



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 25 OF 2012

JOSEPH WANYAMA KIBIRA.....PLAINTIFF

VERSUS

BOARD OF MANAGEMENT

ST. TERESA SECONDARY SCHOOL.....1ST DEFENDANT

HASSAN NDAMWE WAKOLI.....2ND DEFENDANT

RULING

The Application

1. By a notice of motion dated **28/1/2021** has been brought under **Section 3A** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules**, the defendants seek the following orders:-

1. ...spent.

2. That by review or otherwise the court be pleased to review its judgment delivered via electronic mail on 26/1/2021, by making a determination and/or finding on the defendants' counterclaim dated 20/3/2012.

3. That costs be provided for.

2. The application is supported by affidavit of Justus Chatty Wafula, the Secretary to the Board of Management of the 1st defendant sworn on **28/1/2021** on its own behalf and on behalf of 2nd defendant. The grounds on the face of the application are that in its judgment delivered via electronic mail on **26/1/2021**, the court dismissed the plaintiff's suit with costs to the defendants but it inadvertently omitted to make a finding on the defendants' counterclaim dated **20/3/2012**; that there is therefore a mistake and/or error apparent on the fact of the record and that the application has been brought expeditiously and without delay.

The Response

3. Though the plaintiff's advocate on record was served. Affidavit of **Joseph Wanyama Kibira** the plaintiff in the main suit was filed in opposition to the application.

Submissions

4. The court directed that the application be disposed of by way of written submissions. The defendants filed their written submissions on **5/2/2021** and supplementary submissions on **8/2/2021** and cited a number of authorities. I have perused through the file record and found no submissions filed on behalf of the respondent.

Determination

5. The issue that arises in the instant application is whether the judgment of this court should be reviewed on the ground that there is an error on the face of the record.

6. The alleged error is in respect of the non-determination of the counterclaim. The counterclaim has a long and unfortunate history: this suit was filed in **2012** and from the file record memos forming the earliest records of the case file, the joint defence of the defendants and the

counterclaim of the 1st defendant were filed on 22/3/2012 and the same was replied to vide the plaintiff's pleadings filed on 4/4/2012. The defence and counterclaim withstood the filing of the reply to defence and counterclaim filed on 4/4/2012 and the amended plaint dated 9/10/2015 to become the defendant's applicable pleadings by the end of the substantive hearing of the suit. However before the court began the hearing in the year 2014, no specific directions were taken as to the manner of hearing and determination of the counterclaim either at the application of the parties or by the court *suo motu* and this continued to the end of the hearing of the defendants' evidence on 5/3/2020 whereupon the defendant's case was closed. Soon thereafter the defendants, realizing this omission lodged an urgent application dated 20/5/2020 which was never heard due to the filing of a consent of the parties thereon dated 28/1/2021 allowing the defendant's counterclaim to be deemed to have been heard alongside the plaintiff's suit and the evidence on the record be adopted in relation to the counterclaim. Unfortunately, that appears not to have helped because when this matter came up for judgment the court, though having canvassed the contents of the defence and counterclaim and the reply to the defence and counterclaim in paragraphs 3-6 of the judgment, delivered its judgment on the plaintiff's claim and omitted to determine the 1st defendant's counterclaim. The respondent's views are different. In his affidavit he depones based on his advocate's advice that he believes that there is no error on the face of the record to warrant a review. His argument is that since the court found that he had no *locus standi* to file the suit and therefore he also had no *locus standi* to be sued and so the counterclaim was misplaced. Pointing at paragraph 26 of the judgment he stated that the court had stated that the issue of *locus standi* had disposed of the whole suit and that the reference to "the whole suit" can only be construed to include the counterclaim.

