



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**IN THE ENVIRONMENT AND LAND COURT**  
**ELC.NO.2484 OF 1994**

FRANCIS WAKAHIU THEURI..... PLAINTIFF/APPLICANT

VERSUS

MONICAH NJERI

ESTHER WANGUI

CATHERINE MUTHONI

FRANCIS NJURU NGUGI T/A

WAWAGE INVESTMENT COMPANY..... DEFENDANT/RESPONDENTS

AND

JOSEPH GITUMA NDEGWA & 29 OTHERS..... INTERESTED PARTIES

**RULING**

The matter for determination is **Notice of Motion** dated **25th July 2014**. The application was brought by the plaintiff seeking for the following orders;-

***1. That this honourable court be pleased to amend the Judgment dated and delivered 14<sup>th</sup> December 2012, which judgment erroneously referred to the suit premises as Ruiru/Ruiru Block 1 (witeithie/125) as opposed to Ruiru/Ruiru Block 1 (witeithie/ 126) which is the correct parcel number of the Suit Premises.***

***2. That the cost of this application be in the cause.***

The application is anchored on the grounds stated on the face of the Notice of Motion and on the supporting affidavit of **Judy W.Gichumbi** Advocate.

These grounds are;-

***a. That Judgment was entered by the Honourable Lady Justice Nyamweya on 14<sup>th</sup> December 2012 and referred to Ruiru/Ruiru Block 1 (witeithie/125) as opposed to Ruiru/Ruiru Block 1 (witeithie/ 126) which is the suit premises.***

***b. That unless the Judgment is amended, the plaintiff herein is unable to extract and execute the decree as the judgment refers to the wrong property.***

***c. That it is in the best interest of justice that the application herein be allowed.***

On her supporting Affidavit ***Judy W.Gichumbi***, averred that the Plaintiff dated ***12<sup>th</sup> July 1994***, and filed on the same day by the Advocates previously on record on behalf of the plaintiff referred to the suit as ***plot 125*** consisting of ***26 acres*** and situated along ***Ruiru -Kiambu Road*** as per annexure ***JWG 1***” and that the title deed for the suit premises was acquired in ***1999*** which title deed referred to the suit premises as ***Ruiru/Ruiru Block 1 (witeithie /126)*** as per annexure ***JWG 2.***”

The deponent further averred that on ***30<sup>th</sup> September 2010***, the defendants filed a further Amended Defence and Counterclaim dated ***28<sup>th</sup> September 2010*** which sought to amend ***Ruiru/Ruiru block 1(witeithie /125)*** to read as ***Ruiru/Ruiru block 1 (witeithie 126)*** as per annexure ***JWG 3.***” And that Judgment was entered by Honourable ***Lady Justice P.Nyamweya*** on the ***14<sup>th</sup> December 2012***, and referred to Plot no. ***Ruiru/Ruiru Block 1(witeithie 125)*** as opposed to ***Ruiru/Ruiru Block 1(witeithie /126)*** as per annexure ***JWG 4.***”

She further averred that the suit was filed five years before the title deed was issued for the suit premises to the plaintiff and that unless the Judgment is amended the plaintiff is unable to execute the decree as the Judgment refers to a wrong property.

The deponent argued that it is in the best interest of Justice to amend the clerical error in the Judgment to refer to the Suit Premises as ***Ruiru/RuiruBlock 1(witeithie/126)***.

The application is opposed and ***Francis Njuru Ngugi*** swore a Replying Affidavit on ***11<sup>th</sup> May 2015*** and averred that their Amended Defence and Counterclaim filed on ***30<sup>th</sup> September 2010*** which sought inter alia retrospective rectification of all erroneous reference to suit premises ***Ruiru/RuiruBlock 1(witeithie/125)*** to read ***Ruiru/ Ruiru block 1(witeithie/126)*** which prayer was dismissed by court on a ***Judgment*** delivered on ***14<sup>th</sup> December 2012***.

