



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 218 OF 2021

SAKI LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

HUMPREY OMOLO & 22 OTHERS.....DEFENDANTS/APPLICANTS

RULING

INTRODUCTION

1. The Defendants/Applicants herein have filed the Notice of Motion Application dated the **6th of February 2020** and in respect of which the Defendants/Applicants have sought the following Reliefs;

i.(Spent)

ii. *This Honorable Court do Review its own judgment dated the 17th day of October 2018 by Lady Justice Mary M. Gitumbi and delivered by Justice Bernard Eboso at Nairobi.*

iii. *Pending the hearing and determination of this Application, the Court stays the execution of the Eviction order issued on the 28th of February 2019 by this Honorable Court.*

iv. *Pending the hearing and determination of this Application, the Honorable Court be pleased to issue an Injunction restraining the Respondents and/or their agents, employees or servants from Evicting the Defendants/Applicants.*

v. *Costs be provided for.*

2. The subject Application is predicated on the various, albeit numerous grounds which have been alluded to at the foot thereof and same is further supported by the Affidavit of one, Daisy Ruto, sworn on the 6th of February 2020, and to which the Deponent has attached a total of eight annexures.

3. Upon being served with the Notice of Motion Application herein, the Plaintiff/Respondent reacted to the Application by filing an Affidavit sworn by one, Eliud N. Kihara, on the 4th of June 2021. For clarity, the said Replying Affidavit has annexed thereto various annexures which comprise of a bundle of three documents.

4. It is important to observe that upon being served with the Plaintiff's Replying Affidavit, the Defendants/Applicants herein sought for and obtained leave, and thereafter filed a Further Affidavit, sworn on the 15th of July 2021, and to which the Applicants have further annexed a total of eight annexures.

DEPOSITIONS BY THE PARTIES

Defendants/Applicants Case

5. The Defendants/Applicants herein have contended that upon the filing of the subject suit, same instructed and retained an Advocate who entered appearance, and thereafter filed a statement of defence on their behalf.

6. It is the further averment on behalf of the Defendants/Applicants that after statement of defence was entered on their behalf, the Plaintiff/Respondent herein filed a Notice of Motion Application whereby same sought to strike out the statement of defence and for entry of summary judgment.

7. Nevertheless, the Defendants/Applicants have averred that the said Application was dismissed by the Honorable Court vide Ruling rendered on the 24th of April 2015, whereby the Honorable Court found and held that the statement of defence on behalf of the current Defendants/Applicants raised triable issues that should be dealt with in a plenary hearing.

8. Notwithstanding the foregoing, the Defendants/Applicants have thereafter averred that the subject matter proceeded to and was heard without Notice and/or service on themselves. In this regard, the Applicants thus contend that same were never afforded an opportunity to be heard.

9. Despite the foregoing, the Applicants thus aver that the judgment which was rendered by the Honorable Court has conferred upon the Plaintiff/Respondent ownership rights to the suit property and on the basis of same, the Defendants/Applicants are now exposed to eviction.

10. The Defendants/Applicants have averred that the suit property, namely, L.R. NO. 9042/1570, belongs to a company known as Euga Networks Limited, wherein the Defendants/Applicants are the shareholders.

11. In the premises, it is the Applicants' averment that their occupation and possession of the suit property is premised on the ownership thereof by the Applicants' company, and in this regard the judgment of the Court and the consequential Eviction orders ought to be reviewed and/or vacated.

The Plaintiff/Respondent's Case.

12. In an elaborate Replying Affidavit sworn on the 4th of June 2021, one Eliud N. Kihara, has averred that the suit property lawfully belongs to and is registered in the name of the Plaintiff/Respondent. In this regard, the Plaintiff/Respondent is thus entitled to exclusive occupation, possession and use thereof.

13. It is the Plaintiff/Respondent's further averment that upon the filing of the subject suit, the summons to enter appearance and the entire Court process was duly served upon the Defendants/Applicants, who thereafter retained the firm Jaleny & Co. Advocates to enter appearance and file defence.

14. It is the Plaintiff/Respondent's further averment that pursuant to the instructions by the Defendants/Applicants, indeed a joint statement of defence was filed and/or mounted on their behalf.

15. Further, the Plaintiff/Respondent has also averred that subsequent to the filing of statement of defence, the matter was listed for hearing on various occasions, which have been itemized in Paragraph 12 of the Replying Affidavit and that despite service having been effected upon the Defendants/Applicants' nominated Advocate, same failed to attend court.

16. Other than the fact that the Defendants/Applicants were duly represented by an Advocate, the Plaintiff/Respondent have further averred that the issue of Euga Networks Limited, which has been alluded to by the Defendants/Applicants, is not a new issue. In fact, the Plaintiff/Respondent avers that the said issue was alluded to and/or enumerated in Paragraph 3 of the Defendant's statement of defence dated the 20th of January 2012.

17. Lastly, the Plaintiff/Respondent has averred that even though judgment had been rendered, on the 23rd of October 2018, the law firm of Khaminwa & Khaminwa, who have filed the subject Application, neither sought for nor obtained Leave before coming on record.

18. In short, the Plaintiff/Respondent has prayed that the subject Application be dismissed.

Defendants/Applicants' Further Affidavit

19. Stung by the contents of the Replying Affidavit, the Defendants/Applicants herein filed a Further Affidavit in respect of which, same reiterated the earlier position but added that their previous Advocate on record had not been served with the Hearing Notices, and therefore the hearing proceeded behind their back.

20. Further, it is the Defendants/Applicants' averment that the suit plot lawfully belongs to their company and that their occupation thereof is lawful.

21. In fact, the Defendants/Applicants have further averred that this Honorable Court had confirmed that indeed the Applicant's defence raised triable issues vide Ruling rendered on the 24th of April 2015, and that it is that Ruling that the Applicants agree with.

22. On the other hand, the Applicants have averred that the Title that the Plaintiff/Respondent has, merely resembles the one owned by their company, and in this regard, the Defendants/Applicants aver that the Respondent's title is a forgery and that they shall ask the Court to refer same for Examination.

23. Finally, the Applicants have averred in Paragraph 25 of the Further Affidavit that their Advocate filed a Notice of Change Advocates after receiving a consent from the firm of Ms. Jaleny & Co. Advocates.

24. As pertains to the consent from Ms. Jaleny & Co. Advocates, the Applicants have proceeded to indicate that a copy of the consent has been annexed, but in actual sense, what has been annexed is only a Notice of Change of Change of Advocate.

SUBMISSIONS BY THE PARTIES

25. The subject Application came up for hearing before the Honorable Court on the 5th of May 2021, on which day the Court directed that the Application be disposed of by way of written submissions.

26. Pursuant to and in respect of the directions given by the Court, the Defendants/Applicants proceeded to and filed written submissions on the 22nd of February 2021, in respect of which same have addressed the issues of law pertaining to and concerning the circumstances when an Order for Review ought and should be granted.

27. On the other hand, the Plaintiff/Respondent filed their written submissions on the 4th of June 2021.

28. For clarity, both parties have also cited several authorities to buttress their respective positions.

ISSUES FOR DETERMINATION

29. Having examined and evaluated the Notice of Motion Application dated the 6th of February 2020, the Supporting Affidavit thereto, as well as the Further Affidavit, together with the written submissions filed by the Defendants/Applicants, on one hand, and having also examined the Replying Affidavit as well as the written submissions filed by the Plaintiff/Respondent, I am of the considered view that the following issues are germane for determination;

i. Whether the law firm of Ms. Khaminwa & Khaminwa are properly on record for the Defendants/Applicants and if not, whether the subject Application has been filed by a stranger.

ii. Whether the subject Application has espoused and/or satisfied the requisite conditions to warrant Review of the judgment and consequential decree of the Honorable Court.

