



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 154 OF 2000

MUSA KIMATHI.....PLAINTIFF

-VERSUS-

JOSHUA MBAYA.....1ST DEFENDANT

JENNIFER KAROKI MBAYA.....2ND DEFENDANT

RULING

A. INTRODUCTION AND BACKGROUND

1. The material on record indicates that this matter has been in court for over 20 years now. By a Judgment dated 14th May, 2009 the High Court entered judgment for the Plaintiff and issued an eviction order against the Defendants from the suit property known as **parcel No. 1036 Mwachiri Farmers Company**. The Defendants were also restrained by permanent injunction from trespassing

upon or interfering with the suit property. The court also dismissed the Defendants' counterclaim with costs.

2. The material on record further indicates that judgment was passed after a full hearing of the suit and after the parties had called witnesses and tendered documentary evidence in the matter.

3. Being aggrieved by the said judgment, the Defendants filed a notice of appeal dated 21st May, 2009 indicating their intention to appeal to the Court of Appeal against the whole of the said judgment. There is, however, no indication on record to demonstrate whether the Defendants ever filed a record of appeal and whether they pursued their intended appeal.

B. THE DEFENDANTS' APPLICATION FOR REVIEW

4. It would appear that pending the filing and prosecution of the appeal, the Defendants filed a notice of motion dated 17th March, 2010 under **Section 80** of the **Civil Procedure Act (Cap. 21)**, **Order XLIV Rule 1** of the **Civil Procedure Rules** and **all enabling provisions of the law** for review and setting aside of the judgement dated **14th May, 2009**.

5. When the said application was listed for hearing before the High Court on 29th June, 2010, it was struck out with costs to the Plaintiff since the court found that it was improperly on record. There is no indication on record to show whether or not the Defendants ever challenged the striking out order or if they filed a competent application for review thereafter.

C. THE IMPUGNED ORDER

6. When the matter was mentioned on 21st November, 2019 before Hon. Justice M. C. Oundo, the court noted that the Defendants were basically seeking to re-open a concluded suit. The court advised the 2nd Defendant who was present that there was nothing pending before court since the application for review was no longer in existence. Consequently, the court marked the file as closed.

D. THE DEFENDANTS' APPLICATION

7. Undeterred by the order made on 21st November, 2019 the Defendants filed a notice of motion dated 10th December, 2019 seeking the setting aside of the order for closure of the file and reinstatement of the suit. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 2nd Defendant on 10th December, 2019 and the annexures thereto.

The Defendants were of the opinion that if the order of 21st November, 2019 were to set aside, then they could be heard on their application for review dated 17th March, 2010.

E. THE PLAINTIFF'S RESPONSE

8. There is no indication on record of the Plaintiff having filed a response to the Defendants' said application.

F. DIRECTIONS ON SUBMISSIONS

9. When the said application was listed for hearing on 30th July, 2020

it was directed that the same shall be canvassed through written

submissions. The record shows that the Defendants filed their written submissions on 6th October, 2020 but the Plaintiff's submissions were not on record by the time of preparation of the ruling.

G. THE ISSUES FOR DETERMINATION

10. The court has considered the Defendants' said application together with the supporting affidavit and annexures thereto. The court is of the opinion that the following issues arise for determination:

(a) Whether the Defendants have made out a case for setting aside the order made on 19th November, 2019.

(b) Whether there is a pending suit or application for reinstatement.

(c) Who shall bear costs of the application.

H. ANALYSIS AND DETERMINATION

(a) Whether the Defendants have made out a case for setting aside of the order made on 19th November, 2019

11. The court has considered the material and submissions on record on this issue. The impugned order simply marked the case as **closed** since the court found that there was nothing pending determination before court. As indicated before, the Defendants wanted the case reopened so that they may persuade the court to consider additional evidence with a view to making a different decision on the matter.

12. The Defendants' submissions make it clear that they were aggrieved by the judgment and decree dated 14th May, 2009 because they believed that the court had favoured the plaintiff and failed to consider the evidence they had tendered in support of their counter-claim. It is evident from the submissions that the Defendants were of the opinion that the trial court had not correctly evaluated the evidence tendered at the trial in consequence whereof it made an erroneous decision.

13. The 2nd Defendant summed up her grievances and the anticipated remedies in the concluding paragraph of her submissions as follows:

“Lastly, I shall request this Honourable court to look again (sic) this case and be judged in accordance with the law and with the evidence available based on documentary evidence available in this case ...”

14. It is undeniable that by the time the court made the order for closure of the court file on 21st November, 2019 there was already a judgment in this matter dated 14th May, 2019. It is also evident from the court file that there was a notice of appeal dated 21st May, 2019 filed by the Defendants. It is also beyond dispute that the Defendants' application for review dated 17th March, 2010 was struck out on 29th June, 2010.

15. In those circumstances, the court was certainly right in holding that there was nothing pending determination in this matter. It would, therefore, follow that the court was entitled to order that the case file be marked as closed. The Defendants have not demonstrated any material change in circumstances which would warrant a review or setting aside of the order of closure for the file.

16. The truth of the matter is that there was no pending suit or application as at 21st November, 2019 and those circumstances have not changed. The court is thus not satisfied that the Defendants have made out a case for setting aside of the closure order made on 21st November, 2019. The 1st issue is consequently answered in the negative.

(b) Whether there is any pending suit or application for reinstatement.

17. The Defendants in their application sought setting side of the order made on 21st November, 2019 and “reinstatement” of the suit or matter for hearing. The Defendants were of the opinion that once the closure order is set aside then they shall be heard on the application for review of the decree.

18. As indicated before, the material on record indicates that the suit was concluded on 14th May, 2009 when judgment was delivered. The subsequent application for review dated 17th March, 2010 was struck out on 29th June, 2010 hence there was no pending suit or application as at 21st November, 2019. So, even if the court was inclined to set aside the closure order, there would still be nothing pending before court for adjudication.

19. The material on record indicates that the suit has essentially come to its logical conclusion save, perhaps, the notice of appeal dated 21st May, 2009. The said notice was filed pursuant to Rule 74 of the former **Court of Appeal Rules** hence its application was limited to **initiating** proceedings before the Court of Appeal. It cannot be subject of further litigation before this court hence further proceedings pursuant to the notice can only be undertaken before the Court of Appeal. The 2nd issue is accordingly answered in the negative.

(c) Who shall bear costs of the application

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 (1) of the Civil Procedure Act (Cap 21)**. As such, a successful litigant should normally be awarded the costs of the suit unless, for good reason, the court

directs otherwise. See **Hussein Janmohamed & Sons vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. However, since the Plaintiff did not respond to the application the court is of the opinion that the appropriate order to make is that there shall be no order as to costs.

H. CONCLUSION AND DISPOSAL

21. The upshot of the foregoing is that the court finds no merit whatsoever in the Defendants' notice of motion dated 10th December, 2019. Accordingly, the same is hereby dismissed with no order as to costs.

It is so ordered.

RULING DATED and **SIGNED** in **Chambers** at **NYERI** this **10th Day** of **MARCH, 2021** and delivered via Microsoft Teams platform in the presence of the 2nd Defendant Jennifer Karoki Mbaya and in the absence of the Plaintiff and the 1st Defendant.

HON. Y. M. ANGIMA

JUDGE