Mae Properties Limited v Kibe & another (Civil Suit 311 of 2004)
[2024] KEHC 12458 (KLR) (Commercial and Tax) (18 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12458 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 311 OF 2004

A MABEYA, J

OCTOBER 18, 2024

BETWEEN

MAE PROPERTIES LIMITED ..... PLAINTIFF

AND

JOSEPH KIBE ..... 1ST DEFENDANT

PLANFARM INVESTMENTS LIMITED ..... 2ND DEFENDANT

RULING

1. Before Court is the application dated 16/1/2020. It is brought under section 1A, 1B and 3A of the *Civil Procedure Act*, CAP 21, Order 10 rule 10 and 11, order 45rule 1 and Order 51 rule 1 of the *civil procedure rules 2010*.

2. The application seeks the review of the judgment dated 24/7/2019. It also seeks that the defendants' defence dated 8/1/2020 be deemed to be properly on record and that the order of 4/4/2019 with regard to the award of costs be reviewed.

3. This application was premised on the grounds set out on the face of the Motion and the supporting affidavit of Kevin Wakwaya sworn on 16/1/2020. The defendants' case was that the Court entered judgment on 24/7/2019 in default of defence as the Court had struck out the defence on 4/4/2019.

4. It was contended that there was no liquidated amount claimed by the plaintiff to warrant a default judgment and therefore, judgment could only be made after formal proof. According to the defendants, the prayers in the plaint did not warrant judgment without formal proof and the defendants having entered appearance, they were entitled to participate in the formal proof.

5. It was therefore contended that the impugned judgment was an affront to the defendants' right to a fair administrative action and fair hearing. That the order of 4/4/2019 had erroneously granted the plaintiff costs of the suit in an interim application.

6. The application is opposed by the plaintiff vide grounds of opposition dated 5/5/2020. It was stated that the application did not disclose any sufficient grounds to warrant the orders sought. That there was no error apparent on the face of the record and the Court had fully considered the issues raised by the defendants on merit.

7. Further, it that the application called for the re-assessment of the evidence that had been produced before the Court and put reliance on evidence that was not pleaded before Court. It was contended that the Court lacked jurisdiction to sit on appeal from its own jurisdiction.

8. The application was canvassed by way of written submissions which I have considered. The defendants submitted that, the defence was struck out on an interlocutory application for striking out and that therefore, there was no final determination of the suit to warrant an order for costs of the suit. That an award for final costs at an interlocutory stage meant that the defendant had lost the suit which was not the case. Counsel submitted that the award of final costs of the suit at an interlocutory stage was a patent error apparent on the face of record which did not require an intervention of the appellate court.

9. It was further submitted that the judgment of 24/7/2019 was an improper judgment and ought to be set aside. That since the defendants were not served with the application seeking summary judgment or entry of judgment in default of defence, the judgment was defective for want of service. That a request for default judgment under Order 10 of the Civil Procedure Rules could only be made where there was a liquidated demand. That since the plaint did not disclose a liquidated demand, no judgment could be made as against the defendants.

10. On its part, the plaintiff submitted that the order for striking out the defence was made on 4/4/2019 in the presence of all the parties and the application for review was filed 10months later. That the delay had not been explained. That the defendants' defence was struck out for failure to comply with the orders of the Court where they had been ordered to make disclosure.

11. Counsel submitted that the plaintiff was entitled to withdraw the general damages claim and request entry for judgment for the liquidated claims thus no formal proof was necessary. It was further submitted that the amount of Kshs 9,532,909/- was pleaded and the plaintiff had demonstrated how the same was arrived at.

12. I have considered the party's contestations and the submissions on record. Two issues arise for determination, to wit, whether the defendants have met the threshold for review and whether the defendants' defence dated 8/1/2020 should be deemed to be properly on record.

13. The court's jurisdiction for review is founded on section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. The effect of those provisions is that a review would be made where there is an error apparent on the record, where there is new evidence that was not available at the time the decision was made and for sufficient reason. Further, an application for review should be made at the earliest or without any delay.

14. The defendants contended that the impugned judgment dated 24/7/2019 was irregular and void for reasons that it was entered in default of defence yet the plaintiff's prayers in the plaint were unliquidated. The defendant stated that a claim for an unliquidated claim could only be made after formal proof. The defendants further challenged the judgment terming it irregular for want of service

of the application for entry of judgment. That in its ruling of 4/4/2019 the court awarded costs of the suit whereas the suit had not been determined.

15. On its part, the plaintiff contended that it has abandoned its claim for general damages and only proceeded with the claim for liquidated damages. That the application called upon the court to re-assess the evidence produced before court.

16. The application for review was based on the ground that there was an error apparent on the face of record. In *Muyodi vs. Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243, the Court of Appeal stated as follows: -

> "In *Nyamogo & Nyamogo vs Kogo* (2001) 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 the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal."

17. Further, in *National Bank of Kenya Limited v Ndungu Njau* (1997) eKLR, the same Court stated: -

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established."

18. From the foregoing, it is clear that an error apparent on the face of record must be clear and obvious which can be ascertained without the need for additional arguments. In the ruling of 4/4/2019 Nzioka J allowed the plaintiff's application for striking out the defence on the ground that the defendants had failed to comply with the orders of the court made on 20/5/2015.

19. In its ruling, the court allowed the orders sought in the application dated 21/7/2015. In that application, one of the orders sought was that the plaintiff be awarded costs of the application as well as the suit. I see no error as once the defence was struck out, there was nothing that stopped the court to enter judgment thereafter as it did. In any event, judgment having been entered later, costs follow the event.

20. As to whether the judgment entered on 24/7/2019 was irregular, the Court acknowledges that the defendants has raised concerns about the merits of that judgment. The issues presented in the application appear to touch on the very foundation of the original pleading. Addressing these issues would essentially require the Court to reassess the judgment.

21. The court is mindful that it should not sit on appeal over its own decision and this issue should have been ventilated in an appellate court and not in a review application. The plaintiff having abandoned the claim for general damages, nothing prevented the plaintiff from applying for judgment in default of defence. The judgment was properly entered and there was no need for formal proof.

22. In any event, the application was made so after inordinate delay. That alone is enough ground to reject the application. There was no error apparent on the record in either the entry of the judgment on 24/7/2020 or the order of 4/4/2019.

23. In view of the foregoing, the court finds that the defendants' application is bereft of any merit and dismisses the same with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER, 2024.

A. MABEYA, FCI Arb

JUDGE