



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 21 OF 2004**

**KEFA WERE.....PLAINTIFF**

**VERSUS**

**BENEDICT CHEPKERING.....DEFENDANT**

**RULING**

1. This is a ruling on the application dated 27/3/2019 and filed in court on the same date. That application has been brought by the defendant seeking the following orders:-

(1) ...spent

(2) ...spent

(3) That this court be pleased to review and/or set aside the orders made on 6<sup>th</sup> December, 2018 dismissing the defendant's counterclaim and reinstate the same.

(4) That this court be pleased to mark the plaintiff's suit as withdrawn with costs to the defendant.

(5) That this court be pleased to observe that the orders adopted in Kitale SPMC LDT No. 54 of 2003 cannot be enforced after the lapse of twelve (12) years.

(6) That costs of this application be provided for.

2. The application is premised under **Article 60 (1) f, 40, 159 of the Constitution of Kenya 2010, Section 80, 34, 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 45, Rule 1 Order 51, Rule 1 of the Civil Procedure Rules, Section 4(4) of the Limitation of Actions Act Cap 22 Laws of Kenya.**

3. The grounds on which the said application is made are that the plaintiff vide a plaint dated 3/2/2004 instituted suit against the defendant herein; that vide a notice of withdrawal dated 14/2/2017 the plaintiff discontinued the suit against the defendant; that upon withdrawal of the plaintiff's suit the court should have determined the defendant's counterclaim; that directions were not given on the issue of costs upon withdrawal of the suit by the plaintiff as this court opined that the same was to be given after hearing the defendant's counterclaim (this last averment is not borne out by the court record); that the plaintiff thereafter filed a notice of preliminary objection dated 21/5/2018 seeking that the defendant's counterclaim was *res judicata* as the dispute relating to ownership of the suit land had been determined by the Kwanza Lands Disputes Tribunal; that the preliminary objection was heard during the service week on 31/10/2018 by the Hon. Justice C. Yano and a ruling was delivered on 6/12/2018 upholding the preliminary objection and dismissing the defendant's counterclaim with costs to the plaintiff; that it is in interest of justice that execution of the plaintiff's costs do await directions on the issue of costs on the withdrawal of his suit by himself; that the plaintiff's decree has therefore become null and void by operation of law and that this application has been brought promptly and in utmost good faith.

4. The application is supported by the affidavit of the applicant sworn on 27/3/2019. That affidavit reiterates the same matters set out in the grounds above.

5. In his opposition to the application, the plaintiff filed a replying affidavit sworn on 11/5/2019. He stated that the instant application is defective, lacking in merit and is based on false assertions hence it should be summarily dismissed; that judgment was delivered in this suit in favour of the plaintiff and no new facts have arisen to warrant this court grant the orders prayed for; that judgment having been delivered in this matter the applicant ought to have lodged an appeal against the same and the present application is but a disguise to lodge an appeal out of time; that the applicant's prayer to mark the suit as withdrawn with cost to the defendant is neither here nor there as the plaintiff suit has already been marked as withdrawn; that on 27/3/2019 the applicant filed an application in **Kitale SPMC LDT No. 54 of 2003** seeking similar orders as in the present application which application was dismissed for want of prosecution; that the application is an abuse of the

court process as no new issues have been discovered to warrant this court order setting aside the judgment made on **6/12/2018** and that the application does not meet the threshold to enable this court exercise its discretion in her favour.

6. The applicant filed submissions on **29/5/2019**. I have perused the file and noted there are no submissions filed on the part of the respondent.

7. The genesis of this application is the order made on **6/12/2018** by the Honourable Justice C.K. Yano dismissing the counterclaim on the basis that it is incompetent and an abuse of court process.

8. Upon an application for review under **Order 45** of the **Civil Procedure Act** and in order to obtain the orders sought the applicant must demonstrated the following:

**(1) That there is 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 the order was made**

**(2) Alternatively, some mistake or error on the face of the record.**

**(3) Any other sufficient reason.**

**(4) That the application for review has been lodged without any unreasonable delay.**

9. **Order 45 (2)** states that an application for review of decree or an order of the court on grounds other than the discovery of new and important matter or evidence must be made only to the judge who passed the decree or made the order sought to be reviewed. However **Sub-rule (2)** provides that if the judge who made the order is no longer attached to the court the application may be heard by any other judge who is attached to that court at the time the application comes up for hearing. I find that that sub-rule applies to this case and therefore I have the mandate to dispose of the instant application.

