



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC 82 OF 2018

BERNARD MWANGI MAINA.....1ST APPLICANT/PLAINTIFF

ANN ROSE WANJIRU.....2ND APPLICANT/PLAINTIFF

AGNES NJERI MUIYA.....3RD APPLICANT/PLAINTIFF

(suing in a representative suit on

behalf of 56 others)

VERSUS

JULIUS KAMAU MWANGI1ST RESPONDENT/DEFENDANT

HARRISON KIMANI MWANGI 2ND RESPONDENT/DEFENDANT

JOSECK WACHIRA MWANGI.....3RD RESPONDENT/DEFENDANT

STEPHEN KIMOTHO MWANGI.....4TH RESPONDENT/DEFENDANT

SIMON KIAGO KIMANI.....5TH RESPONDENT/DEFENDANT

RULING

1. This application is brought under Order 8 Rules 3, 5 & 8 of the Civil procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law.
2. The application dated 9th December 2019 seeks the following orders;
 - a. The order of this Court dated 22/10/2019 on withdrawal of this suit be reviewed vacated and set aside and the Plaint be amended and heard afresh.
 - b. This honourable Court be pleased to grant the Applicant leave to amend the plaint which raises weighty issues in this suit.
 - c. That the said amended plaint be deemed as duly filed and served subject to the payment of the Court fees and the Respondent be at liberty to amend their defence within 14 days from the date of the order.
 - d. The costs of this application be provided for;
3. The application is premised on the following grounds;
 - a. The plaint as filed by counsel for the Applicants need to be amended to raise weighty issues hence the need for the review of the said withdrawal orders.
 - b. That the Court has unfettered general powers to amend the plaint under order 8 rule 3 of the Civil Procedure Rules.
 - c. That the Respondents will not be prejudiced as there will have the opportunity to amend their defence.

4. In their joint supporting affidavit, the Applicants aver that the withdrawal of the suit ought to be reviewed because the plaint raises weighty issues as set out in the amended plaint and pray for the amendments to be allowed. That after the orders are reviewed, the matter be set down for hearing.

5. The application is opposed through the replying affidavit of Julius Kamau Mwangi (the 1st Respondent) who posits that the application is meant to delay and obstruct the end of justice being realized. That the application is bereft of merit and the reasons advanced by the Applicants are not plausible. That the same is incompetent and bad in law and has urged the Court to dismiss the application with costs. That the said orders emanated from the Plaintiffs / Applicants and not suo moto therefore the sought prayers are untenable in law. That the application is an afterthought considering that the Applicants were granted ample time to consult and file the report of the Land Registrar in Court on several occasions to no avail after which they voluntarily withdrew the suit on 22/10/2019.

6. In a rather unrelated and diversionary manner the Respondents contend that the application does not meet the grounds as set out in the case of **Giella vs. Cassman Brown & Co Limited (1973) EA 358** as pertains the requisite elements to necessitate the granting of the orders sought.

7. That the Applicant has failed to establish any grounds to warrant review orders as there is no new evidence to be introduced and neither have, they highlighted any mistake/error apparent on the face of the record.

8. That equity does not aid the indolent since the application was filed after 48 days from the date of the impugned orders. That the Respondents will be prejudiced in that the transfer of their respective parcels of land and issuance of title deed will be delayed *ad infinitum*. Finally, that the application is vexatious and an abuse of the Court and it ought to be dismissed.

9. It is on record that the counsel for the Applicants withdrew the suit on the 22/10/2019 on his own motion with request for waiver of costs. The application for withdrawal was not opposed by the Respondents' counsel, that being so the Court then pronounced itself allowing the withdrawal of the suit with costs to the Respondents.

10. Order 25 rule 2 of the Civil procedure Rules provides as follows;

“Order 25, rule 1. Withdrawal by plaintiff.

1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

[Order 25, rule 2.] Discontinuance. 2. (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.

(2) Where a suit has been set down for hearing the Court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just”.

11. Order 25 Rules 1 and 2 above provides three ways in which a suit may be withdrawn/discontinued; First is where the Plaintiff at any time before the suit is set down for hearing, on application, which application is served on the defendant seeking to withdraw the suit. In such a case if the plaintiff is no longer interested in the suit and applies for leave to so withdraw, he cannot be stopped from taking such an action. The only remedy to the defendant shall be costs. The second way is where the suit has been set down for hearing, it may be discontinued or withdrawn by consent of the parties. Thirdly, if consent is not forthcoming or not sought the plaintiff may apply to Court to withdraw or discontinue the suit. The Court may grant leave to withdraw or discontinue the suit on such terms as to costs, the filing of any other suit or otherwise as are just. The defendant may request for payment of costs.

12. In this case the Plaintiffs by an application in open Court sought to discontinue the suit wholly with no orders as to costs. The Defendants did not oppose the application subject to the payment of their costs. The Court granted leave to discontinue the suit subject to payment of costs to the defendants.

13. At the pronouncement of the said orders the suit stood discontinued wholly. This suit stands discontinued even to this day. It is a dead suit.

14. It is to be noted that the only condition on the discontinuance orders was the payment of the costs to the Defendants. The Plaintiffs did not seek orders to discontinue suit subject to filing another suit. The effect of the discontinuance orders is that the suit is spent. There is therefore no suit for which any application could be made least of all an application for review and or amendment of pleadings. There are no pleadings capable of amendment under order 8 of the Civil Procedure Rules.

15. Order 45, Rule 1(b) is clear that for the Court to review its decision, certain requirements should be met. This section provides as follows:

“(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.

11. The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states 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.

16. An order for review of any judgment or order of the Court is provided for under Order 45 rule 1 of the Civil Procedure Rules only upon the following events; error apparent on the face of record; discovery of new and important matter unknown to the parties when the case was being heard; or other sufficient reason.

17. The Plaintiffs have argued that they want the orders reviewed to allow an amendment of the plaint in order to enable them raise weighty issues in the suit. In simple words the Plaintiffs want to reverse their actions and reinstate the suit for purposes of amending the plaint. The Court has determined that there is no suit existing to anchor the amendments desired by the Plaintiffs.

18. Even if it is supposed that there was a suit in existence (which is not), the three grounds for seeking review orders being discovery of new evidence or there being an error on the face of the record or for sufficient reasons have not been met in this application. None has been satisfied.

19. I agree with the Respondents’ arguments that the application is indeed an abuse of the process of the Court and should not be allowed to see the light of day.

20. The application is not meritorious. It is dismissed with costs to the Respondents.

21. It is so ordered.

DATED, DELIVERED AND SIGNED VIA EMAIL THIS 7TH DAY OF MAY 2020.

J.G. KEMEI

JUDGE.

ORDER

In light of the declaration of measures restricting court operations due to the COVID - 19 pandemic and following the practice directions issued by his Lordship, the Chief Justice dated 20th March 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice No. 3137, this ruling has been delivered to the parties by electronic mail/video conferencing. In this case the parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court

J.G. KEMEI

JUDGE