Polpane Properties Limited v Waweru & 2 others (t/a Omondi Waweru & Co Advocates) (Civil Suit 32 of 2015) [2024] KEHC 16908 (KLR) (16 February 2024) (Ruling)

Neutral citation: [2024] KEHC 16908 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 32 OF 2015

F WANGARI, J

FEBRUARY 16, 2024

BETWEEN

POLPANE PROPERTIES LIMITED ..... PLAINTIFF

AND

MOSES WAWERU ..... 1ST DEFENDANT

JASPER OMONDI ..... 2ND DEFENDANT

DALMAS OMONDI ..... 3RD DEFENDANT

T/A OMONDI WAWERU & CO ADVOCATES

RULING

1. This is a Ruling on an Application dated 28th July 2023 and filed by the Plaintiff seeking the review of the Ruling of this Court dated 7th July 2023. The Application is brought under the provisions of Order 45 of the Civil Procedure Rules and is materially based on the ground of an error apparent on the face of the Ruling. The Applicant contends that the court erroneously set aside the Judgement.

2. The 1st and 2nd Respondents filed Grounds of Opposition dated 26th September 2023. The Objection is substantially on the grounds that the Application for review is a masked Appeal.

3. The Applicant filed submissions. It was submitted that this is a proper Application for review under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. The Respondents filed submissions. They contended that there was no error apparent on the face of the record.

4. They relied inter alia on the case of National Bank of Kenya v Ndungu Njau (1997) eKLR to canvass the argument that it is sufficient ground for review that another judge would have taken a different view.

Analysis

12. I have perused the Application and the response thereto as well as the submissions and authorities filed in support and opposition to the Application. The single issue for my determination is whether the Applicant has met the legal threshold for an Order of review on account of the error apparent on the face if the record.

13. I note that the Application is filed under the provisions of Order 45 of the Civil Procedure Rules. The Jurisdiction of this Court to grant review is well set out in the law.

14. Section 80 of the *Civil Procedure Act* states that:

> " Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit".
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> Section 63 (e) of the *Civil Procedure Act* states that:
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> " In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient

12. Order 45 of the Civil Procedure Rules provides for Review and it states as follows:

> " (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is hereby allowed, and who 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 the order made, 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 judgment to the court which passed the decree or made the order without unreasonable delay.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

12. I associate myself with the reasoning of Kuloba, J (as he then was) in Lakesteel Supplies v Dr. Badia and Anor Kisumu HCCC No. 191 of 1994 where he opined that:

> " The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

12. I am thus required to determine whether there is an error apparent on the face of the Ruling and Order dated 7th July 2023 that is subject to review in the Application. The Application dated 21st February 2023 leading to the impugned Ruling sought the following Orders:

    1. Spent
    2. Spent
    3. That M/s Omondi Kinyua & Co. Advocates be permitted to take over the conduct of representation of Dalmas Omondi/ the Applicant herein from M/s Omondi Waweru & Co. Advocates as against Dalmas Omondi/Applicant.
    4. The Judgement dated 6th December 2017, Decree issued on 19th February 2018 and all consequential Orders be set aside.
    5. Cost of the Application be provided for.

12. I have perused the said Application vis a vis the impugned Ruling dated 7th July 2023. I note that the Application also sought to set aside the Judgement of the Court on grounds among others, that the Applicant was not served with the summons to enter appearance.

13. From the Ruling, it appears that the court did not delve on the issue of service of summons in the context of setting aside Judgement of the Court. Conversely, the court considered the prayer in the Application that sought that Messrs. Omondi Kinyua & Co. Advocates be permitted to take over the conduct of representation of Dalmas Omondi/ the Applicant herein from M/s Omondi Waweru & Co. Advocates as against Dalmas Omondi/Applicant.

14. I say so because that is the issue that was not contested as was stated in the Ruling. In considering whether there is an error apparent on the face of the record, it has been held that the intention of the

court as appears from the Ruling or Order is supreme. The Court of Appeal in Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418 expressed itself as follows:

> " The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."

12. One of the errors the Applicant points out was that this court's ruling finding the 3rd Defendant, Dalmas Omondi was not a partner in the firm of Omondi Waweru, ought to be reviewed. Respectfully, this is a finding based on affidavit evidence and as decreed by the Court of Appeal in Ndung'u Njau (above), this is a ground for appeal and not review and I thus decline the Plaintiff's/Applicant's invitation on this limb.

13. The other error pointed out was that the court did not consider the parties' submissions. Is this a ground to review the ruling of 7th July, 2023? In answering this question, it is imperative to consider whether any party was prejudiced by the court's failure to consider parties' submissions. A court of law in arriving at its decision is primarily bound to consider the parties' pleadings and evidence be it oral or affidavit. Submissions cannot take the place of evidence. In Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR, the Court Appeal held as follows: -

> " ...Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented..."

12. Based on the above, failure to consider parties' submissions was not prejudicial and cannot be a ground to warrant this court to review its ruling of 7th July, 2023. The only correction this court notes is the blanket order setting aside the judgement dated 6th December, 2017 and the decree issued on 19th February, 2018. This was on an honest omission of consideration noting that the setting aside of the Judgement and decree was only in respect of the 3rd Defendant. The court shall thus review its order on setting aside by specifying that it was only in respect of the 3rd Defendant.

13. An in-depth consideration of the principles to consider in an application to set aside judgement was not necessary since the 1st and 2nd Defendants confirmed that indeed, the 3rd Defendant was not a partner either at the time the claim arose or when judgement crystallized. The Plaintiff cannot force a party whose co-defendants have exonerated him or her from a crystallized claim such as the present one. In any event, the Plaintiff has a remedy against the co-defendants whom it is at liberty to pursue.

Determination

12. The upshot of the foregoing is that I make the following Orders:

    i. The Order of the Court setting aside the entire Judgement dated 6th December 2017, Decree issued on 19th February 2018 and all consequential Orders be and is hereby reviewed and set aside but only limited to the 3rd Defendant;

    ii. The Judgment against the 1st and 2nd Defendants stands; and

iii. There shall be no order as to the costs.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 16TH DAY OF FEBRUARY, 2024

.....

F. WANGARI

JUDGE

In the presence of:

Onyango Advocate for the Plaintiff

M/s Omondi Advocate for the 3rd Defendant

Salwa, Court Assistant