10. Where it appears that there are no sufficient grounds for review the court shall dismiss the application.

11. The grounds upon which the instant application is brought are primarily that directions on the issue of costs upon withdrawal of the suit by the plaintiff were not given and the execution on the plaintiff's costs should await such directions; that this court should give directions that the plaintiff's suit should be marked as withdrawn with costs; that the decree in **Kitale SPMC Land Case No. 54 of 2003** is unenforceable as 12 years has lapsed since the decree was passed and the plaintiff's decree is therefore null and void by operation of the law.

12. It is not in dispute that the plaintiff withdrew his claim against the defendant vide a notice dated **14/2/2017** and no directions were issued on costs. The preliminary objection raised by the plaintiff to the defendant's counterclaim stating that it was *res judicata*, was dealt with with finality on **6/12/2018**.

13. The only issue that now appears to vex the defendant is that no directions were given regarding costs of the plaintiff's suit against him which was withdrawn while costs were awarded against him in favour of the plaintiff upon success of the preliminary objection. Judging by the list of possible grounds for review above, in what category should that ground then fall? Most likely the second.

14. While determining the preliminary objection, the court did not refer to the circumstances surrounding the withdrawal of plaintiff's suit and the issue of costs. It only considered the merits of the defendant's counterclaim. However it made an express order that the same is dismissed with costs. There is no new matter or evidence revealed in the instant application. However the court never delved into the issue of who should pay the costs after noticing the filed notice of withdrawal of suit. The matter went on being mentioned for one reason or the other without any specific address of this issue. Can it be said there was a mistake on the face of the record? There is no mistake or error on the record proved by the applicant. What can be detected is merely an inadvertent omission.

15. I also do not find any other sufficient reason that can enable this court to set aside the order of dismissal of the counterclaim. **Section 27** of the **Civil Procedure Act** provides that "costs of an incidental to all suits shall be in the discretion of the court or judge and the court shall have full power to determine by whom and to what extent such costs should be paid and to give all necessary directions for the purposes of those costs and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers. The proviso to that section states that the cost of any action, cause or other matter shall follow the event unless the court or judge shall for good reason otherwise order. The order was made in a full ruling prepared by the judge and he must be deemed to have focused on the issues as to why the counterclaim should be dismissed and as to why costs should be borne by the defendant in respect of the counterclaim and he pronounced himself clearly on it.

16. In the circumstances, want of directions on the issue of costs upon the withdrawal of the plaintiff's suit vide notice dated **14/2/2017** in the ruling on the preliminary objection affords the applicant no good reason for review of the court's order on dismissal of the counterclaim and on costs on the counterclaim.

17. **Prayer No. 3** of the application therefore has no merit.

18. Should this court then having found that the application has no merit in respect of prayer No. 3 dismiss the same entirely?

19. The question remains whether prayer No. 4 is capable of being granted in this application for review.

20. I note that a notice of withdrawal dated **14/2/2017** was filed under **Order 25 Rule 1** of the Civil Procedure Rules. That Rule provides that

**“At any time before the setting down of the suit for hearing, the plaintiff may by notice in writing which shall be served upon all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim thereof.”**

21. The first hearing date was **15/6/2004** when the matter was listed for formal proof. The application to set aside the ex-parte judgment was dismissed and the case was on **3/12/2004** set down for hearing again on **9/5/2005**.

22. **Order 25 rule 2(1)** provides that where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn only upon the filing of a written consent signed by all the parties. **Subrule 2(2)** of **Order 25** provides that where the suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to, inter alia, costs. It appears this sub-rule was not observed when the plaintiff withdrew his suit vide the notice dated **14/2/2017** yet by that time the suit had already been set down for hearing.