7. A look at the list of issues for determination shows that they appear to have all been framed with only the plaintiff's suit in mind and the presence of the counterclaim was omitted. This is where the problem arose first, for the court, having set out the contents of the counterclaim, should have also set out the issues for determination in respect of the counterclaim according to the consent filed by the parties, which are the issues that the court should have determined in order to effectively determine the defendant's counterclaim alongside the plaintiff's claim in the main suit.

8. In this court's view, perchance this court finds there is an error on the face of the record, the recorded determination on the plaintiff's claim should remain unaffected by the review since it has not faulted by any of the parties, and in any event the plaintiff's claim was defeated on a very preliminary issue of *locus standi*.

9. First I must delve into the issue of *locus standi* as raised by the respondent in the replying affidavit before dealing with the issue of error on the face of the record.

10. The respondent's view is that since the plaintiff had failed in his claim on the basis of the issue of *locus standi*, then the claim against him could also not be maintainable for the same reason. However in matters of actual physical trespass it is the person in actual trespass who is normally enjoined in the suit. By the time of the filing of the suit the plaintiff's mother was long since deceased and it is the plaintiff who was in occupation of the suit land and his joinder in the matter was therefore proper as the order of eviction or injunction would have to be directed at him as a living person in physical occupation. That the issue of *locus standi* defeated the plaintiff's claim in the main suit did not then bear the consequence that the counterclaim was defeated.

11. Reverting back to the issue of error, when the matters set out in all the pleadings in a suit and a counterclaim have been addressed by the court in its introductory paragraphs there is a legitimate expectation on the part of all the parties who begin to read the judgment that those issues would be addressed in the judgment and a decision delivered on each issue arising therefrom.

12. Is the omission to determine the counterclaim an error on the face of the record?

13. In the case of **National Bank of Kenya Limited -vs- Ndungu Njau CA Civil Appeal No. 211 of 1996** the Court of Appeal observed as hereunder:

"A review may be granted whenever the court considers 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."

14. In the present instance there is not alleged to be any incorrect exposition of law that led the court to reach an erroneous conclusion of law or misconstruction of statute; The application does not seek a re-hearing of the suit or counterclaim; there is only an omission to determine a counterclaim, which does not require an elaborate argument to be established.

15. It is clearly an inadvertent omission by no fault of the parties that led to the proceedings being determined only partly although the parties by their filed consent dated 28/1/2021 had signified their legitimate expectation that both the main suit and the counterclaim would be determined in the same judgment.

16. In the case of **Raila Odinga & 2 Others Vs Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR** the Supreme Court of Kenya observed as follows:

[18] We, therefore, have to consider the concept of "functus officio," as understood in law. Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832, has thus explicated this concept:

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be

revoked or varied by the decision-maker.”

[19] This principle has been aptly summarized further in *Jersey Evening Post Limited v. A1 Thani* [2002] JLR 542 at 550:

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”

17. This court would therefore only consider itself *functus officio* as the respondent impliedly urges, only upon the determination of the plaint and counterclaim. In that event it would have done all its duties in the proceedings.

18. The instant application invokes the power of review enabling this court to do what is considered by the applicant, and rightfully so, to be unfinished. Before this court has determined that which both parties have agreed should be determined, the judgment dated 26/1/2021 remains incomplete and with a glaring omission, and in my view the judgment, having canvassed the contents of both the plaint and the counterclaim and the evidence produced in respect of each and the responses thereto and having failed to determine the claim in one of them, has an error on the face of the record.

19. The error on the face of the record, a genuine mistake, has therefore been confirmed by this court to exist. Since the parties had agreed by consent that the counterclaim be determined on the basis of the evidence on the record, then this court will proceed to determine the counterclaim as urged by the applicant.

20. In this court’s view, the additional issues for determination with respect to the counterclaim should have been as follows:

a. Should an order of permanent injunction to restrain the defendant from trespassing on plot No. 61 - Chepkorok Farm issue against the defendant in the counterclaim as prayed?

b. Who should meet the costs of the counterclaim?

