



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT KERICHO

CIVIL SUIT NO. 20 OF 2016

JOEL KIPKOECH TONU.....PLAINTIFF

VERSUS

BONDET ARAP TUIKONG.....DEFENDANT

RULING

Introduction

1. What is before me is a Notice of Motion dated 10th January, 2018. The said Notice of Motion is brought pursuant to Order 45 Rule 2 of the Civil Procedure Rules, Section 3, 3A, 1, 1A and 1B of the Civil Procedure Act seeking the following prayers:

a) *Spent*

b) *That this Honourable Court be pleased to review the judgment dated 17th November 2017 and all consequential order.*

c) *That the costs of this application be provided for.*

2. The application is predicated on the grounds stated in the Notice of Motion as well as the Defendant's affidavit sworn on the 30th January, 2018. The gist of the defendant's application is that there is an error apparent on the face of the record. According to the defendant the said error arises from the fact the court awarded costs to the plaintiff after making a finding that both the plaintiff and the defendant had encroached on the road meant to be a road reserve.

3. The application is opposed by the plaintiff through his Grounds of Opposition filed on the 30th January, 2018 to the effect that the application is fatally defective as the court is *functus officio* having pronounced with finality on the issue of costs.

4. The parties agreed to canvass the application by way of written submissions though only the Plaintiffs counsel filed theirs.

5. It has been submitted on behalf of the plaintiff that an error in judgment or the exercise of discretion does not constitute a basis for review as it does not amount to an error on the face of the record.

Issues for Determination

6. I have considered the pleadings, application, rival affidavits as well as counsels' submissions and the following issues emerge for determination:

i. Whether the applicant has met the threshold for review of the orders issued on 12th July 2017

ii. Whether the defendant should be granted the reliefs sought

iii. Who should bear the costs of this suit.

Analysis and Determination

7. With regard to the first issue, the conditions for review are set out in Order 45 (1) of the Civil Procedure Rules as follows:

“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 a 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 review of judgment to the court which passed the decree or made the order without unreasonable delay”.

8. The applicants rely on the ground that there is an error apparent on the face of the record. It is the defendant’s contention that the court having come to the conclusion that both parties had encroached on the road of access ought not to have awarded costs to the defendant. It is arguable whether the discretion to award costs in a particular case can be challenged as being an error apparent on the face of the record. For example, in the instant case, costs were awarded to the plaintiff because the court found that he had largely proved his case on a balance of probabilities.

9. What constitutes an error apparent on the face of the record was defined in in the case of **Antony Gachara Ayub V Francis Thinwa C.A No 92 of 2008** while quoting with approval the case of **Draft and Develop Engineers Limited V National Water Conservation and Pipeline Corporation Civil Case No 11 of 2011** the Court of Appeal stated as follows:

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on 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 apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal”

10. Similarly, in the case of **National Bank of Kenya Limited V Ndungu Njau C.A No 211 of 1996** the Court of Appeal held as follows:

“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 an elaborate argument to be established. It will not be a sufficient ground for review that another judge would have arrived at a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review”.

11. In the instant case the defendants are challenging the court’s interpretation of section 27 of the Civil Procedure Act which provides as follows:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the cost of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court shall for good reason otherwise order”

12. In **Origo & Another V Mungala (2005) 2KLR** cited in **Jameny Mudaki Asava V Brown Otengo Asava & Another (2015 eKLR** the court held as follows:

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction. They have now come to a dead end”.

13. The upshot of the foregoing is that the application lacks merit and is dismissed with costs.

Dated, signed and delivered at Kericho this 20th day of March, 2018.

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J.M ONYANGO

JUDGE

In the presence of :

1. Miss Cherotich for the Defendant
2. Mr. Langat for the Plaintiff
3. Rotich – Court assistant