China Bente Industry (K) Limited v Komen & another (Environment & Land Case 358 of 2019) [2022] KEELC 15387 (KLR) (21 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15387 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 358 OF 2019

JO MBOYA, J

NOVEMBER 21, 2022

BETWEEN

CHINA BENTE INDUSTRY (K) LIMITED ..... PLAINTIFF

AND

SELINE J. KOMEN ..... 1ST DEFENDANT

LANDEX GROUP LIMITED ..... 2ND DEFENDANT

RULING

Introduction and Background

1. Vide Notice of Motion Application dated the October 7, 2022, the Plaintiff/Applicant herein has approached the Honourable court seeking for the following Reliefs;

   i. .....Spent.

   ii. That this Honourable court be pleased to Review, Set aside and/or Vary the orders issued on the September 21, 2022, pending the hearing and determination of this Application.

   iii. That the Honourable Court be pleased to Review, Set aside and/or Vary the orders issued on the September 21, 2022 and issue an order to reinstate this suit for full hearing.

   iv. That the Costs of this Application be provided for.

2. The subject Application is premised and anchored on the basis of various, albeit numerous grounds enumerated at the foot of the Application.

3. Additionally, the subject Application is supported by the affidavit of one, namely Tao Lang, sworn on the October 7, 2022 and to which the Applicant has attached/annexed a copy of the order issued by the court on September 21, 2022.

4. Despite being served with the Application under reference, the Defendant/Respondent neither filed a Replying Affidavit nor Grounds of opposition.

5. Be that as it may, the Application herein came up for hearing on October 31, 2022 and same was canvassed and disposed of by way of oral submissions.

Submissions By The Parties:

a. Plaintiff's/Applicant's Submissions:

6. During the hearing of the subject Application, learned counsel for the Plaintiff/Applicant submitted that though the suit was dismissed for want of prosecution pursuant to and in line with the provisions of Order 17 Rule 4 of the *Civil Procedure Rules, 2010*, the Honourable court is still seized of the requisite Jurisdiction to reinstate and restore the suit for hearing and determination on merits.

7. Secondly, counsel for the Plaintiff/Applicant also submitted that the Application herein is not only for setting aside of the impugned orders, but same also seeks an order for review pursuant to the provisions of Order 45 of the *Civil Procedures, 2010*.

8. In this regard, counsel added that when the suit was dismissed for want of prosecution, same was not seized or in possession of some critical information, which was relevant to the determination of the said suit.

9. Owing to the foregoing, counsel has further submitted that the Applicant has established a suitable basis to warrant the grant of an order for review.

10. Thirdly, counsel laid emphasis that the reason why the Plaintiff's witness was not able to attend court and give evidence, was because the witness had a domestic emergency. For clarity, counsel added that the witness's son was taken ill and therefore needed medical attention.

11. Fourthly, counsel has submitted that the Honourable court herein should be geared towards hearing and determining matters on merit as opposed to the invocation and reliance on technical grounds.

12. Premised on the foregoing, learned counsel for the Plaintiff/Applicant implored the court to find and hold that the Plaintiff/Applicant has established sufficient cause to warrant the grant of the Application.

b. Defendants/Respondents Submissions:

13. Counsel for the defendant/respondent acknowledged and admitted that same had neither filed a replying affidavit nor grounds of opposition in respect of the suit.

14. However, the counsel stated that same would be raising submissions and relying on issues of law.

15. First and foremost, counsel for the defendant submitted that when the suit came up for hearing, the Plaintiff sought for an adjournment but same was heard and dismissed.

16. Besides, counsel added that upon the dismissal of the Application for adjournment, the honourable court directed the plaintiff/applicant to call her witness and tender evidence.

17. Nevertheless, it has been submitted that despite being granted the requisite opportunity and latitude to tender evidence, the plaintiff/applicant did not tender any evidence or at all.

18. Based on the foregoing, counsel therefore contended that the honourable court was left with no alternative but to dismiss the suit for want of prosecution.

19. Secondly, counsel submitted that having dismissed the suit for want of prosecution, this court is therefore devoid and bereft of jurisdiction to review or set aside the impugned orders.

20. Thirdly, counsel submitted that the dismissal of the Plaintiff's/Applicant's suit on the basis of want of prosecution, constitutes a final Judgment in favor of the Defendants. Consequently, counsel contended that such a Judgment can only be appealed against and not otherwise.

