



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND COURT CASE NO. 851 OF 2012

KIGWE LIMITED..... PLAINTIFF

VERSUS

NJEWAR ACADEMY..... DEFENDANT

RULING

1. This court on 26th September 2014 delivered a ruling on the plaintiff's application dated 12th November, 2013. By the ruling the court ordered struck out the defendant's defence and counterclaim and entered judgment for the plaintiff on terms that the defendant vacates and delivers vacant possession of the portion of LR No. 10823/5 Juja occupied by the defendant on or before 31st December 2014.

2. The defendant by a Notice of Motion dated 4th February 2015 expressed to be brought under Sections 1A, 1B, 3A and 80 of the Civil Procedure Act and Order 45 Rules 1, 2 and 3 (2) Order 51 Rule 1 of the Civil Procedure Rules seeks the following substantive orders:-

1. THAT this honourable court does review the order made on 26th September 2014 by Honourable Justice J. M Mutungi.

2. THAT this honourable court do vary and set aside the said ruling and orders of learned judge and does reinstate the defendant's defence and counterclaim struck out.

3. That pending the hearing and determination of this application, this honourable court does order a stay of execution of the ruling and order made by the learned judge.

4. That in the alternative this honourable court do make such other interlocutory orders as it may deem just and expedient pending the hearing and determination of this application.

3. The application is supported on the grounds set out on the body of the application and on the affidavit sworn in support thereof by one Godfrey MCN Ngugi dated 4th February 2015. Upon being served with the application the plaintiff/respondent filed a preliminary objection dated 13th February 2015 on the grounds that the court lacked any jurisdiction to sit on appeal on its own judgment decision. That the court was *functus officio* and that the application was unmeritorious as it offended the principle of finality and was an abuse of the court process and deserved to be dismissed. The plaintiff further filed a replying affidavit in opposition to the defendant's application sworn by one Christopher Kang'ethe on 4th March 2015. The parties canvassed the application by way of written submissions. The defendant/applicant filed his submissions on 16th April 2015 while the plaintiff/respondent filed their submissions dated 27th April 2015 on 29th April 2015.

4. The defendant/applicant in his grounds in support of the application inter alia states as follows:-

1. That the main issues taken into consideration by the learned judge in making the ruling was the fact that the plaintiff is an incorporated company which did not enter into any contract with the defendant and that the land control board consent was not obtained.

2. That however the court failed to consider the blatant fraud being perpetrated by director of the company, necessitating the lifting of the corporate veil and also failed to take into account the provisions under the Land Control Act Cap 302 allowing for extension of time to obtain the Land Board consent.

3. That in the circumstances, the new aspect of fraud as a tool to lift the corporate veil shall enable the case proceed for full hearing on merit.

4. That in view of the foregoing, there is good and sufficient cause for review of the said ruling as prayed in the application filed herewith.

5. The foregoing grounds are what the defendant/applicant has reiterated in the supporting affidavit. The defendant in the replying affidavit depones that Christopher Kigwe who is a director of the plaintiff company at the time of executing the agreement for sale fraudulently held himself out as the authorized signatory and vendor of the land in question LR No. 10823/5 Juja. That the said Christopher Kigwe always maintained he was authorized to sell and receive money for the suit property. The defendant avers that the said Christopher Kigwe is shielding himself with the veil of incorporation of the plaintiff company to escape liability and urges the court to treat the company and him as one entity and on that account reinstate the defence and counterclaim of the defendant to enable the case to proceed to full hearing on merits.

6. The plaintiff respondent through the replying affidavit avers that the applicant's application is misconceived and does not satisfy any of the conditions upon which the court may review its judgment or order under Order 45 of the Civil Procedure Rules. The plaintiff asserts that the court lacks jurisdiction to grant the orders sought as it is *functus officio*. The plaintiff further avers that the plaintiff is through the application seeking to introduce new matters which were not contained in its counterclaim such as lifting of the corporate veil and extension of time under the **Land Control Act** Cap 302 Laws of Kenya.

