



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 18 OF 2018

BRIDGET ELSIE DAVIES

(Suing as executor of the estate of John Robin Davis –Deceased).....PLAINTIFF

VERSUS

THE NATIONAL LAND COMMISSION.....1ST DEFENDANT

MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING AND URBAN DEVELOPMENT.....2ND DEFENDANT

KENYA RAILWAYS CORPORATION.....3RD DEFENDANT

CHINA ROAD & BRIDGE CORPORATION LTD.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

RULING

What is before Court for determination is the 3rd Defendant's Notice of Motion application dated the 12th June, 2019 brought pursuant to sections 3 & 3A of the Civil Procedure Act; and Order 45 Rules 1 & 2 of the Civil Procedures Rules. The Applicant seeks the following orders:

- a) That this court be pleased to order a review and/or set aside the orders made on the 3rd April, 2019 for the reason that there is an error apparent on the face of the record.
- b) That this court be pleased to order a stay of proceedings/ further proceedings and or determination in Kajiado Civil Misc. Application Number 41 of 2019 pending the hearing and determination of this application.
- c) That the costs of this application be provided for.

The application is premised on the grounds on the face of it and the affidavit of TOM MUTEI ESQ where he explains that the 3rd Defendant instructed his firm to enter an appearance and file a Defence as well as responses to all the Plaintiffs pleadings, statements, affidavits and documentary evidence. He explains that the matter was set for mention on 3rd April, 2019 on which date he instructed an advocate to hold his brief but the court file was not brought to court. He claims the 3rd Defendant later informed him that the Plaintiff's advocate had served him with a Notice of Withdrawal of suit on 26th March, 2019 without serving them. Further, they prepared their Bill of Costs and filed it in court vide Kajiado High Court Misc Application No. 41 of 2019 and a date of taxation was set for 3rd June, 2019. He avers that the Plaintiff's advocate vide a letter dated 29th May, 2019, sent through email on 31st May, 2019 enclosed an extract of an order apparently made on the 3rd April, 2019 exparte after the matter had been formally withdrawn. He insists there was a blatant abuse of the court process. Further, that since the matter was formally withdrawn on 26th March, 2019 while the file was placed before Court on 3rd April, 2019 discloses a clear error apparent on the face of the record, thus a request for review. He reiterates that the Plaintiff's Advocates' application to dismiss their Bill is set for ruling on 5th August, 2019.

The Plaintiff BRIDGET ELSIE DAVIS opposed the application and filed a replying affidavit where she deposes that the instant application is frivolous and devoid of merit. She contends that the application is full of falsehoods calculated to mislead the court with intent to cause her undue hardship. She confirmed filing this suit on 16th February, 2018 seeking prompt and just payment of her full compensation including interest in respect to land parcel number Kajiado/ Oloolokitoshi/ Kitengela/ 2694 but received her compensation in February, 2019 from the

1st Defendant. She explains that on 21st February, 2019 her advocates advised her that on 5th February, 2019, the matter was fixed for pre trial directions on 3rd April, 2019. Further, she advised her advocates to withdraw the suit as she did not wish to pursue the outstanding amount as well as costs of the suit. She contends that on 3rd April, 2019, the Notice of Withdrawal of the Suit had to be endorsed by the Court. Further, that the said Notice of Withdrawal of the suit was indeed endorsed on the 3rd April, 2019 but there was no appearance in court by Counsel for the Applicant. She insists she did not need the Court's approval to withdraw the suit as the same had not been certified ready for hearing. She reiterates that costs incidental to a suit is the discretion of the court. She contends that there is no error apparent on the record, nor any sufficient cause that would allow the Court to exercise its discretion in favour of the Applicant. Further, that the Application has been brought with unreasonable delay. She further insists that pursuant to the order issued on 3rd April, 2019, there is no live suit to be prosecuted which renders this Application defective and lacking in merit. She avers that the court should not allow the prayer for costs taking cognizance of the fact that the delay was by the 3rd Defendant in releasing the compensation award in contravention of Article 40 (3) (b) (i) of the Constitution necessitated the filing of this claim. Further, granting the Applicant costs would amount to arbitrarily depriving her of the lawful proceeds of the compensation award.

The 1st, 2nd, 4th and 5th Defendants never filed their responses in respect to this application.

The Application was canvassed by way of written submissions which were filed by the 3rd Defendant and the Plaintiff.

Analysis and Determination

At this juncture, the only issue for determination is whether the court should proceed to review its order dated the 3rd April, 2019 allowing this suit to be withdrawn with no order as to costs. The Applicant in its submissions reiterated its claim. The Plaintiff/ Respondent opposed the application and relied on the cases of **Associated Insurance Brokers V Kenindia Assurance Co. Ltd (2018) eKLR**; **Nyamongo and Nyamongo Advocates V Kogo (2001) 1EA**; **Naibwa Wakenya Moses V University of Nairobi & Another (2019) eKLR**; **Evan Bwire V Andrew Nginda Civil Appeal No. 103 of 2000 Kisumu**.

Section 80 of the Civil Procedure Act and Order 45 Rule 1 (1) of the Civil Procedure Rules makes provisions on review of Court Orders.

Section 80 of the Civil Procedure Act provides that:—**“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.”**

Further, Order 45, rule 1 (1) of the Civil Procedure Rules stipulates thus: ‘ **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.**’

While section 27 of the Civil Procedure Act provides that;

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

In the current case, the Plaintiff had filed this suit seeking payment of compensation in respect to her land that had been compulsorily acquired. During the pendency of the suit but before pretrial directions, the 1st Defendant paid the Plaintiff her compensation culminating in the withdrawal of the suit with no order as to costs. The said Notice of Withdrawal of the Suit was entered as an order of the Court on 3rd April, 2019. The 3rd Defendant seeks for a review of the said orders claiming its costs. *From the court file, the 3rd Defendant was not represented. From a perusal of the pleadings filed herein, I note the suit arose as a result of the actions/inactions of the 1st and 3rd Defendants for failure to pay for compensation on time. Further, the said compensation was paid to the Plaintiff in February, 2019 during the pendency of this suit. I opine that this suit was hence justified even though it was later withdrawn as the fulcrum had been compromised. It is my considered view that the Applicant cannot claim costs that emanated from a suit which arose partly due to its inactions.*

*In the case of **Evan Bwire V Andrew Nginda Civil Appeal No. 103 of 2000 Kisumu**, it was held that:’ **an application for review will only be allowed on very strong grounds particularly if its effect will amount to reopening the application or case afresh.***

Further, in the case of **MUYODI v INDUSTRIAL AN COMMERCIAL DEVELOPMENT CORPORATION AND ANOTHER EALR (2006) EA 243**, the Court of Appeal while describing an error apparent on the face of record, held as follows:’ **“ In Nyamongo & Nyamongo -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 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. This laid down principle of law is indeed applicable in the matter before us.”

Based on the facts before me and in associating myself with the two decisions, I find that the 3rd Defendant has not met the threshold set for review of this Court’s order dated the 3rd April, 2019 allowing the suit to be withdrawn with no order as to costs.

It is against the foregoing that I find the application dated the 12th June, 2019 unmerited and will disallow it.

I make no order as to costs.

Dated signed and delivered via email this 7th day of May, 2020.

CHRISTINE OCHIENG

JUDGE