ANALYSIS AND DETERMINATION

Issue Number One

Whether the law firm of Ms. Khaminwa & Khaminwa are properly on record for the Defendants/Applicants and if not, whether the subject Application has been filed by a stranger.

30. It is common ground that judgment was entered and/or delivered in respect of the subject matter on the 23rd of October 2018, whereupon the Honorable Court found and held that the suit property belongs to and is lawfully registered in the name of the Plaintiff/Respondent.

31. Subsequently, the Plaintiff/Respondent herein proceeded to and extracted a Decree arising from the judgment of the Court.

32. Indeed, the foregoing position is conceded and confirmed by the Defendants/Applicants and thus the request that the Honorable Court be pleased to grant an Order of stay of the Eviction orders issued on the 28th of February 2019.

33. Given that a judgment had already been issued and/or otherwise rendered, if the Defendants/Applicants herein were keen to effect change of Advocate, it was thus incumbent upon the intended Advocate to seek for and obtain Leave of the Court before filing a Notice of Change of Advocates.

34. In the alternative, it was similarly open to the intended Advocate to procure and obtain the consent of the outgoing Advocate on record, and thereafter file the consent for purposes of endorsement by the Court, before filing the Notice of Change of Advocates.

35. In respect of the subject matter, when the issue of the impropriety of the pleadings filed by the law firm of Khaminwa & Khaminwa was raised, an averment was made by the Defendants/Applicants at paragraph 25 of the Further Affidavit as hereunder;

“That the allegation that our Advocate are not properly on record is not true as a Notice of Change was duly filed and served after receiving consent from Jaleny & Co. Advocates, the former advocates and I am verily advised by my Advocates that the same ought not to hinder substantive justice as intended by the Respondent. (I hereby attach and mark as DJS 8A, a copy of the Notice of Change.”

36. One would have expected the Defendants/Applicants Advocate to substantively address and/or respond to the issue of whether Leave was sought for and/or obtained beforehand or better still, whether a consent was procured and filed with the Court for purposes of endorsement, prior to the filing of the Notice of Change and the subject Application.

37. Other than the foregoing, it would also have been appropriate for the Defendants/Applicants Counsel to own up and concede the Application was filed prior to and/or before obtaining the requisite Leave and/or filing of a consent.

38. In respect of the latter position, the Defendants/Applicants would then have either sought for the permission of the Court to remedy the lapse and/or inadvertence, and in my humble view, the Court would have considered such an Application and no doubt exercised discretion, one way or the other.

39. Better still, the Defendants/Applicants herein would have sought Leave of the Court to withdraw the Application and thereafter file a compliant Application, taking into account the positions of **Order 9 Rule 9 of the Civil Procedure Rules, 2010**.

40. I am afraid that when the firm of Ms. Khaminwa & Khaminwa filed the Notice of Change, on the 29th of January 2020, same did not obtain Leave and in any event, the revenue receipt number A0746492 which was issued on the 29th of January 2020, only related to a Notice of Change of Advocates and no more.

41. In the circumstances, it is my humble finding that the Notice of Change of Advocates which was so filed, was irregular and thus illegal for violating the provisions of **Order 9 Rule 9 of the Civil Procedure Rules, 2010** which provide as hereunder;

“[Order 9, rule 9.]

Change to be effected by order of court or consent of parties.

9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court— (a) upon an application with notice to all the parties; or (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

42. The foregoing observations notwithstanding, I must point out that the Notice of Change of Advocates upon which the law firm of Ms. Khaminwa & Khaminwa has proceeded to file the subject Application is also curious.

43. I say so because the Notice of Change of Advocates relates to a case between the following parties;

“Saki Limited.....Plaintiff

-Versus-

Euga Networks Limited.....Defendants”

44. So, if the firm of Khaminwa & Khaminwa were filing a Notice of Change to act for Euga Networks Limited, who in any event is not one of the Defendants herein, then on what basis has the said firm thus filed the subject Application on behalf of the Defendants/Applicants herein?

45. In my humble view, the law firm of Ms. Khaminwa & Khaminwa Advocates, are not on record for any of the Defendants/Applicants, and in this regard, same could not file any legitimate court process.

