



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 601 OF 2014

MATHINGIRA WHOLESALERS LTD.....PLAINTIFF/RESPONDENT

-VERSUS-

KIMWATU KANYUNGU.....1ST DEFENDANT/APPLICANT

KIIRU GACHUIGA.....2ND DEFENDANT/APPLICANT

GADSON GITONGA.....3RD DEFENDANT/APPLICANT

KIBERA GATU.....4TH DEFENDANT/APPLICANT

SAMUEL GITHINJI KIBAKI.....5TH DEFENDANT/APPLICANT

HON. MWAI KIBAKI.....6TH DEFENDANT/APPLICANT

RULING

1. Vide an application dated the 23rd September 2019, the Plaintiff Applicant sought for the following orders;

- i. That the court be pleased to enjoin the intended 7th and 8th Defendants in the suit herein
- ii. That the court substitutes Daniel Githinji for the late Gadson Gitinga And Egedios Mwangi Kibera and John Mwangi Kibera for the late Kibera Gatu
- iii. They also sought that the suit be revived in favour of the 3rd and 4th Defendants/Applicants
- iv. That finally that the court releases to the Applicants' Advocates Messers Kamau Kuria & Company Advocates, the rent received and held in the Nyeri branch of Kenya Commercial Bank Limited A/C No. 1140771892 in the name of Kamau Kuria and Company Advocates and Lucy Mwai & Company Advocates pursuant to the order of this court made on the 18th February 2013.
- v. And lastly that if the prayer (i) above was allowed, that the said grant to be paid into the Applicants' Advocate's bank account within Koinange Branch of Standard Chartered Bank Ltd No. 01020121501700.

2. The said Application was supported on the grounds on its face as well as the supporting and further affidavit sworn by Hon Mwai Kibaki on the 23rd September 2019 and Gibson Kamau Kuria sworn on an undated day.
3. This Application was opposed by the Respondents vide a Replying Affidavit of Peter Nderitu Munuhe sworn on 14th October, 2019, wherein the said application was argued by way of written submissions and parties highlighted on the same thereafter.
4. The Respondents' highlight on the Application was that by the Applicants seeking for the release of the money that was deposited in a joint account of the Advocates on record, the same amounted to an act of the execution of the Decree of Court of Appeal in Appeal No. 6 of 2017 where the gist of the judgment was that the Applicant's counter-claim in this court had succeeded whereas the Respondent's suit had been dismissed with costs, as per their annexure marked as PNM 3.
5. That the expectations would be that the Decree would be in tandem with the release sought in the counter-claim, however the Decree, herein marked as PNM 4 showed a different picture and was not related at all with the counter-claim. That the same was approved, the Respondent was not represented.
6. That they had thus filed an Application under certificate of urgency to the court of Appeal seeking to review the terms of that Decree as per the annexure PNM5.
7. That it was therefore prudent to await for the resolution of the correct terms of the Decree before the monies could be removed. Further that at the institution of the suit, the Plaintiff had instructed the Advocates who have already filed their Bill of costs (See PNM 7) which was set for taxation which was yet another matter for consideration before the money could be removed. That the Applicants ought to await the outcome of the two events from wherein, they could take the net balance. The application on this limb was premature
8. That in regard to the further affidavit sworn by Dr. Kuria, Senior Counsel, the same was to the effect that he was now open for cross-examination on oath which was not possible as it would mean that he leaves the bench to be cross examined. Counsel's submission was that the parties were persons capable of swearing the affidavit by themselves.
9. In response Counsel for the Applicants submitted that the Respondents had not opposed to prayers 1, 3, 4 and 5 of their Application and thus prayed that the same be granted.
10. That there was no Appeal against judgment of the Court of Appeal which found that the initial proprietors were the rightful owners of the properties hence they were entitled to rent from their properties which was not an issue in the Application for Review pending in the Court of Appeal. That the Respondents had not disputed that the Applicants were the owners of the premises and the rent ought to be released to them.
11. Further that the Applicant's Counsel swore the affidavit since it had been found that there had been persons who had been irregularly placed in the company and who had no authority to act or undertake any action in the name of the Plaintiff Company.
12. That pursuant to the above, it had been wrong for the Respondent/Plaintiff to have filed a bill of costs against the Applicants.

