



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ELC CASE NO. 412 OF 2018

PETER MUNJUNGA GATHERU.....PLAINTIFF/RESPONDENT

-VERSUS-

HARUN OSORO NYAMBOKI.....1ST DEFENDANT/APPLICANT

NESCO SERVICES LIMITED.....2ND DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. The Applicants herein filed a Notice of Motion Application dated 22nd June 2021, whereby the Applicants’ herein have sought for the following Reliefs;

- i.(Spent)
- ii.(Spent)
- iii. The honourable court be pleased to Review and/or set aside its Ruling and Orders made on the 6th May 2021.
- iv. In the alternative and without prejudice to prayer 3 above, the honourable court be placed to give its interpretation of its Ruling and orders made on the 6th May 2021 in relation to the parties’ Rights in the suit premises pending the hearing and determination of the suit.
- v. The costs of this application be provided for.

2. The subject Application is based and/or anchored on the grounds contained at the foot thereof and same is said to be supported by the affidavit of HARUN OSORO NYAMBOKI, namely the 1st Defendant/Applicant. However, it is important to note that no such affidavit has been attached to the Application and/or otherwise availed to the court.

3. To the contrary, the Defendant’s/Applicant’s herein have attached and/or availed to the court an affidavit sworn by one Esther Katheu Maingi sworn on the 22nd June 2021, wherein the deponent avers that same is one of the Directors of the 2nd Defendant/Applicant.

4. Following the service of the subject Application, the Plaintiff/Respondent proceeded to file a Replying Affidavit which is purportedly sworn on the 23rd November 2021, and in respect of which the Plaintiff/Respondent has opposed the Application for Review.

DepositionS by the parties

5. Vide the Supporting Affidavit sworn on the 22nd June 2021, one Esther Katheu Maingi, has averred that same is one of the Directors of the 2nd Defendant/Applicant and that she has been granted the requisite authority and/or mandate to swear the subject affidavit.

6. On the other hand, the deponent has further averred that the 2nd Defendant/Applicant, as well as the 1st Defendant/Applicant, were

aggrieved with the ruling and order of the honourable court dated the 6th May 2021.

7. It is further averred that having been so aggrieved, same proceeded to and filed a Notice of Appeal, expressing their intention to pursue an appeal before the Court of Appeal.

8. It is further averred that upon the lodgment of the Notice of Appeal, the Applicants herein proceeded to and filed an Application for stay of execution before the Court of Appeal, but the said Application before the Court of Appeal was not certified urgent.

9. Be that as it may, the deponent has further averred that during the intervening period, the Plaintiff/Respondent herein has proceeded to and demolished the perimeter wall as well as the gate that had been erected across the suit property and that by virtue of the demolition, the Applicant's tenants who are residing in the 2nd Applicants premises situate on the suit property, are now exposed to several risks including attack by robbers.

10. It is the deponent's further averment, that the suit property, which is being claimed by the Plaintiff/Respondent was transferred to and registered in the name of the 2nd Applicant in the year 2001. In this regard, the deponent avers that the Plaintiff/Respondent therefore does not have any legitimate claim to the suit property.

11. On the other hand, the deponent has further averred that though the Applicants lodged a Notice of Appeal same has since been withdrawn and in this regard, the deponent has attached and/or exhibited a copy of the Notice of withdrawal of the Notice of Appeal.

12. Owing to reported withdrawal of the Notice of Appeal, the deponent now contends that the honourable court has jurisdiction to entertain and/or adjudicate upon the Application for Review.

13. Finally, the deponent has further averred that the orders which were issued by the court on the 6th May 2021, have also created confusion and thus there is need for the court to interpreted same for the parties to appreciate the meaning, import and tenor of the said orders.

14. Based on the foregoing, the Applicants have thus implored the court that it is appropriate to grant the orders of Review and Setting aside of the Ruling and the resultant order issued on the 6th May 2021.

Respondents case

15. The Plaintiff/Respondent herein filed a Replying Affidavit, which is said to be sworn on the 3rd November 2021, in respect of which, the Respondent has averred as hereunder;

16. First, that the Defendants/Applicants herein were aware and knowledgeable of the terms and import of the orders of the court given on the 6th May 2021, which directed the Defendants/Applicants to demolish the wall that same has erected across the road as well as the gate that was similarly erected.

17. It is further averred that despite the clear and express import of the court order, the Applicants herein failed and/or neglected to comply with the court order.

18. Owing to the failure and/or neglect by the applicants to comply with the court orders, the Plaintiff/Respondents was constrained to and indeed sought for the assistance of the police and thereby proceeded to and demolished the offensive wall, as well as the gate, in line with the orders of the court.

19. It is further averred, that following the delivery of the ruling issued on 6th May 2021, the Applicants herein proceeded to and filed a Notice of Appeal to the Court of Appeal. For clarity, it is pointed out that the Notice of appeal was filed on the 7th May 2021.

20. It is further averred that owing to the fact that the Notice of Appeal has not been properly withdrawn, the subject Application is therefore an abuse of the Due process of the Court.

21. On the other hand, the Plaintiff/Respondent has further averred that the subject Application is premature and misconceived, insofar as the Defendants/Applicants, have not exhibited a copy of the order that is the subject of the Application.

22. In the circumstances, the Plaintiff/Respondent has therefore sought to have the entire Application be Dismissed.

Submissions

23. The Notice of Motion Application dated the 22nd June 2021, came up for hearing on the 30th September 2021, on which date the court gave directions, touching on and/or concerning the hearing and disposal of the Application. For clarity, it was ordered and/or directed that the subject Application be canvassed and/or disposed of by way of written submissions.

24. Pursuant to and in line with the direction of the court, the parties herein proceeded to and filed their respective written submissions, which submissions are on record and shall thus receive due attention and consideration.

Issues for determination

25. Having considered the Notice of Motion Application dated the 22nd June 2021, the supporting affidavit, as well as the written submissions filed on behalf of the Defendants/Applicants, on one hand and having examined the Replying affidavit sworn by the Plaintiff/Respondent on the 3rd November 2021, as well as the written submissions dated the 4th November 2021, the following issues do arise for Determination;

I. Whether the Application the 22nd June 2021, is supported by a competent Supporting Affidavit.

II. Whether the Application for Review has been filed during the life time and/or subsistence of a valid Notice of Appeal or otherwise

III. Whether the Application for Review has established the requisite grounds for Review.

IV. Whether the orders of the court made on the 6th May 2021 are ambiguous/ambivalent and thus require interpretation as sought or at all.

Analysis and determination

Issue number 1

26. The Notice of Motion Application dated the 22nd June 2021, has indicated at the foot thereof that same is supported by the annexed affidavit of one Harun Osoro Nyamboki. In this regard, the only document that is alluded to and which thus should buttress the Application is therefore mentioned the affidavit.

27. Nevertheless, despite alluding to the affidavit of Harun Osoro Nyamboki, the Defendants/Applicants herein has not annexed and/or availed a copy of the said affidavit, either as alleged or at all.

28. Conversely, the Defendants/Applicants have availed to the honourable court the affidavit of one Esther Katheu Maingi, sworn on the 22nd June 2021, and wherein the deponent avers that same is one of the Directors of the 2nd Defendant/Applicant and further that same has been mandated and/or authorized by the 1st defendant/Applicant herein to swear the said affidavit on its behalf.

29. Whereas Esther Katheu Maingi, who is reported to be one of the directors of the 2nd Defendant/Applicant, would be disposed to swear an affidavit to Support the subject application, however before the said Esther Katheu Maingi, can proceed to swear such an affidavit, the Application under reference must refer and/or allude to the annexed affidavit of the said Esther Katheu Maingi.

30. As concerns the subject matter, the Notice of Motion Application has only identified and thereby associated itself with the affidavit of Harun Osoro Nyamboki and not otherwise.

31. Despite the Application referring and/or alluding to the affidavit of Harun Osoro Nyamboki, none has however, been availed and/or supplied. Consequently, it thus means that the subject Application is neither supported by nor grounded on any affidavit, either as required under the law or at all.

