Jivetti v Amutemi (Environment and Land Appeal E003 of 2021)
[2023] KEELC 631 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEELC 631 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VIHIGA

ENVIRONMENT AND LAND APPEAL E003 OF 2021

E ASATI, J

FEBRUARY 9, 2023

BETWEEN

BILLYSTORM ARONYA JIVETTI ..... APPELLANT

AND

RODAH MUHATIA AMUTEMI ..... RESPONDENT

(from the ruling of Hon. M. Ochieng PM in Hamisi PM (ELC) NO.1 OF 2020 made on 29.10.2021)

JUDGMENT

Introduction

1. Vide the Memorandum of Appeal dated November 11, 2021, the Appellant appealed to this Court against the Ruling dated October 29, 2021 by Hon M Ochieng PM in Hamisi PMC E&L Case No 1 of 2020 (the suit). He seeks for orders that the appeal be allowed, the orders made by the trial court on October 29, 2021 be set aside, the Appellant's application dated August 26, 2021 be allowed and he be awarded costs of the appeal.

2. A brief background to the appeal is that the Appellant sued the Respondent in the suit seeking for an order of eviction of the Respondent, her family, agents, servants or any other person claiming on her behalf from land parcel No Tiriki/Bumbo/1852 (the suit land) and an order of permanent injunction restraining the Respondent and her agents from encroaching/trespassing onto the suit land. Though served, the Respondent did not enter appearance or file Defence. The suit proceeded *ex parte* and the trial court after hearing the case found in favour of the appellant and entered judgement in his favour for an order of permanent injunction and costs of the suit.

3. Subsequent to the judgement, the Appellant filed an application dated August 26, 2021, seeking for review of the Judgement so as to include an order of eviction as prayed in the plaint. Upon hearing the

application, the trial Court delivered its ruling on October 29, 2021 dismissing the application with costs. The Ruling is the subject of this appeal.

4. The Appellant challenges the Ruling on the grounds contained in the Memorandum of Appeal namely:

    i. That the learned trial Magistrate erred in law by making a finding that there was no error apparent on record yet it did issue an order of eviction which was specifically pleaded and prayed for in the Plaintiff's Plaint dated January 3, 2020 without giving reasons in its judgement dated 25th June 021.

    ii. That the learned trial Magistrate erred in law in granting an injunctive order of permanent injunction against the Defendant acting by herself, agents, employees and other persons from entering upon land parcel No Tiriki/Bumbo/1852 registered in the name of the Plaintiff/ Appellant which order is difficult to be enforced before an order of eviction is issued as the Defendant already resides on the suit land.

    iii. That the learned trial Magistrate erred in law by awarding costs to the Defendant/Respondent who never filed any response nor appeared for the hearing of the application dated August 26, 2021 has never entered appearance and did not defend the suit.

    iv. That the learned trial Magistrate erred in considering matters not pleaded before him.

    v. That the trial Magistrate erred in failure to find the Appellant had met conditions for review.

Submissions

5. The appeal was urged by way of written submissions. The Appellant filed written submissions dated September 14, 2022 through the firm of Gabriel Fwaya & Company Advocates acting for him. Counsel submitted that the court in its judgement delivered on June 25, 2021 did not issue an order of eviction which was specifically prayed for in the Plaint. That no reasons were given as to why the court did not issue the orders which were prayed for as contemplated by the provisions of Order 24 Rule 4 of the *Civil Procedure Rules*. That there was an error apparent on the record which the court could have easily rectified vide the review. That it is difficult for the applicant to enforce the judgement as the Respondent is already residing on the suit parcel of land. That the trial court erred in awarding the costs of the application to the Respondent yet the Respondent neither entered appearance nor incurred any costs that she deserved to be awarded.

6. The Respondent filed no written submissions and did not respond to the appeal in any way.

Issues for Determination

7. Though the Memorandum of Appeal contains five (5) grounds of appeal, in my assessment, the same raise one main issue for Determination in this appeal namely: -

    a. Whether or not the trial magistrate erred in failing to find that the appellant had met the conditions for grant of an order of review under Order 45 of the *Civil Procedure Rules*.

    b. Who pays the costs.

Analysis & Determination

8. As a court handling a first appeal, this court is obligated to reconsider and analyse the evidence adduced before the trial court and arrive at its own independent conclusion as held in the case of *Selle and another vs Associated Motor Boat Company Ltd and others* 1968 EA 123 that:

> " An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not- necessarily bound to follow the trial court's findings of fact if it appears either that he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

This position is applicable in respect of appeals from the subordinate courts to the High Court and courts of equal status as well (See also *South Nyanza Sugar Company Ltd vs Simeona A Opala*[2020]eKLR.)

9. Being an appeal against a ruling, this court is obligated to reconsider and reanalyse the contents of the Notice of Motion, the Affidavit in Support, the annextures thereto and the submissions presented before the trial court. The Notice of Motion application was brought pursuant to the provisions of Order 45 Rule 1 and 2 and Order 9 Rule 9 of the *Civil Procedure Rules* and Sections 3A, 63 (e) and 80 *Civil Procedure Act*. The Orders sought were:

   a. The application be certified urgent and be heard on priority basis

   b. The honourable court be pleased to review and or vary the order/judgement of 25th day of June 2021

   c. That the honourable court do include the order of eviction of the Defendant, family, agents, servants or any other person claiming on her behalf from land parcel No Tiriki/Bumbo/1852.

   d. That thereafter, a permanent injunction be issued restraining the Defendant, her family, agents, employees or any other person from entering upon the suit property namely land parcel Tiriki/Bumbo/1852 registered in the name of the Plaintiff or in any way interfering with the Plaintiff's peaceful use and occupation

   e. The order of eviction to be issued be effected, undertaken and supervised by the Officer commanding Station (OCS) in charge of Cheptulu Police Station.

   f. That the costs be provided for.

   Among the grounds upon which the application was based were that:

   i. The court in its judgement granted an order of permanent injunction and inadvertently failed to include an order of eviction which was prayed for

   ii. That the application was brought without delay and there is good cause to warrant the orders sought

   iii. That the Plaintiff is unable to enforce the orders issued by the court

   iv. That the relief sought meets the ends of justice

The same grounds were reflected in the Supporting Affidavit of Hardley Songole Sinjaa the authorized agent of the Plaintiff sworn on August 26, 2021.

10. The application was presented before the trial court on October 21, 2021 and Ruling delivered on October 29, 2021. In its Ruling the trial court held that:-

> " I have taken into account Order 45 Rule 1 (1) (a) and (b). I find that there is no discovery of any new and important matter or evidence which has been placed before me. I also find that there is no apparent error or mistake in the judgement. I do confirm that the judgement is not subject to the review orders as sought by the applicant under O. 45. In any case, this court is now functus officio. I shall therefore say no more. The applicant's application is devoid of merit. It is dismissed accordingly with costs."

11. Review and setting aside of judgements, decrees and orders is provided for in Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules 2010*. Section 80 provides that: -

> " 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 has been preferred, or
>
> b. by a decree or order from which no appeal is allowed by this Act may apply for review of the judgement to the court which passed the decree or made the Order, and the court may make such order thereon as it thinks fit"

Order 45 Rule 1 (1) provides

> "Any person considering himself aggrieved-
>
> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or
>
> b. by a decree or order from which no appeal is hereby allowed and from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay."

12. From the above-quoted provisions of the law, it is clear that the grounds upon which an application for review of a judgement, order or decree can be made are: -

a) discovery of a new and important matter or evidence

b) some mistake or error apparent on the face of the record

c) any other sufficient reason

d) the application must be brought without unreasonable delay.

13. These are the provisions of the law under which the application for review was brought in the trial court in the instant case. The applicant in bringing the application, relied on the ground, mainly, that

there was a mistake or error apparent on the face of the record of the judgement. The mistake or error apparent on the face of the record complained of in the case is the failure by the trial court to grant eviction order. It has been submitted on behalf of the Appellant that the court in its judgement did not issue an order of eviction which was specifically prayed for in the Plaint. That no reasons were given for this. Yet the provisions of order 21 Rule 4 of the *Civil Procedure Rules 2010* require that court gives reasons for its decisions. That this constituted an error apparent on the face of the record which the Court would have easily rectified.

