grace Anyango*** [2010]eKLR.

Counsel moved on to his conclusion, by the following words:

"The upshot of all the foregoing, is that the Court system erred in indicating that the applicant's application was non-existent. Having annexed the same herein, the defendant/applicant ought to be afforded his rightful opportunity, had the aforesaid error not been entered, and that is to file his amended defence and counterclaim. This Honourable Court wished away the defendant's submissions on the ground that they were founded on an imagined amended defence."

Obviously anticipating that a question might arise whether the proper recourse, regarding the Judgment of ***14th July, 2010***, is an ***appeal*** rather than a return to the same Judge who rendered that Judgment, ***Mr. Njugi*** urged:

"This Honourable Court hat unfettered discretion to ensure that its record is not only untainted, but that justice is seen to be done".

Endeavouring to see the guiding principles attributed by counsel to the case - authorities, I find that, in ***Said v. Maitha*** [2000] 2 EA 495 (HCK) he does not extract any fundamental statement of law bearing on this matter, but he marks out the editorial listing of the holdings at the front of the report. Counsel marks out the following listing of holdings (at p. 506):

"*Held* ***– Whilst it is desirable to end any litigation it is equally desirable to allow a party to canvass fully any relevant point he may have on the issues.***

"The Court has inherent power to recall an Order before it is perfected to amend the same to rhyme with the intentions of the Court … The Court ought not to reject an application for review merely because the Applicant may appeal instead …."

Similarly in ***Njoroge & 104 Others v. Savings & Loan Kenya Ltd***[1990] KLR 78, ***Mr. Njugi*** simply marks out the head-note holdings (at p. 79):

"4. A record includes documents which are the basis of the decision as well as the statement of the decision itself.

"5. The Order for injunction affected 309 houses whereas the Court earlier-on reduced the number to 104. This was an error apparent on the face of the record. This Court had jurisdiction and duty to correct this error on a review"

Clearly, the concept of *"error on the face of the record"* which is illustrated by the ***Njoroge Case***, would be something entirely different from counsel's intentions, in respect of this Court's Judgment of ***14th July, 2010.*** Counsel's reference to the High Court's decision (***Omondi, J***) in ***Charles Mwavita Mwangome v. Grace Anyango*** [2010]e KLR confirms that he is relying on the concept of *"error on the face of the record"* in an unusual manner, in respect of the Judgment of ***14th July, 2010***.

Learned counsel, ***Mr. Mung'ata***, for the respondent, submitted that *"the defendant's conduct throughout this suit is that of a party who does not deserve or merit the exercise of the Court's discretion in his favour*"; in particular, counsel contended that: "*The defendant has throughout sought to delay or obstruct the cause of justice herein. His conduct is not as a result of accident or inadvertence, it is deliberate. There is no excusable mistake or error, instead the defendant has continuously and repeatedly demonstrated contempt for the law, rules of procedure …*"

Counsel submitted that what is now before the Court is an application to amend the defence ***after Judgement***, "*poorly disguised as an application for review*".

Counsel questioned the averment that the defendant's application to amend pleadings had been filed in ***November, 2001:*** "***Even if that were so, why has the application not been prosecuted to-date – almost 10years later***?" Counsel urged it to be curious that even with the application now brought before the Court, no attempt has been made to explain the delay. Moreover, counsel urged, the alleged application of ***November, 2001***, even to-date, has never been served upon the plaintiff/decree-holder.

Mr. Mung'ata submitted that when the issue of the said application of ***November, 2001*** was raised in Court, on ***21st April, 2005,*** the matter was ***fully discussed***, as the record for that day shows, and the Court ***made its pronouncement*** on the question. The Court found as a fact, that the said application was ***non-existent***; yet the applicant now says he tendered the application ***on that day***, and that it is ***part of the Court's record*** – something in direct conflict with the finding of the Court.

