



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 401 OF 2011

JOSIAH NYIKA MUIA.....PLAINTIFF

VERSUS

JAIRO ATENYA ASITIBA.....DEFENDANT

RULING

1. This court rendered a judgment in this suit on 15/6/2020. The court identified the following as the two key issues falling for determination in the suit: (i) *Whether, as against the defendant and his agents, the plaintiff was entitled to the prayers sought in the plaint; and (ii) What order should be made in relation to costs.*

2. The court proceeded to make the following findings:-

“8. The pleadings and sale agreement relied on by the plaintiff suggest that the suit property is surveyed and has Land Reference Number 12666/1. However, neither a copy of the title nor an official search were produced by the plaintiff. Notwithstanding this, in view of the fact that the defendant did not lead any evidence to controvert the plaintiff’s claim and evidence, the court is satisfied that, as against the defendant, the plaintiff has proved his case on a balance of probabilities.

9. Prayer 2 related to and is directed at tenants who are not parties to this suit. The court would not grant adverse orders against persons who are not parties to this suit. The plaintiff has the legal obligation of notifying the tenants to either vacate the premises or pay rent to him. Unless that is done and an appropriate action is brought by the plaintiff against the tenants, it would be irregular to issue adverse orders against the tenants at this point and in this suit.

10. The plaintiff seeks rent of Kshs 60,000 per month from the date of the agreement. This is a special damages claim. No conclusive evidence was tendered by the plaintiff to support the claim. At the very least, the plaintiff should have led evidence by a valuer to support that limb of the claim. For lack of evidence, that limb of the claim fails.”

3. Ultimately, the court issued the following disposal orders:

a) The defendant together with his agents/servants are hereby permanently restrained from demanding or receiving monthly rents or any other rents in respect of the property known as Land Reference Number 12666/1 situated in Villa Imara Development Project, Imara Daima, Nairobi.

b) The plaintiff is at liberty to issue appropriate directions to any tenant(s) occupying the suit property relating to payment of rent and/or termination of tenancy.

c) The defendant shall bear costs of this suit.

4. About six months later, the plaintiff brought an application dated 15/1/2021 seeking the following review orders under Section 80 of the Civil Procedure Act and **Order 45 rule 1(1)(a)** of the Civil Procedure Rules, among other provisions of the law:

a) That this honourable court do review the orders made by the Honourable Justice B M Eboso on 15th June, 2020.

b) That the honourable court do make an order that the plaintiff’s suit was undefended and that he is entitled to all the prayers sought in the plaint.

c) That the costs of this application be provided for.

5. The said application is the subject of this ruling. The application was supported by the plaintiff's affidavit sworn on 5/1/2021 in which he deposed that he had been advised by his advocate that the judgement rendered on 15/6/2020 had an error apparent on the face of the record because the court did not address all the issues raised in the plaint and more so the issue of refund of all the rent collected by the defendant at the rate of Kshs 60,000 per month from the date of execution of the agreement until the handing over of vacant possession of the premises to him. He added that he had been advised that the suit was undefended and that he was, in the circumstances, entitled to all the reliefs sought in the plaint.

6. The defendant opposed the application through a replying affidavit sworn on 28/5/2021. He deposed that at paragraph 10 of the judgment, the court found that the plaintiff's claim for rent of Kshs 60,000 per month from the date of the agreement was a special damages claim and that he (the plaintiff) had failed to lead evidence to support it, hence the limb failed. He added that the court became *functus officio* upon declaring itself on the evidence.

7. The application was canvassed through written submissions filed through the firm of *Mbaluka & Co Advocates*. Counsel for the plaintiff identified the following as the three issues falling for determination in the application: (i) *Whether the plaintiff was entitled to the review of the orders issued by the court on 15/6/2020*; (ii) *Whether the plaintiff was entitled to all the prayers sought in the plaint*; and (iii) *Who should bear costs of the application*.

8. On whether the plaintiff was entitled to a review of the judgment, counsel cited **Section 80** of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules and submitted that the plaintiff produced a sale agreement and an acknowledgement of receipt of purchase price and despite that, the court failed to address all the issues raised in the plaint, particularly the issue of refund of the rent collected by the defendant. Counsel cited the case of **Muyodi v Industrial & Commercial Development Corporation & Another (2006) 1 EA 243**, **Solomon Ndegwa Kuria v Peter Nditu Gitau (2019) eKLR** and the case of **Gitonga Wambugu Kariuki & 2 others v Eliud Timothy Mwamunga (2018) eKLR**.

9. On whether the plaintiff was entitled to all the prayers in the plaint, counsel submitted that because the suit was undefended, the plaintiff was entitled to all the reliefs sought in the plaint. Lastly counsel urged the court to grant the application and award the plaintiff costs of the application.

10. The defendant filed written submissions dated 23/7/2021 through the firm of *Akolo Wanyanga & Company Advocates*. Counsel for the defendant identified the following as the two issues falling for determination in the application: (i) *Whether the applicant is entitled to the order sought*; and (ii) *What are the appropriate orders to be made in the application*.

11. On whether the applicant was entitled to the orders sought in the application, counsel submitted that the right to apply for review was regulated by Section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules. Counsel added that all prayers in a suit are subject to proof and that even if a claim is undefended, the claimant is obligated to adduce evidence to support his claim. Counsel added that the plaintiff had failed to satisfy the criteria for review as set out under the law.

12. The court has considered the application; the response to the application; and the parties' respective submissions. The court has also considered the relevant legal framework and jurisprudence. Two questions fall for determination in this application. The first question is whether the application meets the criteria upon which this court exercises jurisdiction to review a judgment under Section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules. The second question is, if the court's finding on the first question is in the affirmative, should the orders sought in the application be granted? I will make brief sequential pronouncements on the two questions in the above order.

13. This court's jurisdiction to review its judgment is regulated by the framework in Section 80 of the Civil Procedure Act which provides as follows:-

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(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.”

14. The jurisdiction is further regulated by the framework in Order 45 rule 1 of the Civil Procedure Rules which provides as follows:

“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.

(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.”

15. The Court of Appeal in **Daniel Macharia Karagacha v Monicah Watithi Mwangi, Civil Appeal No. 159 of 2000** rendered itself on the criteria for review in the following words:

“Review is only available where there is an error of law apparent on the face of the record or there is a discovery of new and important matter of evidence which the applicant could not by exercise of due diligence have placed in his pleadings or before the Judge when he heard the earlier application.”

16. The Supreme Court of India in the case of **Afit Kumar Rath v State of Orisa & others (a Supreme Court case)596** at page 608 rendered itself on how this jurisdiction is exercised in the following words:

“The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law which states in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” used in Order 47 rule 1 means a reason sufficiently analogous to those specified in the rule.”

17. The gist of the plaintiff’s application is that the court failed to consider the plea for (issue of) refund of rent collected by the defendant at the rate of Kshs 60,000 per month from the date of execution of the agreement until the date of hand over of vacant possession.

18. In paragraph 4 of the amended plaint, the plaintiff had pleaded thus:

“4. At the time of the said sale the defendant had rented the property to tenants in respect of which the defendant received monthly rents of Kshs 60,000 per month.”

19. In paragraph 6, the plaintiff had pleaded thus:

“6..... The plaintiff’s claim is for payment by the defendant to the plaintiff of the entire sum collected by the defendant as at the date of execution of the agreement until determination of this suit and thereafter until full enforcement of the decree in this suit.”

20. In terms of prayers, the plaintiff made the following prayer relating to rent which the defendant had allegedly collected:

“3. Payment by the defendant to the plaintiff of the entire sum collected by the defendant as rent for the premises at the rate of Kshs 60,000 per month from the date of execution of the agreement until the handing over of vacant possession of the premises to the plaintiff.”

21. Did this court pronounce itself on the above claim for rent collected by the defendant? My perusal of the judgment confirms that this court rendered itself on the issue at paragraph 10 of the judgment as follows:

“10. The plaintiff seeks rent of Kshs 60,000 per month from the date of the agreement. This is a special damages claim. No conclusive evidence was tendered by the plaintiff to support the claim. At the very least, the plaintiff should have led evidence by a valuer to support that limb of the claim. For lack of evidence, that limb of the claim fails.”

22. The pronouncements of the court on the issue of rent which was allegedly collected by the defendant were so unequivocal that I do not see a proper basis for the contention that this court failed to address the issue. If the plaintiff was dissatisfied with the finding of the court on the issue, he had the right of appeal to the appellate court. What I discern from the plaintiff’s application is that the plaintiff is dissatisfied by the finding of the court on the claim for rent collected by the defendant. Instead of the plaintiff challenging the finding in the appellate court, he is inviting this court to render a second finding on the same issue. That is not how review jurisdiction is exercised under Section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules.

23. For the above reasons, my finding on the first question in this application is that the applicant has not satisfied the criteria for exercise of review jurisdiction under **Section 80** of the Civil Procedure Act and **Order 45 rule 1** of the Civil Procedure Rules. In light of the above finding, it follows that the orders sought in the application under consideration are not available. In summary, the plaintiff’s application dated 15/1/2021 is rejected for lack of merit. The plaintiff/applicant shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 16TH DAY OF NOVEMBER 2021

B M EBOSO

JUDGE

In the presence of: -

Mr Wanyanga for the Defendant

Court Assistant: Lucy Muthoni

NOTE:

This application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually at Thika.

B M EBOSO

JUDGE