14. Mistake or error apparent on the face of the record has been defined in various judicial decisions. In the case of *Muyodi vs Industrial & Commercial Development Corporation & Another* [2006] 1 EA 243 the Court of Appeal described error apparent on the face of the record as follows: -

> " In Nyamogo & Nyamogo vs Kogo (2006) EA 174 this court said that 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 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 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 a court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

17. Perusal of the judgement that was sought to be reviewed reveals that the trial court after hearing the appellant's uncontroverted was convinced that the Plaintiff had proved his case on a balance of probabilities. The Court stated in its Judgement '

> " I have carefully considered the evidence on record which was not challenged or rebutted at all. The greed card indicated that the suit property was registered in the name of the appellant as at December 15, 2016. .....this court finds that ownership of the suit property is not in dispute."

18. The Court then proceeded to award an order of permanent injunction and costs. From the evidence that was availed before the trial Court, it was clear that the appellant's problem was that the Respondent had failed to move out of the suit land yet her husband had sold it and bought alternative land for his family. It was also clear that the appellant had gone to court to seek the assistance of the court to, inter alia, remove the Respondent from the suit land. It is my view that failure by the Court to award the relief of an order of eviction in view of the other orders awarded was erroneous. And that the error could be corrected by way of review of the Judgement because it is an error that is obvious, it does not require long drawn process of reasoning. It is not an error in the courts reasoning or application of the law but in the awards made. Otherwise the judgement is vain as it is unenforceable. Court does not to make decisions in vain.

19. I agree with the Appellant that it will be difficult to implement a permanent injunction against a person who resides on the subject land. There are no reasons given in the Judgement why the Court did not award the pray for an eviction. The explanation by the Appellant is that this was by inadvertence. The court ought to have exercised its discretion to review the judgement and correct the error. The essence of the court's discretion to review and set aside its decisions is to serve such purposes as to avoid injustice

or hardship resulting from some error or mistake. See case of *Richard Nchapai Leiyang vs IEBC & 2 Others* Civil Appeal 18 of 2013.

20. I respectfully find that the holding that the judgement was not subject to review under Order 45 and that the court had become functus officio to be erroneous. Order 45 clearly identifies the category of decisions that can be subject of review. The judgement the subject matter hereof is one of such decision. Secondly the court was not functus officio in as much as review was concerned. The court was not being asked to revisit the merits of the case but to correct an error in the judgement. The Court of Appeal discussed the principle of functus officio in the case of *Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited* [2014] eKLR held that

> " The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once a final judgment has been entered and a decree issued.
>
> There do exist certain exceptions and these have been captured in Jersey Evening Post Ltd v-Ai Thani [2002] JLR 542 at 550 Thus:
>
> "a court is functus officio 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."

Conclusion

21. In the premises I respectfully find that the application for review was merited and ought to have been allowed. The trial court erred in rejecting the application. Further I find that there was no basis for awarding costs of the application to the Respondent who had not participated in the proceedings at all. Costs follow the event. I find that the appeal has merit. I allow the appeal in the following terms: -

    a. The Ruling and orders of the trial court dated October 29, 2021 are hereby set aside and replaced with an order allowing the Notice of Motion dated August 26, 2021 as follows:

        i. the judgement dated June 25, 2021 is reviewed and varied to include an order that the Respondent do vacate and hand over vacant possession of the suit land to the appellant within 60 days of this judgement in default of which the Respondent will be evicted from the suit land. The eviction to be executed by a duly licenced court bailiff or auctioneer in accordance with the law.

        ii. The OCS Cheptulu police station to provide security and escort during the eviction exercise.

    b. Costs of the appeal to the Appellant.

Orders accordingly.

JUDGEMENT DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 9TH DAY OF FEBRUARY 2023.

E. Asati

JUDGE

In the presence of:

Patricia- Court Assistant.

Kegehi advocate for the Appellant.

No appearance for the Respondent.