46. In my humble view, the subject Application, which has been filed by a law firm, who is not on record at all for any of the Defendants/Applicants, is a nullity and thus incapable of founding the request for Review.

47. On this account alone, I would have been constrained to terminate the Notice of Motion Application dated the 6th of February 2020. However, for completeness of record, and having itemized a second issue for determination, I feel obliged to address same.

Issue Number Two

Whether the subject Application has espoused and/or satisfied the requisite conditions to warrant review of the judgment and consequential decree of the Honorable Court.

48. The subject Application is premised and/or anchored on the provisions of **Order 45 Rule 1 of the Civil Procedure Rules, 2010**. For clarity, the said provisions provide as hereunder;

“[Order 45, rule 1.]

Application for review of decree or order.

1. (1) 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 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.”

49. My reading of the provisions of **Order 45 Rule 1 of the Civil Procedure Rules, 2010**, drive me to the conclusion that an Order for Review can only be sought for on the basis of the following grounds;

- i. Discovery of new and important evidence which was not within the knowledge of the Applicant and which could not have been gotten despite exercise of due diligence.*
- ii. The existence of error and/or mistake apparent on the face of the record.*
- iii. Sufficient cause.*

50. It is also important to point out that a party seeking to apply for Review must also mount the Application without unreasonable delay. In this regard, the Applicant is called upon to exercise Due Diligence and to move the Court with due expediency.

51. On the other hand, before a party can proceed to canvass an Application for Review, it is incumbent upon the Applicant to disclose in the body of the Application and/or in the Affidavit in support thereof, the grounds and/or basis upon which Review is sought. It is only then that the Applicant can then be able to buttress the disclosed grounds by making submissions aimed at proving the specific grounds enumerated and/or alluded to.

52. However, in respect of the subject matter, it is sufficient to note and/or observe that the Defendants/Applicants herein have not alluded to any of the grounds stipulated under **Order 45 Rule 1** or at all.

53. Having not enumerated or alluded to any ground, upon which Review is being sought, the question thus remains as to whether the Defendants/Applicants herein can be allowed to wander around and/or go on a fishing expedition, in search of anything and/or nothing.

54. In my humble view, it was incumbent upon the Applicants to narrow down the Application to a specific ground and/or grounds known to law, and thereafter endeavor to prove same, but that has not been done.

55. In support of the foregoing observation, I beg to refer to and share in the sentiments of the Court in the decision in the case of **Republic vs Advocates Disciplinary Tribunal Ex-parte Apollo Mboya [2019] eKLR**, where the Honorable Court distilled the relevant principles as hereunder;

“The principles which can be culled out from the above noted authorities are:-

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.*
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.*
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.*
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.*
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.*
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.*
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.*
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.*
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.*
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”*

56. I must say that if I had a proper Application for Review, premised and/or anchored upon the grounds envisaged under the law, then I would have been constrained to evaluate the available evidence to ascertain whether the pointed grounds were proven.

57. However, in the instant case, the Application has not enumerated and/or alluded to any of the Grounds and neither has the Affidavit aided the fatal omission. Consequently, the subject Application would also fail on the second ground herein.

FINAL DISPOSITION

58. I observed while dealing with the first issue that the law firm of Ms. Khaminwa & Khaminwa Advocates, who filed the subject Notice of Motion, did not file the requisite Notice of Change on behalf of the Defendants/Applicants.

59. In any event, the Notice of Change which was filed was for and on behalf of a person, namely, Euga Networks Limited, who is not a party to the subject matter.

60. I have also observed, that the subject Application which was in any event filed by an Advocate who was not on record, did not comply with and/or espouse the grounds provided for under the law.

61. In the premises, the subject Application, which suffers from fatal deficiencies is similarly devoid of merit and same is a candidate for Dismissal.

62. In a nutshell, the Notice of Motion Application dated the 6th of February 2020 is hereby Dismissed with costs to the Plaintiff/Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant