



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO.110 OF 2011

MUSYOKA MUTIE MAKAUPLAINTIFF

VERSUS

MUNYAO MUTIE MAKAU1ST DEFENDANT

PETER MUTIE MAKAU2ND DEFENDANT

RULING

1. In the Amended Notice of Motion dated 18th December, 2014, the Defendants are seeking for the following orders:

a. That this Honourable Court be pleased to review and/or set aside its Ruling herein dated 29th May, 2012, the subsequent proceedings, Judgments and Decree given on 7th November, 2012 and issued on 8th November, 2012 and any other subsequent orders thereto and to have the entire Plaintiff's suit struck out.

b. That the Honourable Court do review its Ruling dated 29th May, 2012, set aside interlocutory Judgment entered on 6th July, 2011 and the ex-parte Judgment delivered on 7th November, 2012 and do grant the Defendant/Applicants leave to file their Defence.

2. The Application is supported by the Affidavit of the 1st Defendant who has deponed that the pleadings the substratum of this suit were drawn by one Jacob Ngwele who was not authorized to practice law on his own; that the said Jacob Ngwele did not have an advocate's professional indemnity cover and that the failure by their former advocate to file a Defence should not be visited on them.

3. The 1st Defendant deponed that having entered appearance, they should have been notified of the date of formal proof; that the judge who heard the Application and delivered the Ruling of 29th May, 2012 as well as the Judgment did not have jurisdiction and that they should be granted leave to file a Defence.

4. The Defendants'/Applicants' advocate submitted that the law allows the court to review its Ruling or Judgment on account of mistake or error apparent on the face of the record, or for other sufficient reason; that the court erroneously entered interlocutory Judgment in this matter and that interlocutory Judgment can only be entered for a claim of pecuniary damages.

5. The Defendants' advocate submitted that the Plaintiff failed to inform the court that the award of Machakos District Land Disputes Tribunal in Case No. 124 of 2002 was quashed by the High Court in Civil Misc. Application No. 160 of 2006 and that being not the administrator of the Estate of Mutie Makau, the Plaintiff did not have locus to file the suit.

6. The Defendants' counsel submitted that although the Defendants had filed a Memorandum of Appearance, he was never served with a hearing notice and that when Jacob Ngwele filed the Plaint, he did not have a professional indemnity cover.

7. The current Application is seeking to review the Ruling of the court dated 29th May, 2012 and the Judgment delivered on 7th November, 2012. The said Application is based on the ground that the Plaint and the Verifying Affidavit were prepared by an unqualified person; that the learned Judge lacked jurisdiction to entertain the matter; that the Defendants were never served with a hearing notice and that the Machakos District Land Disputes Tribunal Award in Tribunal Case Number 124 of 2002 was quashed by the High Court.

8. Order 45 of the Civil Procedure Rules provides circumstances under which the court can review its Judgment or Ruling. Order 45 Rule 1 provides as follows:

“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 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

9. The first pre-requisite for a party to file an Application for review of a Judgment or Ruling is where the person has not preferred an Appeal. The Application for review is also supposed to be filed without unreasonable delay.

10. The record shows that by way of Chamber Summons dated 5th August, 2011, the Defendants sought to set aside ex-parte Judgment and to be allowed to file a Defence. In his Ruling of 29th May, 2012, Dulu J. dismissed the said Application.

11. The court proceeded to hear the matter, and on 7th November, 2012, a Judgment was delivered in favour of the Plaintiff. In the said Judgment, the court issued a mandatory injunction compelling the Defendants to vacate the suit land.

12. After the Judgment of the court, the Defendants filed a Notice of Appeal in the Court of Appeal on 4th June, 2012. The Plaintiff filed an Application in the Court of Appeal in which he sought for the striking out of the said Notice of Appeal. The Court of Appeal struck out the Notice of Appeal on 25th July, 2014.

13. The Defendants' Notice of Appeal was struck out on the ground that the Appeal was going to be filed out of time, and the Defendants had not sought for copies of proceedings and Judgment within thirty (30) days as the law demands.

14. It is therefore obvious that the Defendants herein had sought to Appeal against the Ruling of the court vide a Notice of Appeal which was struck out. Having filed an Appeal, he cannot now seek to review the same Ruling after the Notice of Appeal was struck out. The window of reviewing the Ruling of 29th May 2012 was closed the moment he filed the Notice of Appeal which was eventually struck out.

15. The Judgment of this court was delivered on 7th November, 2012. The Defendants never appealed against the said Judgment. However, they now want this court to review the said Judgment way after execution has been undertaken by the Plaintiff, and after two (2) years have lapsed since the Judgment was made. The filing of the Application after the lapse of two (2) years, and after execution of the Judgment has been completed, is in my view unreasonable delay that takes away the right of the Defendants to review the Judgment of 7th November, 2012.

16. In any event, the grounds raised in the current Application for review of the Judgment of the court can only form a basis of an Appeal and not a Review. Indeed, the complaint that the court that delivered the Judgment did not have jurisdiction; that the advocate who filed the Appeal was an unqualified person and that the Defendants were never served with a hearing notice are issues that should have been ventilated on Appeal, and not in an Application for Review.

17. In *Muyodi vs. Industrial & Commercial Development Corporation & Another (2006) 1 EA 243*, the Court of Appeal described an error apparent on the face of the record as follows:

“There is real destruction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law shares one in the face, and there could reasonably be no two opinions, 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 a 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 and is certainly no ground for a review although it may be for an Appeal.”

18. Whether the Judge who delivered the impugned Judgment had jurisdiction to do so or not should have been argued on Appeal. Even if it is argued that the issue of the Plaintiff's advocate being an unqualified person was only discovered after the Judgment, the evidence before the court shows that the said advocate was an advocate of the High Court of Kenya and had a valid practicing certificate.

19. The Defendants did not produce any evidence or point out any law which prohibits an advocate who has a practicing certificate from signing and filing pleadings, on an account that he does not have a professional indemnity cover. The issue of the Plaintiff's advocate not having a professional indemnity cover cannot be a discovery of new evidence warranting the review of the Judgment of the Court.

20. As I have already stated above, the issue of the Plaintiff having misled the trial court is an issue that should have been taken on Appeal. That issue cannot be a subject of review.

21. For the reasons I have given above, the Application by the Defendants dated 18th December, 2014 is unmeritorious. The same is dismissed with costs. For avoidance of doubt, this matter is marked as having been finalized.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 27TH DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE