



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL SUIT NO. 313 OF 1998

ELIZABETH WAMBUI KAMICHA.....PLAINTIFF

-VERSUS-

TERESIA WAMBUI MUGI.....1ST DEFENDANT

THIKA MUNICIPAL COUNCIL.....2ND DEFENDANT

RULING

1. The plaintiff herein filed a suit against the defendants in Nyeri HCCC No. 313 of 1998 seeking the following orders:

- 1) That the 1st defendant be evicted from house No. 1000 Kimathi Estate Thika Municipality and the plaintiff be put in occupation.
- 2) The 2nd defendant to correct and reinstate the names of the plaintiff as the lawful assignee/allottee of house no.1000 Kimathi Estate Thika municipality.

2. The plaintiff later amended her plaint to include paragraphs 10(A) and 10(B) as follows;

- 10(A) That the plaintiff avers that the 2nd defendant on 28th June 2010 without any lawful justification purported to evict the plaintiff and took away her household goods.
- 10(B) An order of restitution of those goods to be particularized during the hearing.

3. The matter proceeded for hearing *ex parte* and Judgment was entered in favor of the plaintiff in the following terms;

- (i) That the 1st defendant be evicted from house No. 1000 Kimathi Estate, Thika Municipality.
- (ii) The plaintiff be restored to occupation of the aforesaid house.
- (iii) The 2nd defendant is directed to rectify the register relating to the tenant of House No. 1000 Kimathi Estate by deleting the 1st defendant's name and substituting with that of the plaintiff.
- (iv) The 2nd defendant is directed to restitute to the plaintiff the goods it carted away from the plaintiff's house on 28th June 2010.
- (iv) The plaintiff is awarded Kshs. 200000 representing damages for unlawful eviction.
- (v) Costs of the suit.

4. Aggrieved by the said judgment, the defendant filed an appeal. The Court of appeal set aside the judgment of **Sergon J** and directed that the matter be heard *de novo*. The defendants were also directed to file an amended defence within 30 days from the date of the judgment.

5. The defendants did not file an amended defence and the matter was never set down for hearing.

6. The plaintiff has now filed the instant application dated **22nd August, 2018** supported by the affidavit of Elizabeth Wambui Kamicha

seeking that the judgment of **Sergon J** dated 17th September, 2010 be reinstated. In that affidavit, she deposes that she has been unable to set down the matter for hearing because the defendants have failed to comply with the orders of the court of appeal to file their amended defence within the time given.

7. The application is opposed vide a replying affidavit sworn by **Joseph Gathogo Wairegi** an advocate of the High court of Kenya. He deposes that the application is frivolous, vexatious and an abuse of the court process. According to him, the judgment of **Sergon J** having been set aside by the court of appeal, there remains no judgment capable of being reinstated. He contends that an attempt to reinstate the said non-existent judgment would be tantamount to this court overturning a decision of a superior court. Furthermore, the 2nd defendant has since filed an amended defence on 21st day of September, 2018 and urges the court to exercise its discretion, admit the amended defence and consider it duly filed.

8. The Court of appeal set aside the judgment of **Sergon J** and directed that the matter be tried de novo. The word *de novo* was defined by **Ibrahim Tanko Muhammed, J.S.C** in the Nigerian case of *Babatunde v Pan Atlantic Shipping and Transport Service* as quoted by **Mativo J.** in the case of **Catherine Wanjiku Kagua v Chinga Tea Factory & another [2016] eKLR** as

"The Latin maxim "De Novo" connotes a "New" "fresh" a "beginning" a "start" etc. In the words of the authors of Black Law dictionary, De novo trial or hearing means trying a matter anew, the same as if it had not been heard before and as if no decision had been previously rendered new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was originally heard and a review of previous hearing. On hearing "de novo" court hears matter as court of original and not appellate jurisdiction... that a trial de novo could mean nothing more than a new trial. This further means that the plaintiff is given another chance to re-litigate the same matter or rather, in a more general sense the parties are at liberty, once more to reframe their cases and restructure it as each may deem it appropriate."

9. My understanding of the above definition is that for a matter to be tried *de novo*, it would mean considering the matter *anew*, as if it had never been heard, no evidence had been taken and *as if no decision had been previously rendered*. The plaintiff must reprove his case like he did the first time. This simply means that as it stands now, there is no judgment capable of being reinstated. This court must as directed by the court of appeal hear the matter afresh. This court has no jurisdiction to overturn the decision made by the court of appeal and reinstate the decision that was set aside. A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. The issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings as stated in the case of **In the Lillian 'S' [1989] KLR 1** where **Nyarangi, JA** stated, *inter alia*:-

"Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

10. If this court was to assume jurisdiction and allow the applicant's prayers, then the orders of this court will be rendered null and void and of no legal consequence as stated in the case of Sir **Ali Bin Salim -vs- Shariff Mohamed Shatry Civil Appeal No. 29 of 1940** as quoted by **Kimei J.** in the case of **Republic v Chairman Meru Central District Land Dispute Tribunal & 6 others Exparte Salacious Kaburu Kirigia & another [2018] eKLR** where the East African Court of Appeal stated, **"if a Court has no jurisdiction over the subject matter of the litigation its judgements and orders however precisely certain and technically correct are mere nullities and not only voidable; they are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the Court in which they were rendered but be declared void by every Court in which they may be presented. It is well established in law that jurisdiction cannot be conferred on a suit by consent of parties and any waiver on their part cannot make up for the lack of defect of jurisdiction"**. (emphasis mine).

11. On whether the amended defence filed on 21st September, 2018 should be deemed to be properly amended and filed, my answer is in the affirmative. I say this because the court of appeal in ordering the defendants to file an amended defence recognized that there was already a defence on record. Whereas it is true that many years have passed without the defendants filing their amended defence within the timelines ordered by the court of appeal, the plaintiff cannot be said to have suffered any prejudice because he had the option of setting the matter down for hearing but he did not. Considering the circumstances of this case and because courts have a duty to determine the underlying issues between the parties and ought not to give undue regard to infractions of procedure rules, I exercise my discretion under **Sections 1A, 1B and 3A** of the Civil Procedure Act and admit the amended defence dated 21st September, 2018 and deem it properly filed. I also direct that the matter be set down for pretrial directions on 29th April, 2019.

12. Costs of the application to abide the outcome of the suit.

Dated, signed and delivered in open court at Nyeri this 28th day March of 2019.

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiff

N/A for the defendants