23. It is therefore clear that this matter had been set down for hearing of the main suit before the notice of withdrawal of the plaintiff's claim was filed. I consider that under **Order 25 rule 2 (2)** the court ought to have at the time of withdrawal given directions as to costs but that never happened.

24. An explanation as to why it never happened lies in the proceedings of 16/3/2017 which reflects Mr. Waweru for the plaintiff as stating that a notice of withdrawal was intended to be filed in two weeks from that date. However the court having perused the file drew its attention to the notice of withdrawal filed that morning by the plaintiff where upon the matter was scheduled for a further mention on 13/3/2017 ostensibly to allow Mr. Bitok for the defendant time to react.

25. Mr. Bitok does not appear to have attended court on 13/3/2017 when Mr. Waweru informed court that the suit having been withdrawn the only thing that remained was a counterclaim and a further mention was set for 10/4/2017. Subsequent mentions on 10/4/2017 and 19/7/2017 were not attended by any counsel on behalf of the defendant. Mr. Bungei holding brief for Mr. Bitok only appeared at a mention on 15/3/2018 when the counterclaim was fixed for hearing on 11/4/2018. By the time the preliminary objection was raised to the counterclaim this court had not therefore issued any directions as to who should bear costs in plaintiff's suit.

26. **Section 80, 34, 1A, 1B** and **Section 3A** of the Civil Procedure rules are relied on. **Articles 40** and **61(1) (f)** and **159** of the Constitution are also cited by the plaintiff. However I find **Articles 40** and **61 (1) (f)** to be of little aid to the applicant in the instant issue.

27. Focus is now on the overriding objective of the Civil Procedure Act and Rules as provided for under **Section 1A, 1B** and the inherent power of the court under **Section 3A** of the Civil Procedure Act.

28. Under the first two Sections this court is enjoined to handle all matters before it for the purpose of the just determination of the proceedings, the efficient disposal of the business of the court, the efficient use of available judicial and administrative resources and timely disposal of proceedings at a cost affordable by the respective parties.

29. If I were to disallow prayer No. 4 of the application dated 27/3/2019 solely on the basis that it has been sought in an application for review of orders unrelated to the issue of directions regarding costs of the plaintiff's suit, that issue would remain pending and parties affected may find themselves embroiled in further applications or proceedings in an application other than a review application in order to settle it. For that reason more proceedings in this litigation may still go on after such dismissal at the expense of valuable judicial time. I do not consider that to be within the contemplation of **Section 1A, 1B** and **3A** of the Civil Procedure Act and **Article 159 (2) (c)** and **(d)** of the Constitution of Kenya, the latter which emphasizes on the principle that justice shall not be delayed or be clogged by undue regard to procedural technicalities.

30. For the foregoing reason I find that this court has inherent power to revisit the record and make directions as prayed in prayer No. 4 of notice of the motion dated 27/3/2019 to satisfy the provisions of **Order 25 rule (2) subrule 2** that directions ought to be made where a suit purported to be withdrawn had already been set down for hearing.

31. As to the merits of the actual directions to be made as sought in this application, regard must be heard to the fact that the suit was filed by the plaintiff and voluntarily withdrawn by him after occasioning the defendant the need to defend himself and file a counterclaim. In my view the proviso to **Section 27** of the Civil Procedure Act with regard to costs following the event applies to the plaintiff's withdrawal notice.

32. Finally on the issue of whether the application has been brought without unreasonable delay I note that the decision on the preliminary objection was delivered on **6/12/2018** and this was just before the Christmas vacation. The instant application was presented to this court on **27/3/2019**. For the purpose of prayer No. 4 which does not fall under the category of review orders I find that the application was timeously brought.

33. The upshot of the above is that **prayer No.4** of the applicant's application dated **27/3/2019** is merited and is hereby granted. All the other prayers are rejected. Each party shall bear their own costs of application.

**Dated, signed and delivered at Kitale on this 8<sup>th</sup> day of July, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**8/7/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Ifedha holding brief for Waweru for Plaintiff

Mr. Kisenbe holding brief for Samba for Applicant

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**8/7/2019**