7. I have reviewed the defendant/applicant's application and have considered the affidavits in support and in opposition together with the submissions by the parties and the issue for determination in this matter is whether the defendant/applicant has satisfied any of the conditions under Order 45 (1) upon which review may be granted to enable the court to exercise its discretion to review the ruling/order of 26th September 2014.

Order 45 Rule 1 (1) provides:-

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.

8. The defendant/applicant premises his application on the ground that there is “**sufficient cause**” to warrant a review of the order. The defendant submits the court has under section 80 of the Civil Procedure Act wide and unfettered discretion to grant review. The defendant in support of his submissions referred the court to case of **Shanzu Investments Limited –vs- Commissioner of Lands [1993] eKLR** where the Court of Appeal considered how the discretion of the court could be exercised in an application for review. The Court of Appeal judges held thus:-

“The power to review is given to the court by section 80 of the Civil Procedure Act, Order 44 (now 45) of the Civil Procedure Rules and the relevant case law.

In Sadar Mohamed –vs- Charan Singh [1959] EA1 793, Farrel, J held that there was unfettered discretion in court to make such orders as it thinks fit on an application for review and that omission of any qualifying words was deliberate. However, in a later decision, Yusuf –vs- Nkorach, [1971] EA 104, the late Chanan Singh J held that “any other sufficient reason” as set out in Order 44 Rule 1 means sufficient reason analogous to those in the rule.

In Wangechi Kimita & Another –vs- Mutahi Wakabiru CA No. 80 of 1985 [unreported] it was held that:-

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by Section 80 of the Civil Procedure Act. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous. The current position, then, appear to be that the court has unfettered discretion to review its own decree or orders for any sufficient reason.”

9. The defendant contends that he dealt with Christopher Kigwe who held himself out as having authority to sell the parcel of land. The defendant does not however suggest he was dealing with the said Christopher Kigwe as a director of the plaintiff so that he could hold himself out as having the authority of the plaintiff to sell the parcel of land. The agreements of sale the defendant relies on were entered into between one Christopher Kangethe Kigwe as the vendor and M.C.N Ngugi as the purchaser. There was no representation by Christopher Kangethe Kigwe that he was entering the sale on behalf of the plaintiff. Indeed the preamble to the agreement was to the effect that **“The vendor is the registered proprietor of that parcel of land No. LR 10823/5 situated at Juja within Thika District”**. If fraud was perpetrated by Christopher Kigwe I do not see how it attaches to the plaintiff company. The defendant had the opportunity to verify the ownership of the property he purported to purchase by carrying out a search at the lands office and/or calling for the documents of title from the vendor. Had he done so he would have noted that the said Christopher Kigwe was not the registered owner of the land he purported to sell. In the circumstances of this case I fail to see how lifting of the veil of the plaintiff company can be brought into question when there is no evidence that any of its directors or shareholders acted on its behalf with or without authority. I am in the premises not persuaded that the issue of fraud as canvassed in the application and submissions by the defendant/applicant would constitute **“any other sufficient reason”** under Order 45 Rule 1(1) of the Civil Procedure Rules to warrant the exercise of this court’s discretion to review the order/ruling of 26th September 2014.

10. The court in rendering the ruling dated 26th September 2014 had considered the various matters the defendant is raising in this application. Indeed the defendant had contended that Christopher Kangethe Kigwe had been fraudulent. The court found there was no privity of contract between the defendant and the plaintiff the agreement of sale having been made directly with the said Christopher Kigwe. The court found there was no cause of action by the defendant against the plaintiff. The court further found that the consent of the Land Control Board having not been sought and obtained in regard to the alleged sale transaction, the agreement of sale became void for all purposes by operation of the law. The court cannot enforce a void contract. The defendant appears to suggest there is a window to extend time within which to apply for the consent of the Land Control Board. With respect, I think that that is farfetched. At the time the ruling was delivered no application for extension of time to apply to the Land Control Board had

been made and I do not see how it would have been made when the vendor under the agreement of sale had no land to sell he having not been the registered owner.

11. I would on that issue of extension of time agree with the observations of my brother Justice E. Obaga in the case of **Ezekiel Kisorio Tanui –vs- Jacinta Ekai Nasak [2014] eKLR** where he stated:-

“On the issue as to whether the defendant can apply for extension of time within which to apply for consent of the Land Control Board, I find that such an application cannot be made in submissions after a case seeking to declare the transaction void has been concluded. The defendant had time to apply for extension of the time within which to apply for consent of the land control board. She did not do so for 9 years and cannot therefore make a request for extension in passing by way of submissions.”

12. An application for extension of time has to be a formal application under the provisions of the **Land Control Act** and the defendant has not made such an application and at least none had been made before the ruling dated 26th September 2014. The Court of Appeal in the case of **National Bank of Kenya –vs- Ndungu Njau [1997] eKLR** made a distinction as to when a review may be granted and when an appeal may be the better option to pursue when they stated thus:-

“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 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 the 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 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.”

13. Having regard to the matters in issue in this application and upon which I am being asked to review my ruling of 26th September 2014, I feel I am being asked to consider and review the said issues which were canvassed by the parties in the application leading to the ruling of 26th September 2014. There being no discovery of any new matter of evidence and having held no sufficient reason has been demonstrated to warrant me to review my said ruling I hold the view that I am being called upon to sit on appeal against my own decision. I will decline that invitation.

14. Although from what I have stated so far in this ruling it should have become apparent that the defendant’s application is for dismissal there is one other issue the plaintiff has raised in the submissions, that the defendant’s advocates M/s Mugo Wairimu & Co. Advocates are not properly on record that I need to address before I conclude this ruling. The plaintiff had submitted that by the time the said defendant’s advocates came on record judgment had been entered and that they needed the leave of the court to come on record in terms of Order 9 Rule 9 of the Civil Procedure Rules.

Order 9 Rule 9 provides:-

9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court:-

(a) Upon an application with notice to all the parties; or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate

or party intending to act in person as the case may be.

15. The key words are that ...**“Such change or intention to act in person shall not be effected without an order of the court”**. The court record shows that the firm of Mugo Wairimu & Co. Advocates filed a Notice of Change of Advocate dated 31st October 2014 on 3rd November 2014. The firm of Mugo Moses & Company Advocates who had previously acted for the defendant wrote to the Deputy Registrar on 29th October 2014 indicating they had no objection to the takeover of the matter on behalf of the defendant by the firm of Mugo Wairimu & Co. Advocates. No application was made to the court and no order was obtained from the court to effect the change. Order 9 Rule 9 is in mandatory terms and does not leave any room for discretion. It is clear that no change of advocate and/or intention by a party to act in person is permitted after judgment without the leave of the court and a court order to that effect. The change of advocate and intention to act in person after judgment is given effect by an order of the court and not otherwise Lady Justice L. N Waithaka considered a similar issue in the case of **Samuel Ngunjiri Muthuma –vs- Peter Kibui Nyuguto & Another [2015] eKLR** and held that it was mandatory for leave of the court to be obtained.

16. In the instant case as no leave of the court was obtained to effectuate the change of advocate, the firm of Mugo Wairimu & Company Advocates are improperly on record and therefore the application dated 4th February 2015 is incompetent and the same is ordered dismissed with costs to the plaintiff. For the avoidance of doubt even if the said firm were properly on record the application would be for dismissal for lack of any merit as I stated earlier in this ruling.

Ruling dated and signed at Kisii this 15th day of February 2016.

J. M MUTUNGI

JUDGE

Ruling **delivered** at Nairobi this 17th day of **March 2016.**

S. OKONG’O

JUDGE

In the presence of:

Ms. Githii for the plaintiff

Mr. Kasyoka for the defendant

Kajuju Court Assistant

S. OKONG’O

JUDGE