21. Fourthly, counsel submitted that the issue that the witness who was to testify on behalf of the Plaintiff/ Applicant had an emergency was raised, canvassed and deliberated upon by the court on the September 21, 2022.

22. In the premises, counsel has added that having deliberated upon the named issue, same cannot now be agitated as a basis for review, either in the manner ventilated or at all.

23. Fifthly, counsel for the Defendants/Respondents has submitted that even if the issue of the domestic emergency, including the son of the witness suffering from a medical issue had not been dealt with, no evidence was placed before the court to attest to such a claim.

24. In this respect, counsel added that it behooved the Plaintiff/Applicant to even attach or exhibit evidence of medical treatment or hospitalization, if any. However, it was pointed out that no such evidence has been tendered or adduced.

25. Finally, counsel for the defendant/respondent submitted that the plaintiff/applicant has not established or pointed out any error or mistake on the face of record to warrant the grant of an order for review.

26. In the premises, counsel for the Defendant/ has therefore contended that the impugned Application is misconceived and otherwise legally untenable.

ISSUES FOR DETERMINATION:

27. Having reviewed the notice of motion application dated the October 7, 2022 and the supporting affidavit thereto and having similarly considered the oral submissions that were tendered on behalf of the Parties, the following are the pertinent issues that arise and are thus worthy of determination:

    i. Whether the Honourable court is seized and possessed of the requisite Jurisdiction to set aside the dismissal orders made pursuant to the provisions of Order 17 Rule 4 of the *Civil Procedure Rules 2010*?

    ii. Whether the Application for Review has met and satisfied the requisite Grounds enumerated under Order 45 of the *Civil Procedure Rules 2010*?

Analysis And Determination

Issue Number 1

Whether the honourable court is seized and possessed of the requisite J urisdiction to set aside the dismissal orders made pursuant to the provisions of Order 17 Rule 4 of the *Civil Procedure Rules 2010*.

28. Before venturing to address and deliberate upon the first issue herein, it is appropriate to provide and supply a brief background culminating into the dismissal of the subject suit.

29. Suffice it to point out that the subject matter was fixed and listed for hearing on the September 21, 2022.

30. However, when the matter herein was called out, counsel for the Plaintiff/Applicant indicated that same would not be ready to proceed with the scheduled hearing.

31. In particular, counsel for the plaintiff/applicant applied for an adjournment on the reason and basis that the Plaintiff's witness had experienced a domestic emergency issue and because of the said emergency, the witness was not capable of attending court.

32. Be that as it may, counsel for the plaintiff/applicant contended that the details of the domestic/family emergency issue had not been disseminated or conveyed unto him.

33. On the other hand, having entertained the Application for adjournment, the court was not convinced that a credible and sufficient basis had been established and laid before the court to warrant the adjournment.

34. Consequently, the court rendered a ruling, whereby the application for adjournment was declined and dismissed.

35. Subsequently, the court invited counsel for the Plaintiff to proceed with the scheduled hearing and in this regard, counsel for the Plaintiff reverted back and stated that same was still keen to implore the court to grant the adjournment.

36. Noting that the Plaintiff had been afforded the requisite opportunity and latitude to tender evidence and given that no evidence was forthcoming, the court proceeded to and dismissed the suit for want of prosecution.

37. For coherence, the court was explicit that the dismissal of the suit was premised and anchored on the basis of Order 17 Rule 4 of the *Civil Procedure Rules 2010*.

38. In view of the foregoing, the plaintiff/applicant has now reverted to court and same seeks to have the dismissal orders to be set aside and/or varied.

39. On the other hand, the plaintiff/applicant has also invited the court to reinstate and restore the subject suit for hearing and determination on the merits.

40. Premised on the foregoing, the question that arises is whether this Honourable court is seized and possessed of the requisite Jurisdiction to vary or set aside the impugned dismissal orders.

41. The starting point to interrogating the question of Jurisdiction would be to appreciate the legal meaning, import and tenor of a dismissal order pursuant to Order 17 Rule 4 of the *Civil Procedure Rules, 2010*.

42. In this regard, it is imperative to note that the dismissal of the suit constitutes and amounts to a Judgment in favor of the defendants/respondents.

43. Secondly, it is also important to recall that the impugned dismissal was made and taken in the presence of counsel for the plaintiff/applicant.

44. To the extent that the dismissal was made and/or taken in the presence of counsel for the plaintiff/applicant, it is therefore trite and established that the impugned dismissal was an inter-partes decision.

45. Given that the decision/dismissal was *inter-parties* in nature, it therefore means that the resultant Judgment was indeed a final judgment and thus not capable of being set aside or varied by the same court.