32. The Notice of Motion Application being one for Review, same is by law required to be supported by a competent supporting affidavit, which should provide the Evidential basis, upon which the Application is to be considered.

33. In the instant case, there is no such Evidential basis and the Application is therefore bare. To the extent that the application is not supported by the aforesaid affidavit or at all, it is therefore my finding and holding that the subject Application, is incompetent and thus legally untenable.

34. As pertains to the affidavit sworn by Esther Katheu Maingi, it is my finding and holding that same has no nexus and/or affinity to the Notice of Motion Application dated 22nd June 2021. Consequently, the said supporting affidavit is a strange document and/or piece of evidence that does not go to any specific issue and/or Application on the court record.

35. Owing to the foregoing, the Notice of Motion Application dated the 22nd June 2021, would obviously fail on this first hurdle.

Issue number 2

36. Following the delivery and/or rendition of the ruling dated the 6th May 2021, the Defendants/Applicants herein felt aggrieved and/or dissatisfied. Consequently, the Defendants/Applicants proceeded to and filed a Notice of Appeal whereby same contended that they were aggrieved and/or dissatisfied with the decision of this honourable court.

37. Pursuant to and upon being served with the Notice of Appeal, the Plaintiff/Respondent herein proceeded to and filed a Notice of address of service, as required under the provisions **of Rule 78 of the Court of Appeal Rules 2010.**

38. Be that as it may, on the 16th June 2021, the Defendants/Applicants herein proceeded to and filed before this court a Notice of withdrawal of the Notice of Appeal and subsequently proceeded to and filed the Application herein seeking Review of the orders that were issued on the 6th May 2021. For clarity the Application for Review was filed and/or lodged on the 22nd June 2021, approximately six (6) days after the

filing of the Notice of withdrawal of the notice of appeal.

39. To the extent that the notice of appeal was deemed withdrawn, upon receipt and/or filing of the notice of withdrawal of the notice of appeal by the court on the 16th June 2021, it is thus apparent that the application for Review was filed after the Notice of Appeal stood Withdrawn.

40. For the avoidance of doubt, it was not necessary that there be an order adopting and/or endorsing the Notice of withdrawal of the Notice of Appeal. It was sufficient that the said Notice had been filed and/or lodged with the court and it thus took effect upon the filing and service of same upon the adverse parties. **See Rule 81 of the Court of Appeal Rules 2010.**

In support of the foregoing position, I am fortified by the decision in the case of **PIL KENYA LIMITED v JOSEPH OPPONG [2009] eKLR**, where hon Justice Bosire JA; held as hereunder;

‘As regards High Court Civil Case No. 260 of 200, the plaintiff was Jeneby Taita with the appellant as defendant. The respondent herein was not named as a party. I earlier stated that a notice of withdrawal of suit was filed on 13th November, 2000. By that date the respondent had not been made a party. It was on or about 15th November, 2000 that the respondent brought an application seeking to be enjoined as a defendant on the ground that he had an interest in the subject matter of that suit. The application was heard on 15th November, 2000, by a Commissioner of Assize, Mrs. Tutui, who granted it and directed that an amended plaint be filed. There is no evidence before this Court that it was ever filed. If, however, the notice of withdrawal was valid such an amendment did not arise as there was no suit in existence respecting which an amended plaint or amended defence could be filed. The order was made ex parte, and later, a Mr. Obura for the plaintiff lamented that he should have been but was not served with the order enjoining the respondent herein as defendant and directing the amendment of the plaint. A plaint could not properly be amended at the instance of a party who was not the plaintiff. The said advocate also asserted that the suit had not been withdrawn and any notice to that effect was a forgery. It later transpired, however, that the plaintiff disappeared. He was not answering his advocate’s letters nor did he ever visit him thereafter. The notice of withdrawal was home made and I infer that it was indeed filed by the plaintiff personally. I say so advisedly. By his conduct he had no interest in the suit, with the result that his advocates had to formally apply for leave to cease acting for him. The plaintiff in that suit did not need the leave of the court to withdraw his suit nor was a court order necessary to give effect to the withdrawal. All that was necessary was for the plaintiff to file a notice of withdrawal before judgment. After judgment, however, the leave of the court was necessary’.

