Ngugi v Omongo (Environment & Land Case 216 of 2012)
[2022] KEELC 12576 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12576 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 216 OF 2012

SM KIBUNJA, J

SEPTEMBER 23, 2022

BETWEEN

SAMUEL WAGORO NGUGI .... PLAINTIFF

AND

NICODEMUS HONGO OMONGO .... DEFENDANT

RULING

1. The defendant filed the Amended Notice of Motion dated the March 2, 2022 that has been brought under the provisions of Article 47, 50 and 159(2) (d) of *the Constitution* of Kenya, Sections 1A, 1B, 3, 3A and 80 of the *Civil Procedure Act*; Order 9 Rules 1 to 3, Order 18 Rules 8 & 10, Order 45 & 51 of the *Civil Procedure Rules* 2010 seeking for the following orders;

   a. "Spent.

   b. That the Honourable Court do stay execution of the decree pending setting aside of the Ex-parte Judgment issued on February 9, 2022 and further directions of the Court.

   c. That the Honourable Court do stay execution by eviction pending appeal.

   d. That the Honourable Court be pleased to review, vary or set aside the Judgment delivered on February 9, 2022 and the decree issued in favour of the Plaintiff/Respondent against the Defendant/Applicant, allowing the defendant leave to defend unconditionally.

   e. That the Honourable Court do order the Plaintiff/Respondent and his witness who testified on February 19, 2019, be recalled for cross examination on the date to be determined by this Honourable Court.

   f. That the costs of this application be provided for. "

The application is premised on the twelve (12) grounds on its face and supported by the affidavit sworn by Nicodemus Hongo Omogo, the Defendant, on the March 2, 2022. The defendant contends that his advocate inadvertently failed to diarize the hearing of the February 19, 2019, when the suit was heard and the parties' cases closed in his absence. That he stands to be greatly prejudiced if he is not afforded an opportunity to cross examine the plaintiff and his witness, and to testify in his defence. That it is only fair that the exparte judgement delivered on the February 9, 2019 be reviewed, and he be granted leave to unconditionally defend his claim, as he otherwise stands to suffer irreparably.

2. The application is opposed by the Plaintiff through the replying affidavit sworn by Samuel Wagoro Ngugi on the March 16, 2022 in which he among others deposed that the impugned judgement was inter partes, as the defendant participated in the hearing through cross examining him, was present when the last hearing date was taken, was served with submissions and notice of reading of judgement; that the application is aimed at allowing the defendant continue using the house without paying rent, and that no positive steps have been taken towards appealing the judgement of February 9, 2022 and therefore the stay application should not be granted.

3. Following the courts directions of the March 28, 2022 the learned counsel for the Defendant and plaintiff filed their submissions dated the April 14, 2022 and May 16, 2022 for and against the application respectively.

4. The following issues arise for determination by the court:

    a. Whether the Defendant has satisfied and met the grounds for grant of stay of execution of decree order pending setting aside of the judgment and appeal.

    b. Whether the Defendant has satisfied and met the grounds of review, vary and setting aside of the judgment delivered on February 9, 2022.

    c. Whether the Witness(es) who testified on February 9, 2022 should be recalled for cross examination.

    d. Who bears the costs of the application.

5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by both learned counsel, superior courts decisions relied upon thereon, the record and come to the following determinations:

    a. This suit has been pending for long as it was instituted in the year 2005. As to whether the long wait has been due to the complexity of the suit or the conduct of the litigants, it still remains proverbial. It is clear that the facts culminating to this present application spans back to February 19, 2019, when the Plaintiff witness testified in the absence of the defendant and his counsel. The defence has through the application sought to have the suit reopened, the witness PW3, Land Registrar Uasin Gishu, be recalled for cross examination, review of the *ex-parte* judgment delivered on the February 9, 2022 allow him to tender his defence, and stay of execution pending appeal. It is not disputed that on February 9, 2022 the Court determined the suit through the impugned judgment. The lingering question is whether the said judgment was an *ex-parte* one. The defendant has deposed that the Land Registrar had been stood down on November 12, 2018 and subsequently the hearing fixed for the February 19, 2019. However, his counsel was not in attendance due to inadvertent mistake of failing to diarize the matter. That contention is contested by the plaintiff who has indicated that the defendant had participated in the proceedings, cross examined him and the witness present,

and further took part in the fixing of the last hearing date. That the defendant has not explained the inordinate delay in the filing of the instant application.

b. From the obligatory look of the application, it is not clear whether the defendant has preferred an appeal. However, in the Defendants' submissions, they admit to have withdrawn the appeal dated March 16, 2022 and asked that the court should determine the application on its merit without any due regard to the appeal or prejudice thereto. Therefore what is in contest in this application is whether the Court can grant stay, and if the same have been proved, and stay, vary and review the judgment issued on February 9, 2022, whilst at the same time recalling the Plaintiff witness for cross-examination. The Defendant in his submissions is seeking that the said judgment and decree be stayed, on reason that if enforced he will suffer irreparable loss which may not be recovered by way of damages. And that the plaintiff will not in any way suffer any prejudice. The defendant has cited the following authorities in support of his application; *Tana and Athi Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR; *Murai versus Wainanina*, (No 4) [1982] K.L.R; *Harrison Wanjohi Wambugu Versus Felista Wairimu Chege & Another* [2013] eKLR; *Grindlays Bank International (K) Ltd Versus George Barboor* (Civil Application No Nai.257 of 1995); *Philip Chemwolo & Another versus Augustine Kuhede* [1982-88] KAR103 at 1040; *Richard Ncharpi Leiyagu versus IEBC and 2others* [2013]eKLR amongst a plethora of other authorities.

c. The Plaintiff submitted that the application in question is devoid of merit and should be dismissed with costs. That the defendant has not explained his non-attendance on the hearing date, and the judgment issued should not be set aside. He cited the cases of *James Mogunde versus Faulu Microfinance Bank Limited* (2022) EKLR and *Shah V Mbogo* 1967(EA) in opposition of the application.

d. To start with, the question as to whether the impugned judgement is an exparte or a regular judgment must be determined first. The issue of regular judgment was addressed in the case of *Mwala -v- Kenya Bureau of Standards* EA LR (2001) 1 EA 148, where the court stated that;

> " to all that, I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record, but the same was in inadvertently overlooked, the same ought to be set aside not as a matter of discretion, but ex debit justiciae for a court should never countenance an irregular judgment on its record".

The record herein confirms that the defendant participated in the court processes and proceedings up to the November 12, 2018, when the suit was fixed for hearing on the February 19, 2019, which date he alleges his counsel failed to diarize, and which date the testimonies of PW1, the plaintiff, and PW2 were taken. The failure by counsel for the defendant to diarize the hearing of the February 19, 2019 and to notify his client to attend court cannot in any way be blamed on the plaintiff. It probably may amount to negligence on the part of the counsel and the defendant is not without recourse should he decide to seek redress, but that is against his advocate. The foregoing leads the court to find that the judgement delivered on the February 9, 2022 was not an exparte, or irregular one, but a regular judgement.

f. The defendant has sought orders of stay of execution by eviction pending setting aside of the judgment and pending appeal. It is noteworthy that the defendant had filed a Notice of Appeal dated the February 9, 2022 that was subsequently withdrawn vide the "Notice to Withdrawal Notice of Appeal" dated the March 16, 2021. That fact alone leads the court to the finding that prayer (c) which was for "stay of execution by eviction pending appeal" is spent or abandoned. On the issue of whether stay of execution of the decree arising from the judgment delivered on the February 9, 2022 pending the setting aside and further directions of this court should issue as prayed, the applicable provision of law is Order 42 Rule 6 of the *Civil Procedure Rules* 2010. That Rule provides as follows:

6.(1) "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

The conditions laid down by the above provision, are clear that the defendant, as the applicant, must satisfy the court that there exists a sufficient cause to grant a stay. The two conditions under Order 42 Rule 6 which must be considered are first, whether the court is satisfied that the defendant will suffer substantial loss if the orders are not made; and secondly, whether the defendant is willing to give such security for the due performance of the decree or order in issue, as may ultimately be binding or him. The defendant has submitted that he has indeed demonstrated that substantial loss will occasion if the orders sought are not granted, as he stands to suffer irreparable loss and damages. The court has noted that though the defendant has indeed claimed that he will suffer substantial loss, he has failed to demonstrate and particularize the nature of the substantial loss, or show how execution of the judgment or decree thereof will result to irreparable loss and damages. It is not sufficient for the defendant to only state that substantial loss will be incurred and on that note, I find he has failed to prove this requirement, as in the case of Charles *Wahome Gethi vs. Angela Wairimu Gethi* [2008] eKLR, the Court of Appeal held that;

> " ... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them."

g. On the second requirement as to security, I take note of the court's disposition in [*Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another*] [2018] eKLR, where it was stated that:

> "Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay."