46. As pertains to the fact that a dismissal of a suit denotes a Judgment for the defendant, it is appropriate to take cognizance of the holding in the case of *Njue Ngai v Ephantus Njiru Ngai & Another* (2016) eKLR, where the Honourable Court of Appeal stated and observed as hereunder;

> " Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of *Peter Ngome v Plantex Company Limited* [1983] eKLR stating:-
>
> Rule 4(1) does not say "judgment shall be entered for the defendant or against the plaintiff". It uses the word "dismissed". The *Civil Procedure Act* does not define the word "judgment". According to *Jowitt's Dictionary of English Law* 2nd ed p 1025:
>
> Judgement is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several."
>
> *Mulla's Indian Civil Procedure Code*, 13th Ed Vol 1 p 798 says: "Judgment" means the statement given by the judge on the grounds of a decree or order," "Judgment – in England, the word judgment is generally used in the same sense as decree in this code".
>
> In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order 1XB or under any other provision of law. A dismissal of a suit, under Rule 4(1) is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order 1XB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order 1XB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8". [Emphasis added]

47. Other than the foregoing, by dint of the dismissal having been made or taken inter-parties, can the Honourable court re-visit the subject matter and purport to restore or reinstate same?

48. In my considered view, any attempt to reinstate or restore the suit (sic) for hearing and determination on merits, shall amount to sitting on appeal over and in respect of own decision.

49. Clearly, such an approach is contrary to and in contravention of the established practice of the law. Consequently, such an invite must be deprecated and frowned upon.

50. Nevertheless, I must point out that this very court has hitherto pronounced itself on a similar situation and the court found and held that same would be devoid and divested of Jurisdiction in such situation,

51. To this end, it suffices to revisit the holding of the court in the case of *Homeboyz Entertainment Limited versus Secretary National Building Inspectorate & 2 others* [2022] eKLR, where the court stated as hereunder;

> 'My reading of the foregoing provision of the law [Order 17 Rule 4 of the *Civil Procedure rules, 2010*], suggest and/or connotes that where a Party has been afforded and/or availed sufficient and/or reasonable opportunity to tender evidence, but same has failed to do so,

> the court is at liberty to determine the suit forthwith. It is apparent, that by the usage of the Word; by determining the suit, the court is granted the liberty to either enter judgment, where there is a limb of the claim that is admitted by the adverse party or better still dismiss the suit as against the defendant. Nevertheless, it is imperative to note that even where the suit is dismissed for want of prosecution, such a dismissal constitutes or amounts to a judgment in favour of the defendant.
>
> Whereas, a dismissal which is done in the absence of the Parties or one of the Parties, is amenable to be set aside pursuant to an application under Order 12 Rule 7 of the *Civil Procedure Rules 2010*, a dismissal for want of prosecution, made and/or undertaken in the presence of the Parties leads to an Inter-Partes judgment, in the nature of a dismissal and same does not lend itself to setting aside. In the circumstances, it is my humble position that having entertained arguments from both the Plaintiffs and the defendants, on the December 16, 2021, the resultant decision is one that can only be appealed against and not otherwise.

52. In my respectful and considered view, the finding and holdings in the decision alluded to in the preceding paragraphs still holds sway.

53. In a nutshell, I reiterate that having dismissed the suit for want of prosecution under the Provisions of Order 17 Rule 4 of the *Civil Procedure Rules 2010*, this Honourable court is devoid and bereft of jurisdiction to entertain the instant application.

Issue Number 2

Whether the application for review has met and satisfied the requisite grounds enumerated under Order 45 of the *Civil Procedure Rules 2010*.

54. On the other hand, the Plaintiff/Applicant has also invoked and relied on the provisions of Order 45 of the *Civil Procedure Rules* and sought to have the impugned orders reviewed.

55. First and foremost, it is imperative to state and observe that any claimant who seeks to partake of an order for review, must establish and satisfy the requisite conditions that have been delineated under the provisions of Order 45 of the *Civil Procedure Rules 2010*.

56. However, before endeavoring to satisfy and prove either of the named conditions provided under Order 45 of the *Civil procedure Rules*, the claimant must no doubt isolate, itemize and highlight the requisite grounds upon which the application is premised.

57. Put differently, it behooves the applicant to state and highlight that the application for review is either based on one or all the grounds alluded to under Order 45 of the *Civil Procedure Rules* and if so, to implead the named grounds.

58. Notwithstanding the foregoing, though the Applicant herein seeks an order for review, same has however failed to isolate, highlight and implead any of the grounds stipulated under the provisions of Order 45 of the *Civil Procedure Rules*.

59. Additionally, the Plaintiff/Applicant has also failed to depone to any of the named grounds in the Supporting affidavit.

60. Worse still, even during the submissions and despite enquiry from the court, counsel was unable to point out which ground same was relying upon, to pursue the Application for review.

61. To my mind, it behooved the Plaintiff/Applicant to implead a specific ground and thereafter endeavor to prove or establish same.

62. Without having impleaded any of the named grounds provided for and captured under the provisions of Order 45 of the *Civil Procedure Rules*, it is common knowledge that the Plaintiff/Applicant could therefore not be allowed to ventilate a claim for review.

63. To this end, it is imperative to restate and reiterate the established position of the law that Parties are bound by their pleadings. Consequently, if a party does not implead a particular cause of action or issue, then same cannot seek to prove the un-pleaded claim/issue, either by way of evidence or submissions.

64. Without belaboring the doctrine of departure and the rule of law that parties are bound by their pleadings (in this case the contents of the notice of motion), it is appropriate to refer to the holding of the court in the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR, where the Court of Appeal observed as hereunder;

> " ....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell JSC rendering himself thus;

> " In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

65. Secondly, there is also the issue that during and in the course of ventilating the application for adjournment, counsel relied upon the issue of the Plaintiff's witness having encountered or had a family/domestic emergency.

66. Suffice it to point out that counsel for the Plaintiff/applicant was not able to divulge the nature and details of the impugned family emergency.

67. Be that as it may, it is appropriate to state that the Honourable court considered and dealt with the stated reason for adjournment and the court came to the conclusion that the reason espoused was neither convincing nor credible.

68. Consequently, the court proceeded to and rendered a conscious and deliberate determination on the impugned issue. For clarity, the court dismissed the Application for adjournment.

69. Notwithstanding the foregoing, the plaintiff/applicant has now revisited the same issue and same is seeking to use the impugned ground as a basis for review.

70. Consequently and in the premises, the question that must be addressed and resolved is whether an issue that was canvassed and ventilated before the court and was thereafter disposed of, can be revisited under the guise of review.

71. In my humble view, once a court has calibrated on a particular issue and made a conscious and deliberate finding thereon, the court can not be re-invited to have a second bite on the same issue.

72. Certainly, to do so would be tantamount to inviting the court to overrule him/ herself and effectively to sit on appeal on its own decision.

73. In this regard, I must underscore that the invite by the plaintiff/applicant is not only misconceived but is legally untenable.

74. To underscore the foregoing statement, it is apt to recall the holding of the court in the case of *Re Estate of Nicholas Kiptum (Deceased)* [2021] eKLR, where the court stated as hereunder;

> "An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent 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. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record, though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal..."

75. Additionally, the scope and parameters for review was also underscored and underlined in the case of *National Bank of Kenya Ltd v Ndungu Njao* (1997)eKLR, where the court observed as hereunder:

> A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter.
>
> Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.
>
> In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.

76. Guided by the holdings and observations alluded to in the cited decisions, I find and hold that the issues being re-agitated at the foot of the current Application do not fall within the established scope and tenor for review.

77. Notwithstanding the foregoing, I must also mention that even after a duration of more than 14 days from the time when the suit was dismissed, the plaintiff/applicant has neither attached nor exhibited any medical evidence to vindicate the impugned allegation that the son of the witness was taken ill.

78. Clearly, the plaintiff/applicant is not taking the subject matter seriously and seems to be keen on playing lottery with the due process of the court.

79. Overally, I am not persuaded that a basis has been established and proven to warrant the relief sought.

Final Disposition:

80. In conclusion, it is my finding and holding that the subject application is premature, misconceived and otherwise legally untenable.

81. In any event, it is appropriate to underscore and reiterate that the circumstances under which the suit was dismissed do not afford the Honourable court any latitude to restore and or reinstate the suit in the manner sought.

82. Consequently and in the premises, the Application dated the October 7, 2022, be and is hereby Dismissed with costs to the 1st defendant/respondent.

83. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2022.

OGUTTU MBOYA,

JUDGE

In the Presence of;

Benson - Court Assistant.

Mr. Christopher Makori for the Plaintiff/Applicant.

Mr. Odoyo for the 1st Defendant/Respondent.

N/A for the 2nd Defendant/Respondent.