Counsel urged that on all occasions when the question of the alleged application of ***November, 2001*** had arisen in Court, it had been recorded that ***no such application existed***; but the defendant took ***no steps to either make a fresh application for amendment, or seek the disposal of the alleged application*** – until Judgment was delivered, on ***14th July, 2010***.

Contesting the foundation of the applicant's case, ***Mr. Mung'ata*** raised several questions: if it is true that the defendant filed an application on ***19th November, 2001*** for amendment of the statement of defence, ***why was it not prosecuted until Judgment was delivered in 2010?*** When the Court found that no such application was on the record in ***2005***, ***what action did the defendant take?*** If the defendant desired to amend his pleadings, ***why did he participate fully and without protest, throughout the trial? Whose responsibility was it to pursue the prosecution of the application?***

Counsel submitted that the Court had already pronounced itself on the status of the alleged application of ***November, 2001*** and the matter is ***res judicata***; had the defendant been dissatisfied with the decision of ***21st April, 2005*** he would have challenged it at the appropriate forum.

Counsel submitted that, in the Judgement of ***14th July, 2010 the Court had considered in specific terms***, the status of the alleged application of ***November, 2001*** (at pp. 27 – 33), and the whole question has been ***settled by the Court***.

Of the case - authorities cited by the defendant, ***Mr. Mung'ata*** urged that they *"are irrelevant to the issues herein, and are on that account distinguishable*".

Counsel submitted that the defendant's application *"is no more than of academic value*"; for the Judgment of ***14th July, 2010*** was delivered upon consideration of the ***merits of the case***; and whether or not the defendant had amended his defence and introduced a counterclaim *"did not affect the decision of the Court in any way"; "every piece of evidence tendered by the defendant was examined and considered by the Court"; "no evidence or witness was locked out because of the status of the pleadings on record". The outcome of these labours, counsel urged, "must not be undone by a litigant who has shown little respect for the law and rules of procedure"*.

As already noted, the applicant has not shown the basis of jurisdiction whereupon he moves this Court; although he says he is seeking a ***review***, and expounds on the unlimited powers of the Court to do justice, his legal foundation is that found in case authorities dealing with *"error on the face of the record*". This case, which dates back to the early 1990s, was conducted, throughout, ***in the presence of the parties personally***, and ***their respective counsel***; it was ***fully canvassed*** as desired by counsel; and the ***witnesses were examined***, ***cross-examined*** and ***re-examined***. The ***entire record*** was fully considered, in the preparation of the 40-page Judgment which was duly delivered on ***14th July, 2010***. It is a case heard ***on the merits***, and in respect of which the Court has exercised its ***fullest jurisdiction***. This matter is ***res judicata***, and the applicant, who clearly is questioning the merits of the Judgment, has but one recourse: ***appeal***.

Res Judicata applies, besides, because the specific question raised by the applicant, about a missed interlocutory application, was itself the subject of full inquiry and judicial determination: the effect, in law, being that, that question coalesces into the merits of the case, as fully disposed of in the Judgment of 14th July, 2010. That Judgment cannot be questioned, in its totality, except on appeal.

The issue of an amended defence which is the basis of the application now before me, was extensively dealt with in the proceedings, and resulted in this Court's Rulings, apart from featuring prominently in the Judgment (pp. 27 – 33). Quite clearly, this is a matter in respect of which, this Court has spoken on the merits; and it is not a question to be returned before the same Judge billed as *"error on the face of the record"*.

Lastly, I note that the lengthy supporting affidavit proffered by the applicant, just as counsel for the respondent submits, is not entirely consistent with the factual position as recorded on file; and I must draw the conclusion that the applicant's case is significantly embellished.

I dismiss the Judgement-debtor/applicant's Notice of Motion of ***3rd August, 2010***, with costs to the Decree-holder/respondent.

Orders accordingly.

SIGNED at **MOMBASA**

J. B. OJWANG

JUDGE

DATED and **DELIVERED** at **MOMBASA** this ***15th*** day of ***July, 2011.***

M. A. ODERO

JUDGE