41. In any event, the time when a Notice of withdrawal of a suit and/or claim takes effect, was further considered in the decision in the case of **Beijing Industrial Designing & Researching Institute v Lagoon Development Limited [2015] eKLR**, where it was stated *inter-alia*;

“The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit **has not** been set down for hearing. In such an instance, the plaintiff is at liberty, at any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the plaintiff is to give notice in writing to that effect and serve it upon the all the parties. In that scenario, the plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit **has been** set down for hearing. In such a case, the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filing a written consent. In this scenario, the right of the plaintiff is circumscribed by the requirement that he must obtain the written consent of all the other parties. The last scenario arises where the suit **has been** set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the plaintiff must obtain leave of the court to discontinue the suit or to withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the plaintiff’s right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the court. That such leave is granted on terms suggests that it is not a mere formality.”

42. Based on the following decisions, it is therefore evident and/or apparent that the notice of appeal which had *hitherto* been filed by the Defendants/ Applicants had effectively stood withdrawn, by the time the Application for Review was filed and/or lodged.

43. In the premises, the argument and/or submissions by and/or on behalf of the Plaintiff/Respondent that the Application for Review was filed on the face of the existing Notice of Appeal, is therefore neither correct nor sound in law.

44. Consequently, I would therefore answer the second issue in the Negative.

Issue number 3

45. Having found that the Application for Review was not filed during the existence and/or lifetime of a Notice of Appeal, the next question that now begs to be addressed relates to whether the Applicants have established the grounds for Review, in the manner provided for under the law or at all.

46. Before venturing to answer the question, it is appropriate to reproduce the provision of **Order 45 Rule 1 of the Civil Procedure Rule 2010, which provides as hereunder;**

Application for review of decree or order [Order 45, rule 1.]

Any person considering himself aggrieved—

(1) (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.

47. My reading of the foregoing provisions of the law drives me to the conclusion that a person and/or claimant, who seeks to attract an order for Review must establish and/or prove the existence of the following grounds;

I. Error and/or mistake apparent on the face of record.

II. Discovery of new and important evidence, which was not within the knowledge and/or custody of the claimant at the time of the delivery of judgment/ruling or which could have not been discovered despite exercise of due diligence.

III. Sufficient cause.

48. It also imperative to note that an Application for Review, must also be filed and/or lodged without undue and/or unreasonable delay. In this regard, the time lapse between the rendition of the order sought to be reviewed and the filing of the application for review is important. Similarly, the reason for any delay, must also be availed.

49. In view of the foregoing, it was thus incumbent upon the Defendants/Applicants herein to plead in the Notice of Motion Application any and/or all of the grounds alluded to and/or contained under the provision of Order 45 of the Civil Procedure Rules.

50. Nevertheless, despite the requirement to do so, the Defendants/Applicants herein did not embody and/or plead any of the known grounds for Review, in the Application beforehand.

51. In my humble view, the failure to embody and/or plead the grounds for Review in the body of the Notice of Motion Application and/or better still, to allude to same in the supporting affidavit(*which in this case is non-existent*), renders the subject application fatally incompetent.

52. In any event, one who has not pleaded the grounds for review either in the body of the Application or in the supporting affidavit, where appropriate, cannot thereafter seek to submit on the existence of the said grounds by way of submissions. For clarity, submissions can only fortify the existing pleadings and/or averments, but same cannot take the place of pleadings and/or averments, whatsoever.

53. On the other hand, it is also sufficient to note that parties, including the Defendants/Applicants herein, are bound by their pleadings and in this case the Defendants/Applicants are thus bound by the contents of the Notice of Motion Application dated the 22nd June 2021, which is *albeit* limited in scope.

54. In support of the foregoing position, I am obliged to refer to and rely in the case of **Independent Electoral and Boundaries Commission v Steven Mutinda Mule & Others (2014) eKLR**,

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

55. In my humble view, given that the Defendants/Applicants herein did not advert to and/or raise any of the grounds known to found review, same cannot now be allowed to travel far and wide, beyond the scope of the Application filed. To allow the Defendants/Applicants to do so, would occasion grave injustice to the Plaintiff/Applicant, who would thus be deprived of the opportunity to answer to the *hitherto* undisclosed grounds.