In this matter, the defendant has neither deposited nor expressed any willingness or intention to provide any security for the due performance of the decree with the court, and has therefore failed to meet this condition. The defendant has therefore failed to meet the above two conditions that are a precondition to be satisfied for an applicant to be considered for the orders of the nature he seeks.

h. The Defendant has also relied on section 80 of the [*Civil Procedure Act*] and Order 45 of the Civil Procedure Rules. Section 80(1)(b) of the [*Civil Procedure Act*] provides:

> "Any person who considers himself aggrieved –

a) by a decree or order from which an appeal is allowed this by this Act, 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 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, 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."

Auxiliary, Order 45 Rule 1 of the *Civil Procedure Rules* operationalizes the above section. It also confers jurisdiction for review of orders that are appealable. As earlier found, an appeal had been initiated by the defendant, but it was later withdrawn, and therefore there is no pending appeal in the matter before the court. I associate myself with the findings of the court in *Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR it was held:

> "Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

The Court in interpreting the above provisions in *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018, developed and enumerated the following principles from a number of authorities:

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is *prima-facie* visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

The above provisions of the law and Superior Courts decisions clearly shows that the power to order a review is an exercise of unfettered discretions by the court, and it should only be limited to the mentioned grounds in Order 45 Rule 1. I have keenly studied the defendant's application and it is clear that there is no discovery of new evidence or mistake evident from the face of record. Also, there is no sufficient cause shown to warrant the review of the orders issued

on February 9, 2022. I therefore find no sufficient ground for review and thus this application for review and setting aside of the said orders is bound to fail.

i. On whether the witness who testified on the February 19, 2019 should be recalled for cross-examination by the defendant, who has failed to satisfy the court with any sufficient reason to warrant an order of review, and the court having pronounced itself with finality in its judgement of February 9, 2022, that prayer is equally defeated. As a caution to creative litigants who may wish to apply for a review as an avenue of either variation of orders or reopening a case, the courts will always frown at such practice which is otherwise mischievous and an abuse of court process. In the reputed case of *Mcfoy Limited Vs Africa Co. Ltd*. (1961) 3 AII E.R. 1169 at 1172 the court stated that;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside ---- you cannot put something on nothing and expect it to stay there."

Similarly, in the case of *Evan Bwire V Andrew Aginda* Civil Appeal No. 147 of 2006 cited with approval the case of *Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers* (2016) eKLR the Court of Appeal held as follows:

> " An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence."
>
> The present application, which is multifaceted, and seeking each and every possible order, falls under the above category. The effect of allowing it would amount to re-opening the case afresh. Litigation must come to an end. Parties must approach the courts with clean hands and present all the evidence with precision and specificity of pleading. What is demonstrated by the amended application is what is akin to a prism, a pleading that is omnibus and seeks to attract orders from every angle of reflection.

j. I have carefully considered the application and the evidence tendered as well as the submissions of the parties on the issue, and I am not satisfied that the elements for grant of orders of stay of execution pending setting aside judgment, review and recall a witness for cross examination have been met. That being the case, the defendant has failed to prove any sufficient cause to warrant any of the orders sought being issued in his favour. Further, it is clear that the judgment delivered on the February 9, 2022 is a regular and proper judgment and not exparte.

6. In view of the foregoing determinations, the court orders as follows;

a. Thatthe defendant's application dated the March 2, 2022 is devoid of merit, and is therefore dismissed in its entirety.

b. That costs of the application to the plaintiff.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 23rd DAY OF SEPTEMBER, 2022

S. M. KIBUNJA, J.

ENVIRONMENT & LAND COURT – ELDORET

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF: Absent..

DEFENDANT: Absent..

COUNSEL: Absent..

COURT ASSISTANT: ONIALA

S. M. Kibunja, J.

Environment & Land Court - Eldoret