21. It is trite that the counterclaim is a suit separate from the plaint and it may be granted even where the plaint has been dismissed as in the instant case. (See **Order 7 rule (3)** of the **Civil Procedure Rules**). This court having not declared that the same can not be conveniently disposed of in this suit, it is bound to pronounce itself on it alongside the determination in respect of the plaint. Dismissal of the plaintiff’s suit therefore left the determination on the counterclaim pending, and the plaintiff’s participation in the confirmation of the consent dated 2/6/2020 in the proceedings of 16/6/2020 is an approbation of this fact from which they are estopped from retracting.

22. I have considered the evidence on the record and I am satisfied that while it did not support the plaintiff’s claim to the required standard, it fully proved on a balance of probabilities both the defence of all the defendants and the counterclaim of the 1st defendant.

23. In the first place the court found on the basis of the evidence on record that the plaintiff in the main suit had no *locus standi* to deal with the land or even bring the main suit and that the joinder of the 2nd defendant in his private capacity was not warranted. Further, by the same evidence, all the defendants have proved that the 1st defendant owned the land. They have also established by evidence of an expert, the County Surveyor who visited the site to implement an order of the court in **Kitale CMCC Land Case No. 12 of 1999** that the 1st defendant’s school’s plot is **plot No. 61**. It was evident from the record that the demarcation map that that former County Surveyor Bainito Ombudu Hussein, (**DW1**) used was the map that was in existence by the time he left office on retirement, and that the evidence of his successor (**PW3**) which purported to contradict that position was weak and unsupported by any first hand evidence of experience at the locus of the dispute. The beacons erected by the former County Surveyor on the ground in the exercise conducted to implement the court order in **Kitale CMCC Land Case No. 12 of 1999** are the proper beacons demarcating the boundary between land owned by the school and the land occupied by the plaintiff in the main suit. It is surprising that **PW3** could not trace any school plot on the map that he had just produced before court yet the school is admitted to exist on the ground by all parties including the plaintiff, and its acreage has been established to be **5 acres**.

24. In the circumstances outlined above I find that the 1st defendant has proved its counterclaim on a balance of probabilities and therefore it deserves judgment against the defendant. An order of injunction must therefore issue on the 1st defendant’s counterclaim restraining **Joseph Wanyama Kibira**, his agents servants and or family members and/or any other person claiming interest through him from trespassing on **Plot No. 61** Chepkorok Farm belonging to **St Theresa’s Secondary School - Sikhendu**.

25. The inclusion of the two final issues for determination listed above, the brief canvassing of the evidence on record as contained herein before and the inclusion of the final orders logically flowing from the above analysis, that is allowing the 1st defendant’s counterclaim and award of costs to the 1st defendant in the main suit are the notable features inadvertently omitted from the judgment dated 26/1/2021. Since the defendants have applied for their inclusion and rightly so, the said judgment must be reviewed to include these items.

26. The defendants’ application dated 28/1/2021 therefore has merit and I grant it in terms of **Prayer No. (b)**. Consequently, the judgment of this court dated 26/1/2021 is reviewed but only to the extent that it shall include:

a. The issues for determination contained in paragraph 20 herein above;

b. The analysis of evidence as contained in paragraphs 21, 22, 23 and 24 hereinabove;

c. On order granting the plaintiff in the counterclaim judgment against the defendant in the counterclaim; and

d. An order awarding the plaintiff in the counterclaim costs against the defendant in the counterclaim.

27. The above mentioned items shall be incorporated in a reviewed judgment which shall bear the same date and issue contemporaneously with this ruling and for all intents and purposes that reviewed judgment shall henceforth be deemed to be the final judgment of this court in this suit for the purposes of execution proceedings and beyond. Consequently, and for the avoidance of doubt and to ensure only one judgment is on the record in this suit, the judgment of this court dated **26/1/2021** is hereby vacated and substituted with the judgment as reviewed by this ruling.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 11th day of February, 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.