Determination

13. I have considered the response for and against the Application dated the 23rd September 2019 as well as the submissions filed by the Applicants herein.
14. There is no doubt that this matter was instituted vide a plaint being Civil Suit No 17 of 2008 which was amended on the 5th November 2013 wherein judgement was delivered on the 12th July 2016. Thereafter an Appeal was filed to the Court of Appeal vide Civil Appeal No. 6 of 2017 against the said Judgment which Court then rendered its judgement on the 21st March 2018 wherein the Court in essence dismissed the Suit in the High Court and upheld the Counter claim therein.
15. Pursuant to the delivery of the judgement by the Court of Appeal, the Plaintiff /Respondents filed their bill of costs which was pending

taxation.

16. It is clear that the prayers sought in the Counterclaim to the said suit were framed as follows:

- i. A declaration that between 1983 and 25th February 2009 the Plaintiff served as an agent of the Defendants in collecting rent from the tenants on LR No. Nyeri Municipality Block 1/94 and running the bar-cum-restaurant-butchery-business on the same.
- ii. A declaration that the Plaintiff is obliged to a pound to the Defendants Paris party shares of the rent and revenue yielded by LR No. Nyeri Municipality Block 1/94 and the business of bar-cum-restaurant-butchery business on the same.
- iii. An order that the Plaintiff do account to the Defendants their respective shares of the rent and revenue yielded by LR No. Nyeri Municipality Block 1/94 business of bar-cum-restaurant-cum butchery business on the same.
- iv. Costs of the Counter claim.

17. From the terms of Decree extracted by the Court of Appeal and annexed to the Respondents' response as PNM 5 however, it is clear that the same was not in tandem with the terms of its judgement to which the Respondents vide their notice of Motion dated the 27th March 2019 sought for the rectification of the said error.

18. Pending the determination of the Application to the Court of Appeal, the Applicant herein filed the present application seeking for orders herein above stated.

19. The provisions of Rule 35(1) (2) of the Court of Appeal Rules provides for "correction of errors" as follows:

(1) A clerical or arithmetical mistake in any Judgment of the Court or any error arising therein from an accidental slip or omission may at any time, whether before or after the Judgment has been embodied in an order, be corrected by the Court either of its own motion or on the application of an interested person so as to give effect to what the intention of the Court was when the Judgment was given.

(2) An order of the Court may at any time be corrected by the Court either of its own motion or on the application of any interested person if it does not correspond with the Judgment it supports or where the Judgment has been corrected under sub rule (1) with the Judgment as so corrected."

20. The Court of Appeal in the case of **Nguruman Limited v Shompole Group Ranch & Another [2014] eKLR**. held as follows:

The mandate thus donated by Rule 35 is for this Court to correct "any clerical or arithmetical mistake or any error arising therein from an accidental slip or omission". The target is either a Judgment or an order. What we are dealing with herein is a ruling which gave rise to orders sought to be impugned. I have no doubt that it is covered by this rule as it forms the basis of a pronouncement of the Court on equal footing as a Judgment or an order as the case may be, as defined in Section 2, of the Appellate Jurisdiction Act, (supra) which defines "a Judgment" as including Decree, order, sentence and decision. It therefore follows that in order for rule 35 to apply, there has to be demonstration of existence of the following: (i) an acknowledgement that there is either a clerical, arithmetical mistake or an error which has arisen in the ruling; (ii) the alleged clerical Arithmetical or error identified arose as a result of an accidental slip or omission; and (iii) its rectification is necessary in order to give effect to the intention of the Court in the said Judgment, order or ruling as the case may be.

21. Judicial discretion is such that no-one is better placed to interpret the meaning and purport of a judgment or order other than the judge who recorded the same.

22. With the above considerations in mind I have no hesitation to find that indeed the purported Decree is at great variance with the judgment entered by the Court of Appeal on the 21st March 2018 and the steps taken by the Applicants herein in the present Application are greatly prejudicial to the Respondent and cannot be allowed to maintain pending the hearing and determination of the Application to the

Court of Appeal herein filed by the Respondent to rectify the said error in its Decree.

23. The Application herein is premature and the same is struck out with costs to the Respondents.

Dated and delivered at Nyeri this 23rd day of January 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE