



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 1 OF 2017 (O.S)

ROBERT K KOECH.....1ST APPLICANT

MOSES KEOECH.....2ND APPLICANT

FRANCIS BIONDO.....3RD APPLICANT

VERSUS

WILLIAM KIPKORIR MUTAI.....RESPONDENT

RULING

Introduction

1. What is coming up for determination is the Defendant's application dated 18th April 2018. In the said application the Applicant seeks that this Honourable Court be pleased to review its orders dated 20th March 2018 together with all consequential orders.
2. The said application is predicated on the following grounds: Firstly that there is an error apparent on the face of the record; secondly that the Court relied on affidavit evidence which had not been tested by way of cross-examination, thirdly, that there were no directions that the matter be canvassed by way of written submissions fourthly that the Applicant stands to suffer substantial loss unless the orders sought are granted. The same is also supported by the applicant's affidavit sworn on the 18th day of April 2018.
3. The application is opposed by the Plaintiffs through the 1st Plaintiff's Replying Affidavit sworn on 11th June 2018.
4. The application was canvassed by way of written submissions and both counsels filed their submissions.
5. In his affidavit the applicant avers that no directions were ever taken on how the main suit should proceed as the only directions taken related to the application dated 17th February 2017. He argues further that the order issued on 6th December 2017 is an error on the face of the record as the issues in controversy could not be adequately and sufficiently disposed of by way of written submissions on the basis of affidavit evidence which had not been tested by way of cross-examination.
6. In opposing the application the 1st Plaintiff/Respondent agrees that indeed no formal directions were taken that the main suit be canvassed by way of written submissions but argues that if the Applicant was not satisfied with the manner in which the matter was proceeding, he ought to have sought the indulgence of the court to take the necessary directions. He avers that the court should be guided by the maxim that 'equity aids the vigilant, not the indolent' and the maxim that 'equity follows the law'. The 1st Respondent also argues that the Applicant has not disclosed sufficient cause to warrant the orders sought being granted.

Issues for Determination

7. Arising from the application, affidavits of both parties as well as counsels' submissions, the following issues emerge for determination:
 - i. Whether the Applicant has satisfied the grounds for review;
 - ii. Whether failure to take directions in a matter commenced by way of Originating Summons renders the proceedings invalid and amenable to review; and
 - iii. Who should bear the costs of this application

8. 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”.*

9. The applicants rely on the ground that there is an error apparent on the face of the record. It is common ground that no directions were taken that the main suit proceeds by way of written submissions. However, both parties to the suit were ably represented by counsel and counsel for the Applicant who was well aware of this fact never raised it until the matter was concluded. No explanation has been offered as to why this was not done.

10. What constitutes an error apparent on the face of the record was defined 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 undefiniteness 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”

11. 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”.

12. In the instant case the Defendants are challenging the fact that no directions were taken for the main suit to proceed by way of written submissions. It is however noteworthy, that inspite of this, counsel for the applicant went ahead and filed their submissions without raising any complaint thereby acquiescing to the proceedings. It is only when judgment was delivered against his client that he raised the matter. I can't help wonder whether Counsel would still have raised the issue had the decision/Judgment been in favour of his client.

13. The crux of the applicant's application is whether failure to take directions on the Originating Summons renders the proceedings invalid and amenable to review.

14. Order 37 Rule 16 of the Civil Procedure Rules provides as follows:

“The Registrar shall within thirty days of filing of the Originating Summons and with notice to the parties, list it for directions before a judge in chambers’.

Order 37 Rule 18 states:

“ At the time of directions if the parties do not agree to the correctness and sufficiency of the facts set for the in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties

Rule 19(1):

“Where on an Originating Summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the proceedings had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to or to apply for particulars of those affidavits.

(2) Where the Court makes an order under sub-rule (1), Order 11 shall apply

(3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint.”

15. A keen reading of the above provisions leads me to the conclusion that directions are a key and necessary step in proceedings commenced by way of Originating Summons and cannot be wished away. Directions serve to guide the parties on how to ensure they bring out the real issues in controversy and to ensure that the necessary material and evidence is placed before the court to enable it make a sound and informed decision. Indeed, in my judgment, I did not note or raise the court’s frustration in determining a matter where the Respondent had proceeded to file submissions on the substantive suit before directions were taken.

16. That the parties omitted this necessary step is in my view an error apparent on the face of the record, though I must add that counsel ought to be more diligent in prosecuting their cases to avoid such lapses.

17. For the foregoing reasons, I find merit in the Applicant’s application and direct as follows:

- a. The orders issued on 20th March 2018 are hereby reviewed and the Judgment is set aside.
- b. The case shall commence afresh in accordance with Order 37 Rules 16, 18 and 19 of the Civil Procedure Rules.
- c. The Plaintiff shall pay to the Defendant thrown costs of Kshs. 30,000 within 30 days from the date hereof
- d. The costs of this application shall be in the cause.

Dated, signed and delivered at Kericho, this 28th day of August 2018

J.M ONYANGO

JUDGE

In the Presence of

Mr. Arusei for Mr. Orina for the Applicant

Mr. Chelule for Mr. Motanya for the Respondent

Court Assistant: Rotich