56. Notwithstanding the foregoing, it also imperative to note that the ruling rendered on the 6th May 2021, which has give rise to the impugned orders, touched on the three (3) Applications Two (2) of which were dismissed and one (1) was allowed.

57. Suffice it to state that some aspects of the ruling and thus the order made on the 6th May 2021, were in favor of the Defendants/Applicants. In this regard, the Defendants/Applicants cannot be heard to say that they were aggrieved by the entire decision of the court made on the 6th May 2021. Granted some orders aggrieved the Defendants/Applicants, but that does not allow the Defendants/Applicants the liberty to file an Omnibus Application.

58. Other than the foregoing, it is also worthy to state that the ruling giving rise to the orders made on the 6th May 2021, was rendered after the court had considered extensive and elaborate submissions from the parties herein. Consequently, the ruling and the resultant orders are a product of conscious and deliberate findings and holdings by the court.

59. The court having rendered herself on the various topical issues that were presented before her and having made conscious and deliberate findings, whether the findings were correct and/or otherwise, a party who is aggrieved by such findings can only pursue an appeal to the court of appeal and not otherwise.

60. In this case, the Application by the Applicants herein which is seeking Review of the orders made on the 6th May 2021, is a deliberate *albeit* disguised attempt by the Applicants to invite the court to sit on appeal on its own ruling and/or decision. Such kind of an invite is inimical to the established position of the law and is therefore a legal anathema.

61. On my part, I am not disposed to appropriate the invitation herein. To do so, would amount to courting anarchy and thus doing violence to the Rule of law.

62. In support of the foregoing observation, my attention is drawn to the decision in the case of **National Bank of Kenya Limited v Ndungu Njau (1997) eKLR**, where the court observed as hereunder;

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. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.

63. To the extent that all the issue that are now sought to re-agitated in the subject Application, were ventilated before the judge, prior to and/or before the rendition of the ruling and decision made on the 6th May 2021, this issues can no longer be brought before the same court by way of an Application for Review.

64. In short, the subject Application for Review, which is otherwise meant that the court sit on an Appeal on the Decision of a court of coordinate jurisdiction, is thus an abuse of the Due Process of the law.

Issue number 4

65. The Applicants herein, have also sought from the court an order for interpretation of the orders emanating from the ruling of the honourable court, Hon Lady Justice K. Bor, Judge.

66. The presupposition where one seeks for interpretation is that the orders of the court are ambiguous, equivocal and/or ambivalent. True, if the orders of the court are incapable of interpretation, then the honourable court would be called upon to do so.

67. However, in respect of the instant matter, the totality of the Orders that were issued by the honourable court were duly extracted on the 12th May 2021, and having perused both the ruling and the extracted orders, all I can see, is that the orders are self-explanatory. For clarity, there is no iota of ambiguity or all.

68. In my humble view, the invitation by the Defendants/applicant for the court to interpret the import and tenor of the said order is pretentious and colored with an explained mischief. For clarity, the Orders were duly extracted and thereafter, same were implemented.

69. Suffice it to say, that a grammatical and/or textual interpretation of the ruling and the duly extracted order would suffice. In this regard, the Defendants/Applicants are called upon to apply the canons of interpretation and where appropriate to apply the provisions of Section 98 of the Evidence Act, Chapter 80, Laws of Kenya, as well as construction of written Documents.

70. In a nutshell, the ruling of the learned judge, which I am called upon to interpret, is self-evident, explanatory and speaks by itself. All that was outstanding was compliance with the terms thereof, but which the Defendants/ Applicants failed to do and as a result of the failure, the Plaintiff/ Respondent duly proceeded to and executed.

FINAL DISPOSITION:

71. Having dealt with and analysed all the issues, which were serialized herein before, I come to the conclusion that the Notice of Motion Application dated the 22nd June 2021, Devoid of merits.

72. In the premises, the Application herein be and is hereby Dismissed with costs to the Plaintiff/Respondent.

73. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2021

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant