



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU
CIVIL SUIT 13 OF 1997

JULIUS MUTUMA PLAINTIFF

VERSUS

STANELY MBOGORI 1ST DEFENDANT

MUTWIRI M'ARIMI 2ND DEFENDANT

RULING

The applicant in this Notice of Motion is seeking a review of this court's judgment delivered on 19th April, 2001. He is also seeking that upon such review Judgment be entered in terms of the counter claim as pleaded.

The application is based on the grounds that upon the plaintiff's suit being dismissed the court inadvertently omitted to enter judgment for the defendant as prayed in the counter-claim. The brief background to this matter can be stated as follows. In 1991 the plaintiff in the main suit brought an action against two defendants claiming that he is the registered owner of parcel of land known as Nyaki/Giaki/872 (suit land) and that the defendants have occupied the suit land without his consent.

He therefore sought the eviction of the defendants from the suit land. He also prayed for costs and interest. The defendants filed their statements of defence. The 2nd defendant also counter-claimed for a declaration that the plaintiff is registered as the proprietor of the suit land to hold the same in trust for him. He also sought an order directed to the plaintiff to take steps in executing necessary documents required for the transfer of the suit land.

The plaintiff filed a reply to the 2nd defendant's defence and counter-claim in which he denied that he was a trustee of the 2nd defendant. The suit was heard and judgment delivered by Tuiyot, J on 19th April, 2001.

In his judgment the learned Judge found that the 2nd defendant was already in possession of the suit land when the plaintiff was registered as a proprietor. Consequently he dismissed the plaintiff's suit with costs to the defendants, saying nothing about the 2nd defendant's counter-claim. It is clear from the record that the original file disappeared and the court (Sitati, J) on 16th June, 2005 ordered for the reconstruction of the present file. Save for the pleadings, submissions and judgment, the file does not contain proceedings of the trial before Tuiyot, J.

The application before me is said to be brought under Sections 80 and 100 of the Civil Procedure Act

(erroneously referred to as Rules) and Sections 3 and 3A of the Civil Procedure Act. Section 100 which deals with general powers of the court to amend any error or defect in the proceedings for purpose of determining the real question in a dispute is clearly not applicable.

Section 80 is the substantive provision donating powers to the court to review any decree or order.

It provides:

“80. 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 44 Rule 1 of the Civil Procedure Rules provides for the parameter for consideration of an application for review. A review, according to this Rule, will only be ordered

- (a) *where the applicant discovers a new and important matter; or*
- (b) *on account of some mistake or error apparent on the face of the record; or*
- (c) *for any other sufficient reason.*

It is not clear under what limb this application is premised. I suppose that by stating that “*the court, by mistake of omission or commission, did not, inadvertently, enter judgment for the defendant in terms of the counter-claim*”, the applicant is suggesting that there is a mistake or error apparent on the face of the record.

The mistakes or errors envisaged by this provision is those that are obvious clerical or arithmetical errors. The situation in this matter is different. The Learned Judge made no decision regarding the defendant’s counter-claim. He did not dismiss it neither did he allow it.

Without the proceedings recorded at the trial it is not clear what evidence the 2nd defendant adduced in support of his claim against the plaintiff and the latter’s case in respect of the same.

Section 19 of the Civil Procedure Act stipulates that-

“19. *Every suit shall be instituted in such manner as may be prescribed by rules*”

Order 8 rule 2 provides that in a suit a defendant can set up a right or claim against the plaintiff by way of a counter-claim. A counter-claim is therefore a cross action and although brought in a suit, is a separate action capable of being pursued independently of the main suit.

Order 8 Rule 12 shows this independence. It states:-

“12. *If in any case in which the defendant sets up a counter-claim the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nonetheless be proceeded with.*”

In my view, this is the course which was open to the 2nd defendant. Not even the last limb of Order 44 rule 1 which allows review for “any other sufficient reason” can salvage this situation as this is not a matter for review as I have held.

If the proceedings recorded at the trial were available, my task would have been to simply decide on the

evidence adduced. Unfortunately that is not the case.

For these reasons this application is dismissed. I make no orders as to costs.

DATED AND DELIVERED AT MERU THIS 15th DAY OF JUNE, 2007

W. OUKO

JUDGE