



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 93 OF 2013

RING ROAD DEVELOPERS LIMITED.....PLAINTIFF

VERSUS

1. PAPELLO INVESTMENTS LIMITED

2. RIDGECREST INVESTMENT LIMITED

3. LUKAS CHIMERA KENGA

4. JAMBO C. MKANDARANGA

5. KULOLA DZENGO

6. KALUME MWANONGO

7. CHIROMBO SINDA

8. JOSEPH MWATEBE SAA

9. KENGA WESA

10. THE COMMISSIONER OF LANDS

11. THE ATTORNEY GENERAL.....RESPONDENTS

RULING

1. By an Application dated 29th May 2017, the 3rd, 4th and 5th Defendants have asked this Court to be pleased to review and/or set aside its Ruling delivered on 24th November 2016 by the Honourable Justice Oscar Angote.

2. The Grounds upon which the Application is brought are stated on the body thereof as follows:-

i. That this Honourable Court found that the Applicants were not entitled to call any further witness as the same would prejudice the Plaintiffs since the Plaintiffs would not be able to controvert their evidence.

ii. That this Court made an error apparent on the face of the record as the Plaintiff will be able to challenge the said evidence by way of cross-examination.

iii. That this Court is duty bound by virtue of Article 10 of the Constitution not to disregard any evidence that would help the Court make a fair and just decision.

iv. That this Court made an error on the face of the record by penalizing the Applicants on procedural technicalities while Article 159 of the Constitution and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act clearly provide that the Court should not

rule on technicalities but strive to decide the substantive issues.

v. That this Court failed to consider the great prejudice that will be occasioned to the Applicants when their evidence is locked out.

vi. That no proper determination can be made in this matter while a lot of evidence is locked out.

3. In a Replying Affidavit sworn by its Director Anthony Kamuiru Gitau on 30th June 2017, the Plaintiff Company avers that the Application is misconceived, incompetent, bad in law and filed contrary to procedure. The Plaintiff contends that their sole witness testified on 20th September 2016 and their case was therefore closed. The Applicant/Defendants then called one witness after which the matter was adjourned.

4. It is further the Plaintiff's case that on 24th November 2016, the Applicant's Advocate made an Oral application to introduce three new witnesses but the Application was rejected by the Court. Subsequently on 2nd December 2016, the Applicants lodged a Notice of Appeal challenging the Ruling. The Plaintiff concludes that there was no error apparent on the face of the record as the Defendants had almost four years from June 2013 to file witness statements but did not do so and waited until the Plaintiff had closed its case before making the application.

5. I have considered the Application and the response thereto. I have equally considered the oral submissions of the Learned Counsels for the parties.

6. From the record it is evident that this case was filed on 7th June 2013. Having been served with summons, the 3rd, 4th and 5th Defendants jointly filed their Defence on 28th August 2013. The case was eventually set down for hearing and on 20th September 2016, the Court heard the evidence of the Plaintiff's sole witness after which the Defendant called one witness (DW1). Upon conclusion of the testimony of DW1, the Defendant's Counsel applied for an adjournment to call two witnesses. The Court then adjourned the matter to 24th November 2016 when the said witnesses would be heard.

7. It is apparent that when the matter came up on 24th November 2016, the Defendants sought to introduce witnesses whose statements had neither been filed nor served upon the Plaintiff earlier. The Plaintiff objected to the introduction of the new statements and evidence an objection that was upheld by this Court.

8. Aggrieved by the decision to uphold the objection, the Applicants opted to appeal the same and indeed proceeded to lodge a Notice of Appeal on 2nd December 2016. The Applicants now state in the Supporting Affidavit that they are no longer interested in pursuing the Appeal hence their filing of this application for review.

9. According to the Applicants, there is an error apparent on the face of record which necessitates a review of the decision made by the Honourable Angote J on 24th November 2016. The said error apparent on the face of the record is repeatedly referred to in paragraphs 4 to 8 of the Supporting Affidavit sworn by Lukas Chimeru Kenga, the 3rd Defendant on 29th May 2017.

10. From the Applicant's affidavit aforesaid, the said error apparent on the face of the record was the failure on the part of the Court to recognize that the Plaintiff would still be able to challenge the evidence adduced by the new witnesses through cross-examination and that therefore the Plaintiff would suffer no prejudice. The error on the face of the record was, according to the Applicants, even more apparent granted that Articles 10 and 159 of the Constitution required the Court to make a fair and just determination without taking recourse to technicalities.

11. In *National Bank of Kenya Ltd –vs- Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported))*, the Court of Appeal held that:-

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

(See Pancras T Swai –vs- Kenya Breweries Ltd (2014) eKLR.

12. A perusal of the grounds cited for review herein clearly point to the fact that the Applicants are of the view that the Learned Judge ought to have reached a different conclusion on the issues raised and that the decision made on 24th November 2016 was erroneous. In my view, that is a ground for appeal and not one for review as purported.

13. In any event, while the Applicants state that they do not intend to proceed with the Appeal, the Notice of Appeal remains lodged herein and is yet to be withdrawn. As was stated in *Kiarie Kariuki & Another –vs- Mohamed Hassan Ali & 4 Others (2014) eKLR*

“It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said Order as such action is likely to affect the outcome of the Appeal.”

14. Accordingly, I find no merit in the application dated 29th May 2017, as the same is misconceived and incompetent. The same is dismissed with costs to the Plaintiffs/Respondents.

Dated, signed and delivered at Malindi this 15th day of March, 2018.

J.O. OLOLA

JUDGE