



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 569 of 1998

WILSON NJIIRI GIKONYO PLAINTIFF

VERSUS

SIMON KIMAMO.....1ST DEFENDANT

GABRIEL KARANJA KIRIKA2ND DEFENDANT

PETER GIKONYO KINYUA.....3RD DEFENDANT

PETER NJUGUNA MBUGA 4TH DEFENDANT

JOSEPH M. ONDIEKI.....5TH DEFENDANT

JOSEPH NJIHIA 6TH DEFENDANT

SAMUEL MURAGURI.....7TH DEFENDANT

GRACE WANJIRU8TH DEFENDANT

RULING

The Applicant/Plaintiff in the Notice of Motion dated 1st March 2005 has sought for orders that;

This court be pleased to review the judgment herein and correct the suit premises indicated to be Title No. Dundori/Miroreni Block 2/94 to read Dundori/Miroreni Block 2/941 as per the amended plaint.

The application is brought under the provisions of **Section 80, 99, 3A of the Civil Procedure Act and Order XLIV Rule (i) of the Civil Procedure Rules.**

The application is premised on the grounds stipulated in the body of the application and which are further expounded in the supporting affidavit of the Applicant.

These grounds were further buttressed during the hearing.

The Applicant's case is that on 18.12.98 he filed a plaint against the Defendants whereby the cause of action (*hereinafter referred to* suit premises was described as Title No. Dundori/Miroreni Block 2/94

(Ndimu).

On 27.9.99, the Applicant filed an amended plaint and amended paragraphs 3, 4 and Prayer 1 of the plaint so that the suit premises was amended to read Title No. Dundori/Miroreni Block 2/941 (Ndimu) and paragraph 4 to read Title Numbers 1030, 1038, 1043, 1071, 1073, 1095, 1094 & 1035 formerly Title number Dundori/Miroreni 2/941 (Ndimu).

After a full hearing a judgment was delivered by Hon. Lessit J on 30th July 2003 indicating the suit premises as Title No. Dundori/Miroreni block 2/94 while referring to the plaint. According to the Plaintiff this was an accidental error that can be corrected. Counsel for the Plaintiff argued that looking at the entire judgment which was in favour of the Plaintiff it is clear that there was an accidental omission. This can be seen from the opening paragraphs of the judgment where the court properly described the suit premises. Further even the exhibits that were produced in court are in regard to the suit premises being Title No.941. Thus Counsel for the Applicant urged the court to recall this judgment as it is within the court's power to correct the absurdities which will not in anyway affect the substance of judgment but will give effect to the judgment.

Counsel for the applicant put forward several authorities to support these arguments.

On the part of the Defendants/Respondents this application was opposed. Counsel termed the present application as a back door attempt to introduce a matter that was not dwelt with in the judgment and which does not at all mention the amended plaint. It was argued on behalf of the Respondents that this was not an accidental omission but a premeditated judgment taken out of the material evidence which was presented to the court and not a mere omission.

Counsel for the Respondents submitted that the Plaintiff was cross-examined on Title No.2/94 any alteration would be prejudicial to the Defendants.

Several authorities were put forward by the Defendant's Counsel to the effect that the Plaintiff in bringing this application for correction is guilty of inordinate delay as the judgment was delivered on 30.6.03 and this application was brought after 1½ years. In the case of **Kenfreight E.A. Ltd -vs- Star East African Co. Ltd (2 KLR 2002)**.

A delay of about three months in making an application for review was held to be unreasonable.

In the case of **Shah -vs- Dharamchi 1981 KLR**,

It was held that for an application for review to succeed the evidence must not only be not new but the applicant must prove that he did not have them in his possession at the time and could not have obtained it despite due diligence.

Finally it was submitted that the application must fail as the formal decree was not attached to the application.

I have carefully considered this matter against the judgment of 30.6.03, the proceedings and the exhibits that were produced.

I have also examined the provisions of **Section 99 of the Civil Procedure;**

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

Thus the question I have to address is whether the description of this suit premises as No.94 instead of 941 was an accidental mistake or deliberate premeditated decision of the court.

To answer the above one would have to look at the pleadings and the exhibits that were produced. There is an amended plaint that describes the suit premises as Dundori/Miroreni Block 2/941. The existence of an amended plaint superceded the original plaint and the amended plaint ought to have guided the proceedings. There was no dispute that there existed an amended plaint at the time of hearing.

Secondly the Plaintiff produced several exhibits such as the Land Control Board consent which describes the suit premises as 941 dated 19.9.96, a letter dated 21st June 1999 addressed to M/s Mwakira Agencies describes the suit premises as Block 2/941. The mutation forms which was the subdivision scheme that is the original title from which Titles Nos.1030, 1038, 1043, 1071, 1073, 1095, 1096, 1094 and 1037 were subdivided from.

Indeed the original plaint did not mention these titles which clearly means they were introduced into the pleadings after in the amendment. Moreover the judgment makes reference on page 3 to the suit premises as No.941 but the formal order was that;

***“I enter judgment for the Plaintiff against each of the Defendants in terms of Prayer (a) and (d) of the Plaint*”**

I am satisfied that taking all the matters into consideration this was error arising out of an omission by the court to refer to the amended plaint. It is an error arising from an accidental slip or omission which can be corrected under the Provisions of **Section 99 of the Civil Procedure Act.**

I have also made reference to a persuasive text **Halsburys Laws of England 4th Ed. Vol 26 596** which is on all fours with **Section 99 of the C.P.A.**

“The Court has inherent jurisdiction to vary or clarify an order so as to carry out the court’s meaning or make the language plain or amend it where a party has been wrongly named or described unless this would change the substance of the judgement. The court will treat as a nullity and set aside, of its own motion if necessary judgement entered against a person who was in fact dead or a non-existent company leading up to the judgment or order which is so serious that the judgment ought to be treated as a nullity the court will set it aside.....”

I am satisfied that this court has power to correct omission in order to give effect to the meaning and intention of the court which is largely drawn from the pleadings, the material that was presented before the court and the gist of the judgment which was in favour of the plaintiff.

I have also taken into consideration the fact that this application can be brought anytime after judgment having taken into account the efforts that the Plaintiff engaged in trying to get the amendment, I do not think that there has been an inordinate delay.

I have also taken into account that his present application did not have to be brought under **Order 44 of the Civil Procedure Rules**, as the court could have corrected the omission on its own motion or the matter could have been filed under **Section 99** by way of Notice of Motion. Bringing this application in addition to the provisions of **Order 44** has not occasioned any prejudice to the Defendants. Accordingly I allow the application as prayed.

There will be no order as to costs. It is so ordered.

Ruling read and signed on 10th March 2006.

MARTHA KOOME

JUDGE