



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 83 OF 1998

ROBIN GITHINJI.....PLAINTIFF

VERSUS

PETER WANJOHI WARUI.....DEFENDANT

RULING

This is an application dated 18/6/15 seeking for the following orders:-

1. *That this court do further clarify the judgment as delivered on 7/6/2012 and the amendment of judgment delivered on 3/5/2013.*
2. *costs be in the cause.*

The application is supported by the affidavit of Robin Githinji Mbui.

The applicant in his affidavit states that he instituted the suit against two defendants Peter Wanjohi Warui and Kerugoya/ Kutus Municipal Council. The case was later withdrawn against the 2nd defendant. Judgment in the matter was delivered on 7/6/2012. All along, the plaintiff says he knew that his plot number 90 Kutus which was initially number 88 Kutus measured 100 by 100 feet. The court heard the case and determined it on 12/6/2012. On page 5 paragraph 4 of the judgment the court noted that there was no evidence that the subdivision was ever effected. The trial judge then proceeded to make a finding on page 6 of the judgment that the pleadings did not talk of plot number 592. This was true as it was never brought to his attention that the plot had been sub-divided.

The judge further explained that it is the defendant who had tried to explain in his defence that plot number 90 was sub-divided and that he got his plot number 592 which he developed for commercial purposes. From observation, it seems plot number 592 was excised from plot number 90. The trial judge noted that according to the evidence of the surveyor PW2 said that each of the two plots i.e. 90 and 592 measured 50 by 100 feet. The judge held that she would not issue an order of eviction as there was no proof of encroachment by the defendant.

The parties to this suit sought for clarification of the judgment. By an amended judgment delivered on 3/5/2013 the trial judge indicated that plot number 90 initially measured 100 ft by 100ft and that after subdivision it was reduced to 50 by 100 feet the court found that the subdivision was irregular. It was held that plot 90 maintains its original size 100 ft by 100 ft. This was despite evidence that plot number 592 was created after the subdivision of plot number 90 was nullified. Whenever the applicant asserts his right over plot No. 90 measuring 100x100 ft, the defendant alleges that the judge found that plot number 592 is not part of plot No. 90. Plot number 90 cannot measure 100x100 feet unless it is extended to plot number 592. The conflict requires clarification by the court.

The application was unopposed.

Section 99 of the Civil Procedure Act provides that;

"Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties"

The provisions of section 99 were explained in the case of **DIAMOND TRUST KENYA LIMITED VS MOTORWAYS KENYA LIMITED & ANOTHER [2015] eKLR** where the court also cited with approval an East African Court of Appeal.

"I do agree with the parties that this Court has the powers both under Section 99 of the Civil Procedure Act and its inherent jurisdiction to correct clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therefrom. Any accidental slip or omission, can without doubt, be corrected at any time by the court, either in its own motion or on the application of any of the parties. Courts have set out guidelines which govern the circumstances under which the exercise of the jurisdiction to correct clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slips or omissions, are to be exercised. The East Africa Court of Appeal in the case of VALLABHDAS KARSANDAS RANIGA VS. MANSUKHLAL JIVRAJ AND OTHERS [1965] EA 780, held:-

"Section 3(2) of the Appellate Jurisdiction Act confers on the Court of Appeal the same jurisdiction to amend judgments, decrees and orders that the High Court has under Section 99 of the Civil Procedure Act, making it unnecessary to look to the inherent powers of the court. The words "at any time" in Section 99 clearly allow the power of amendment to be exercised after the issue of a formal order...."Slip orders" are made to rectify omissions resulting from the failure of counsel to ask for costs and other matters to which their clients are entitled.....A court will only apply the slip rules where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention. In the present case, if the facts had been before the court when judgment was given on appeal, the court would, on application or indeed of its own motion, have made the order for refund, now sought, which was necessarily consequential on the decision on the main issues."

The plaintiff in his claim sought the orders that:-

- a declaration that plot No 90 Kutus Town belongs to the plaintiff.
- Eviction of the defendant from plot number 90 Kutus town.

In the judgment by Ong'udi J. delivered on 7/6/2012, it was found and observed that ;

- both the municipal surveyor and Deputy town clerk confirmed that plot number 90 Kutus Town belongs to the plaintiff.
- Plot number 90 measures 100x100ft.
- Plot number 592 Kutus town belongs to the defendant.
- Plot number 90 and 592 were two distinct plots.
- On 14/7/97 the council decided that plot number 90 be subdivided into two equal plots measuring 50x100ft each after which the plaintiff and the defendant were to get a plot each.
- There was no evidence that plot number 592 resulted from the subdivision of plot number 90.
- There is no evidence that subdivision of plot number 90 took place.
- The alleged subdivision of plot number 90 was irregular as there was no approval from the commissioner of lands and also because the plaintiff was not present when the decision to subdivide the plot was arrived at.
- The court declared that the plaintiff was the owner of plot number 90 but declined to issue an

eviction order as there was no evidence of encroachment into plot number 90 by the defendant.

The plaintiff sought clarification on whether the plot was 50x100ft or 100x100ft. In an amendment of judgment dated 3/5/2013, the judge held as follows;

- *The deputy town clerk stated that plot number 90 initially measured 100x100ft but was reduced to 50x100ft after subdivision. This subdivision was however irregular.*
- *Having found that plot number 592 is not part of plot 90, plot number 90 maintains its original size of 100x100ft.*

What the applicant is seeking is a further clarification of the judgment regarding the size of plot number 90 and whether plot number 592 was part of plot number 90.

In my opinion, this issue was clearly clarified in the further clarification of judgment delivered on 3/5/13. The court has already stated its position on the size of plot 90 and on whether plot 592 is part of plot 90.

it was stated in th Amended Judgment delivered on 3rd May, 2013:-

“And having found that Plot 592 is not part of Plot 90 and that the supposed to have been subdivision of Plot 90 was irregular, I do find that Plot 90 maintains its original size i.e. 100 ft by 100 ft.”

By asking the court to do more, the applicant is clearly suggesting his dissatisfaction with the judgment and is asking this court to sit on its own appeal. What the applicant should do is to move to the appellate court and challenge the findings of Ong'udi, J. in the original and the Amended judgment.

I find no merit in this application and it is hereby dismissed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF NOVEMBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Plaintiff

Mr. Mugusu for Maina Kagio for plaintiff