



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 199 OF 2014 (OS)

LUCAS NYAMBEGERA NYANGWESO PLAINTIFF

VERSUS

FRED NYAMOKERI 1ST DEFENDANT

PROFESSOR JOHN SOLANA AKAMA 2ND DEFENDANT

RULING

1. The court on 13th February 2015 delivered a ruling whereby it dismissed the plaintiff's Notice of Motion dated 19th May 2014 in which the plaintiff sought injunctive orders against the defendants restraining them from in any manner whatsoever dealing with the plaintiff's parcel of land stated to be **Kisii Municipality/Block I/1022** formerly known as **Plot Number "U" Kisii Municipality**.
2. The plaintiff being aggrieved by the order/ruling of the court on 11th May 2015 filed the Notice of Motion the subject of this ruling expressed to be made under Order 40 Rule 10 (1) (a) of the **Civil Procedure Rules** and Section 3A of the **Civil Procedure Act** and Section 19 (3) of the **Environment and Land Court Act, 2011** seeking inter alia the following orders:-

1. **That the honourable court be pleased to review, set aside or vary its order made on 13th February 2015.**
2. **That pending the hearing and determination of this application, the honourable court be pleased to issue a preservative order preserving all that parcel of land known as Kisii Municipality/Block I/1022 formerly known as Plot NO. "U" Kisii Municipality.**
3. **That in the alternative, the honourable court be pleased to issue an order preserving the suit premises until the suit is heard and determined.**
4. **That the costs of the application be provided for.**

3. The application is supported on the grounds set out on the face of the application and on the affidavit sworn in support hereof by Lucas Nyambegera Nyangweso, the plaintiff/applicant. The plaintiff in his affidavit deposes that the 2nd defendant misled the court that the certificate of lease in respect of land parcel **Kisii Municipality/Block I/478** was registered in the name of his company and that the parcel of land was distinct from the plaintiff's plot. The plaintiff deposes that the bundle of documents tendered by the 2nd defendant show that Rondoni Investments which is registered as a business name is registered owner of land parcel **Kisii Municipality/Block I/478**. The plaintiff has furnished letter dated 15th September 2014 from the Registrar General confirming that Rondoni Investment is a business name and that the 2nd defendant is the proprietor and on this account the plaintiff avers that the 2nd defendant misled the court that he was improperly enjoined in the suit.

4. The plaintiff deposes that the 2nd defendant is in the process of commencing construction of a permanent house on the disputed plot having put up a site office on 7th May 2015 and that this is an attempt on his part to fortify his claim to the suit premises and unless a preservation order is made, the 2nd defendant's activities will change the substratum of the suit to the prejudice of the plaintiff. The plaintiff further deposes that he has withdrawn a notice of appeal that he had filed on 6th March 2015 and urges the court to grant the orders he seeks in the interest of justice and fairness.
5. The 1st and 2nd defendants filed grounds of opposition to the plaintiff's Notice of Motion. The 1st defendant's grounds of opposition dated 6th July 2015 and filed on the same day are to the effect that the plaintiff's application is misconceived and otherwise an abuse of the process of the court and the same lacks merit, is bad in law and does not lie. The 2nd defendant's grounds of opposition are dated 1st July 2015 and filed on the same day. The 2nd defendant in the grounds of opposition inter alia avers that:-
 - i. **The application is premature, misconceived and bad in law.**
 - ii. **The application does not satisfy the necessary conditions for review as envisaged under the provisions of Order 45 Rule 1 of the Civil Procedure Rules;**
 - iii. **That the plaintiff having elected to appeal the ruling made by the court on 13th February 2015 divested himself of the option to seek a review;**
 - iv. **That there are no grounds to warrant a review and the applicant is indeed inviting the court to sit on appeal against its own ruling**
 - v. **The purported Notice of Withdrawal of appeal dated 8th May 2015 is nullity and is contrary to the provisions of Rule 81 of the Court of Appeal Rules.**
6. The plaintiff's application was not certified urgent at the ex parte stage and no preservatory order was granted pending the hearing and determination of the application. In essence therefore the only prayers alive in respect of the said application is prayers (3) and (5) which pray for review, setting aside and/or variation of the order made on 13th February, 2015 and an order preserving the suit premises until the suit is heard and determined. The court directed that the parties argue and canvass the application by way of written submissions. The plaintiff filed his written submissions dated 16th July 2015 on 21st July 2015 and the 2nd defendant's written submissions dated 10th August 2015 were filed on 12th August 2015.
7. I have reviewed and considered the plaintiff's application together with the affidavit filed in support and the annexures thereto. I have also considered the grounds of opposition filed by the respondents and the submissions filed on behalf of the plaintiff/applicant and the 2nd defendant/respondent. The following issues having regard to the pleadings and submissions stand out for determination.
 - i. **Whether the applicant having exercised the option to appeal can sustain an application to review;**
 - ii. **Whether the applicant has satisfied the conditions upon which an order for review and/or setting aside or variation may be granted.**

The plaintiff/applicant premised his application on Order 40 Rule 10 (1) (a) and Section 19 (3) of the **Environment and Land Act, 2011**. Order 40 Rule 10 (1) (a) provides thus:-

10(1) The court may, on the application of any party to a suit, and on such terms as it thinks fit:-

(a) Make an order for the determination, preservation, or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein;

8. The plaintiff made an application dated 19th May 2014 in which he sought orders of injunction

against the defendants to restrain them from interfering with his parcel of land known as **Kisii Municipality/Block I/1022** formerly known as **Plot Number "U" Kisii Municipality**. This application was argued interpartes and a considered ruling rendered where the court held the plaintiff did not demonstrate he had a prima facie case to warrant the grant of temporary injunction. The essence of an injunction is to preserve the subject matter until the suit is heard. The court in its ruling of 13th February 2015 did not find any basis to grant an injunction and/or order the preservation of the property. The instant application in my view is asking the court to rehear the matter on whether or not the preservatory order should be granted. This is same application that was urged before **Okong'o J.** and he found no merit in the application. Having reviewed the application, I do not find that any circumstances have changed to warrant the instant application and I accordingly would decline to grant a preservation order as I am being asked to do.

9. Apparently, the plaintiff's advocate may have been unaware that Section 19 (3) of the **Environment and Land Court Act, 2011** does not exist anymore the same having been deleted following the amendments introduced in the Act by **Act No. 12 of 2012**. Before the amendment, Section 19 (3) of the Act provided under sub 3 (f) that the court could review its own decisions. Section 19 (2) of the Act following the amendment provided that the court was to be bound by the procedure laid down by the **Civil Procedure Act** and the Rules thereof. Hence in an application such as the present one where review is sought the court is obligated to consider the same under the parameters set out under Order 45 Rule 1 of the **Civil Procedure Rules** which provides thus:-

Order 45 (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 or 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.

10. As I have pointed out contrary to the plaintiff's written submissions, this court is bound to apply the **Civil Procedure Act** and Rules thereunder in the disposal of cases before it. The court is thus bound to consider the plaintiff's review application on the basis of the provisions of Order 45 Rule 1 of the **Civil Procedure Rules**. For an applicant to succeed in an application for review under Order 45 Rule 1 he or she must satisfy the conditions set out thereunder:

- i. **The applicant must not have appealed the decision/order;**
- ii. **The applicant must either show:-**
 - a. **There is discovery of new and important matter or evidence that could not by exercise due diligence not be available at the time the order was made; or**
 - b. **There is some mistake or error apparent on the face of the record; or**
 - c. **There is some other sufficient reason.**
- iii. **The application must be made without unreasonable delay.**

If a party opts to lodge an appeal against the decision or order of the court he cannot at the same time apply to the court that made the decision or order for review. The 2nd defendant contends that the plaintiff exercised his right to appeal when he filed a Notice of Appeal and that divested himself of the right to seek a review. The 2nd defendant further contends the Notice of Withdrawal of the Notice of Appeal filed in court on 11th May 2015 was ineffectual as it is the Court of Appeal only

which can make an order withdrawing the Notice of Appeal.

11. The record shows that the plaintiff filed a Notice of Appeal dated 20th February 2015 against the decision of Hon. Justice Samson Okong'o given on 13th February 2015. The 2nd defendant upon being served with the Notice of Appeal filed a Notice of Address for service dated 6th March 2015. Under order 42 Rule 6 dealing with applications for stay in case of appeal a Notice of Appeal under the Rules of the Court of Appeal is deemed to initiate an appeal to that court. Order 42 Rule 6 (4) of the Civil Procedure Rules provides:-

42(6)(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of the Court Notice of Appeal has been given.

12. The 2nd defendant submits that once the Notice of Appeal is filed the Court of Appeal becomes seized with the matter as relates to the intended appeal and the High Court ceases to have jurisdiction as regards the appeal. The 2nd defendant argues any withdrawal of the Notice of Appeal can only be done at the Court of Appeal. Rule 81 of the Court of Appeal Rules provides for withdrawal of appeal and notice of cross appeal and provides thus:-

81. A party who has lodged a notice of appeal may withdraw the notice of appeal by notice in writing to all the parties who have been served. The costs of the withdrawal shall be borne by the party withdrawing the Notice of appeal.

13. Rule 81 of the Court of Appeal Rules does not require that the court gives an order for the withdrawal. The key requirement is that notice of the withdrawal be given to all the parties served with the notice. The notice of withdrawal of the Notice of Appeal dated 8th May 2015 indicates service was to be effected to both defendants counsels and there is no reason to suggest service was not effected. Though the notice of withdrawal refers to the Notice of Appeal having been filed on 23rd April 2015, I take this to be an inadvertent typographic error as the Notice of Appeal was dated 20th February 2015 and filed in court on 23rd February 2015. To hold otherwise would be to elevate technicality to a whole new level. There was only one Notice of Appeal filed by the plaintiff in this matter and it must be the one he sought to withdraw. I therefore accept that the plaintiff withdrew the Notice of Appeal and accordingly he would avail himself the option of seeking a review of the decision/order of the court of 13th February 2015. The court therefore has jurisdiction to entertain the application for review.

14. Having disposed of the first issue the next issue to consider is whether the applicant has satisfied the conditions upon which review may be granted. I have earlier in this ruling set out the necessary conditions an applicant needs to satisfy in an application for review. With respect I am not persuaded that the applicant has indeed satisfied any of the conditions to warrant a review. From the submissions of the plaintiff, he appears to peg his application for review on the ground of discovery of new and important matter of evidence and on the fact that the 2nd Defendant did not make full disclosure that Rondoni Investment was a business firm where the 2nd defendant was the sole proprietor. I do not accept that the fact that Rondoni Investment is a business firm and not a legal entity would qualify to be new and important matter of evidence that was not available at the time the earlier application was heard and/or could not have been availed through exercise of due diligence. In the replying affidavit filed by the 2nd defendant on 1st August, 2014 the 2nd defendant annexed a copy of the certificate of lease in regard to land parcel **Kisii Municipality/Block I/478** which showed Rondoni Investment was the registered owner. The applicant has in the present application annexed a copy of the search from the Registrar General dated 14th September 2014 relating to Rondoni Investment which is indicative that this information was available to the parties before the earlier application was scheduled for hearing on 16th October 2014 when direction for filing of submissions were given.

15. I have reviewed the ruling by **Hon. Justice Okong'o** and I am satisfied the issue whether or not Rondoni Investment was a legal entity were appropriate canvassed. The judge in arriving at the decision that he did considered that the plaintiff did not establish a prima facie case and in

particular that he did not demonstrate ownership of land parcel **Kisii Municipality/Block I/1022**. In the course of his ruling the judge stated thus:-

“In the absence of a duly executed and registered lease, I am not satisfied on a prima facie basis that the plaintiff is the owner of Plot No. 1022. Although the plaintiff has claimed that Plot No. 478 and 595 were created illegally and unlawfully, the plaintiff has placed no evidence in support of his allegations and the defendants’ involvement in the same. I have no evidence before me that Plot No. 478 and Plot No. 595 were created from Plot No. 1022 that was formerly known as plot No. “U” that had been allocated to the plaintiff. I have no evidence as to when the two plots were created more particularly whether the same came about after or before the allotment of Plot No. “U” to the plaintiff...”

16. Even if I was to admit the new matter of evidence that the plaintiff is urging me to accept that Rondoni Investment is not a legal entity and that the 2nd defendant misled the court that it was a corporate entity that cannot alter the finding and holding of the judge that the plaintiff had failed to establish ownership of Plot No. 1022 and therefore no prima facie case was established to warrant the grant of a temporary injunction. The applicant in essence is asking me to sit on appeal on the ruling of my brother Justice Okong’o. That I cannot do as that would be the preserve of the appellate court. See the cases of **National Bank of Kenya Ltd –vs- Ndungu Njau C. A Appeal No. 211 of 1996 (unreported)** and **Nyamongo & Nyamongo Advocates –vs- Moses K. Kongo CA Civil Appeal No. 322 of 2000 (unreported)** where the Court of Appeal aptly considered when review may be granted.

17. In the case of **National Bank Ltd –vs- Ndungu Njau (Supra)** the court held:-

“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 provisions of law cannot be a ground for review.”

In the case **Nyamongo & Nyamongo Advocates –vs- Moses K. Kongo (Supra)** the court held:-

“There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on the substantial point of law stares one in the face, and there would reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out Again, if a view is adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even through another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

In the same case the judges cited with approval the **A.I.R Commentaries on the Code of Civil Procedure by Chitale & Rao (4th Edn) Vo. 3. P. 3227** where it was stated:-

“A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for review though it may be a good ground for an appeal.”

18. I have made reference to the above authorities though not being directly on the point under consideration in this matter considering they dealt with review on the ground of apparent error on the face of the record as I consider that they provide the principles that the court ought to consider in dealing with an application for review. In the present application the plaintiff wants the court to reappraise the arguments taken before the judge in the earlier application. The plaintiff wants a second bite of the cherry and that is no permissible other than by way of appeal. I find the

application dated 11th March 2015 by the plaintiff to lack any merit and the same is ordered dismissed with costs to the defendants.

Ruling dated, signed and delivered at Kisii this 11th day of March, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

.....for the 1st and 2nd defendants

J. M. MUTUNGI

JUDGE