The defendant deposed that though the plaintiff states that he obtained a Title to the Suit Property in ***1999***, he never sought to have the correction done during the hearing of the suit and therefore the issue is mute and the plaintiff should not be allowed to revive a dead matter through amendments. The defendant argued that they have filed a Notice of Appeal against the Judgment and that if the plaintiff’s application is allowed it will circumvent the said appeal and make it nugatory.

The defendant further averred that he is advised by their Advocate on record which information he believes to be true that the law doesn’t allow for amendments once Judgment has been entered and that the plaintiff has never produced an official search for the property since their efforts to do an official search of the Suit Property at Thika Land Registry has not yielded any success since the said Registry has never issued one raising questions on plaintiffs alleged Title acquired in ***1999***.

The defendant argued that the plaintiff’s should produce in Court an Official Search to the Suit Property to prove ownership of the same and that contrary to that the Plaintiff should be deemed to have failed to prove ownership. The defendant urged the court to dismiss plaintiff’s application with costs.

The application was canvassed by way of written submissions. The Law Firm of ***Njoroge & Musyoka Advocates*** for the applicant filed their written submissions on ***29<sup>th</sup> May 2015***, and urged the court to allow the Notice of Motion dated ***25<sup>th</sup> July 2014***. They relied on various decided cases among them the case of ***Vallabhdas Karsandas Raniga versus Mansukhlal Jivraj and Others (1965)E.A.***, where the Court of Appeal at Nairobi held that:-

***“Slip orders may be made to rectify omissions resulting from the failure of counsel to make some particular application. A slip order will only be made where the court is fully satisfied that***

***it is giving effect to the intention of the court at the time when judgment was given or in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention.”***

It was also submitted that failure of plaintiff’s counsel in amending the Plaint before hearing and pronouncement of the Judgment dated **14<sup>th</sup> December 2012**, does not prevent this Honourable Court from correcting the clerical error made in the Judgment regarding the parcel number of the Suit Premises.

The Law Firm of ***Gachie Mwanza & Co. Advocates*** for the interested parties/ respondents filed their written submissions on **12th June 2015**, and urged the Court to dismiss Plaintiffs/Applicants application with costs. They relied on various decided cases among them the case of ***Libyan Arab Uganda Bank for Foreign Trade and Development & Anor versus Adam Vassiliadis [1986] UG CA 6*** where the Ugandan Court of Appeal (Judgment of Odoki J.A) cited with approval the dictum of Lord Denning in ***Jones versus National Coal Board [1957]2 QB 55*** that;-

***“In the system of trial which we have evolved in this Country, the judge sits to hear and determine the issues raised by the parties , not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”***

It was also submitted that the plaintiff is asking the court to correct his own mistake which he could have sought leave of the court to amend at the earliest opportune time but he decided not to and therefore this honourable court cannot grant them anything in that regard.

The court has now carefully considered the instant Notice of Motion which is anchored under **Section 3A and Section 99 of the Civil Procedure Act.**

**Section 99** states that;

***‘Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.’***

Further **Section 3A** grants the court the power to make orders that are necessary for the end of justice and prevent abuse of the court process.

The applicant has averred and submitted that the Judgment entered by ***J.Nyamweya*** on **14<sup>th</sup> December 2012**, referred to ***Ruiru/Ruiru Block 1(witethie) 125*** as opposed to ***Ruiru/Ruiru Block 1 witethie/126*** which is the suit premises. It was the contention of the applicant that unless the Judgment is amended the plaintiff herein is unable to extract and execute the Decree as the Judgment refers to the wrong property.

Indeed **Section 99 of the Civil Procedure Act** grants the Court discretion to amend clerical and arithmetical mistakes in Judgment, Decree or Order either on its own motion or on the application of any of the parties.

This application is opposed and the interested party has averred that the defendant filed his Defence and Counter claim which had sought to rectify the suit property but the same was rejected by the court and dismissed.

The court has considered the Plaint and it is not in doubt that the Plaint herein was filed in **1994**.The Suit Property was described as **plot No.125** measuring approximately **26 Acres**.

From the Judgment attached to the application, the Court has noted that the plaintiff testified in court and stated that he owned land in Ruiru whose number is **125**.The plaintiff did not mention that he owns **Plot No.Ruiru/Ruiru Block1/126** but stated survey number **125**.The plaint also refers to **Plot No.125**. The court has also noted that on **30<sup>th</sup> September 2010**, the defendants filed a further Amended Defence and Counter Claim and stated in paragraph 2 “save that the premises are **LR.NO.Ruiru/Ruiru/ Block 1**

**witeithie/126**” which provides;-

Even with that averment in the Counter Claim of the defendants, the plaintiff did not seek to amend the plaint. Parties are indeed bound by their pleadings and it is the plaintiff who introduced **Plot No.Ruiru/Ruiru/ witeithie125** and not the court. The Court referred to the Suit Property that had been indicated in the Plaint. The Court’s reference was **Plot No. 125** and had no intention of referring to **Plot No.126**. The Court even went further and/or dismissed the defendants defence and the Counter Claim. There is no clerical or arithmetic error in the Judgment to warrant the Court amend the Judgment as envisaged by **Section 99 of the Civil Procedure Act**.

By asking the Court to Amend the Judgment to read **Ruiru/Ruiru Block1 witeithie/126** instead of **125**, the applicant is asking the court to amend the Plaint after the Judgment. That would be tantamount to changing the agenda in the claim without giving the defendants an opportunity to ventilate on it. The plaintiff is the one who came to court and gave the Land Reference. He referred to it all through. The court did not make any mistake when it referred to the suit property and the Judgment as **Ruiru/Ruiru/Block1 witeithie/125** as that was from the plaintiff’s pleadings and evidence in court. It is trite that amendments to pleadings can be done at any stage of proceedings even after the close of the case but before Judgment. The plaintiff did not take advantage of that position. See **Order 1 Rule 10(2)**

**“the court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be” necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”**

The Court of Appeal in the case of **Independent Electoral & Boundaries Commission & Another versus Stephen Mutinda Mule & 3 others(2014) eKLR**

Considered the issue of parties being bound by their pleadings and stated as follows;

***In the decision of the Malawi Supreme Court, of appeal in Railways(Ltd) versus Nyasulu (1998) MWSC in which the judges quoted with approval from an article by sir Jack Jacob entitled ‘The present importance of pleadings’ stated;***

***‘.....It is left to each party to formulate his case in his own way; subject to the basic rules of pleadings.....each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without the amendment of the property made.....the court itself is also bound by the pleadings of the parties as they are themselves’***

It is therefore very clear that the court in issuing the Judgement on **14<sup>th</sup> December 2012**, was bound by the pleadings presented by the parties and specifically the Plaint by the Plaintiff/Applicant herein. The Plaintiff is therefore bound by his pleadings and the court never made any error or mistake to warrant the intervention of the Court as stipulated in Section 99 of the Civil Procedure Act.

The Court cannot correct the mistake of the plaintiff that he failed to correct through an amendment of the plaint. Even if the court was to amend the Judgment, what about the Plaint? The Plaint cannot be amended after the Judgment as to do so as submitted by the interested party would be a travesty of justice.

The upshot of the foregoing is that the plaintiff/applicant is Notice of Motion dated **25<sup>th</sup> July 2014**, is not merited and the same is consequently dismissed entirely with costs to the Respondents.

It is so ordered.

Dated, Signed Delivered this at **Nairobi** this **24<sup>th</sup>** day of **February** of **2017**

**L.GACHERU**

**JUDGE**

In the presence of;

Mr Wetaba holding brief for M/s Gichumbi for Plaintiff/Applicant

None attendance for the Defendant/Respondent

Mr Wachira holding brief for Mr Gachie for Interested Party/Respondent

Hilda: Court Clerk

**Court:**

Ruling read in open Court in the presence of the above stated advocates.

**L.GACHERU**

**JUDGE**