



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HCC NO. 20 OF 2006

PRISCILLA JERUTO KISOSO.....PLAINTIFF

VERSUS

KIPOROT OLE TOTONA alias SINGO ARAP TOTONA....1ST DEFENDANT

TUNGO TOTONA.....2ND DEFENDANT

LEDEMA TOTONA.....3RD DEFENDANT

RONALD TOTONA.....4TH DEFENDANT

RULING

(Application for review; factors to be considered; counterclaim filed and not served even after 4 years; same struck out; application to review the ruling; no good reasons to review; however court in utilizing its inherent powers allows for service of the counterclaim but on conditions).

1. The application before me is that dated 3 October 2016 filed by the defendants. They seek the following two substantive orders :-

(i) That the Honourable Court be pleased to review, vary and/or set aside its orders issued on the 21st day of March 2016, striking out the 2nd, 3rd, 4th and 5th defendants from the 1st defendant's counterclaim and order be made that the said parties be reinstated into the counterclaim.

(ii) That upon reinstatement the Honourable Court be pleased to extend time within (which) the defendants in the counterclaim can be served and accordingly service be effected within 15 days of the order.

2. The application is supported by the affidavit of Kiporot Ole Totona, the 1st defendant and is opposed by the plaintiff. Before I go to the gist of these, I think it is important that I lay down the background leading to this application.

3. This suit was commenced by way of plaint filed on 26 January 2006. The plaintiff sued 4 persons, namely, Kiporot Ole Totona, Tungo Totona, Ledema Totona, and Ronald Totona. In her plaint, she has pleaded that she is the registered proprietor of the land parcel Lembus/Chemogoch/10 measuring about 58 Hectares having acquired it by way of a gift from one Paul Chemirmir who had purchased the land in a public auction from Kenya Commercial Bank Limited (KCB). The property had been charged to KCB as

security by the 1st defendant. It is pleaded that the plaintiff took the land in the year 1992, moved into it and embarked on developments. At this time, the 1st defendant had moved out of the land but the 2nd, 3rd and 4th defendants were in it and she gave them 3 months notice to vacate. They did not move out despite her efforts to involve the local administration. In this suit, the plaintiff has inter alia sought orders of eviction of the defendants from the land.

4. The defendants entered appearance through the law firm of M/s Arusei & Company Advocates. On 3 March 2006, they filed a joint statement of defence. Inter alia it was pleaded that no loan has ever been taken over the suit property and that the purported exercise of power of sale by KCB was a fraud. On 28 June 2006, an application to amend the defence was filed. In the application, the defendants sought leave to amend their defence to include a counterclaim to assert that the suit land lawfully belongs to the 1st defendant. The application was allowed on 25 April 2007, when the matter came up in court before Musinga J (as he then was) and an amended defence was filed on 2 May 2007.

5. Another application for leave to amend defence was filed on 29 August 2007. This time, the defendants wished to further amend their defence to inter alia include in the counterclaim 6 defendants, being the plaintiff, one Paul Chemirmir, David Kiprono, KCB, Commissioner of Lands and the Chief Registrar of Titles. It was proposed to be pleaded that in the year 1969, the 1st defendant purchased the suit land and had it transferred to him but he never went to collect the title deed. He repeated that he has never taken a loan using the suit land as security and pleaded fraud against all the proposed defendants in his counterclaim.

6. The application was allowed vide a consent filed on 28 May 2009 and signed by M/s Gordon Ogolla & Associates Advocates for the plaintiff and M/s Arusei & Company Advocates for the defendants, in the following terms :-

(i) That the Honourable Court grants leave to the defendants/applicants to amend the amended defence and counterclaim in terms of the annexed draft.

(ii) That the further amended statement of defence and the amended counterclaim be filed and served within the next fourteen days from the date of filing hereof.

(iii) That the plaintiff shall have a corresponding leave to amend the reply to defence within fourteen (14) days from the date of service.

(iv) Costs of the application be in the cause.

7. On 7 April 2011, a Notice of Change of Advocates was filed, vide which the law firm of M/s Mirugi Kariuki & Company Advocates, came in place of M/s Gordon Ogolla & Associates, who were hitherto acting for the plaintiff.

8. I have seen another consent dated 7 July 2011 and filed on 25 October 2011 between the law firm of M/s Mirugi Kariuki & Company Advocates and M/s Arusei & Company Advocates which was drawn in similar terms to the consent filed on 28 May 2009. I am not too sure why the parties found it necessary to draw this consent but it is probable that the defendants had not complied with the terms of the consent filed on 28 May 2009 for no amended defence had been filed following the consent of 28 May 2009. This consent was endorsed on 28 October 2011 by the Deputy Registrar.

9. A Further Amended Defence was eventually filed on 4 November 2011. Of significance is that this Further Amended Defence raised a counterclaim against 5 persons namely, the plaintiff Priscilla Jeruto Kisoso, Paul Chemirmir, KCB, Commissioner of Lands and the Chief Registrar of Titles. This of course was not quite in line with the draft that was filed together with the application of 29 August 2007, which as I have outlined above, proposed to have 6 defendants, but I guess that the defendants had reviewed their position and thought it best to sue the five persons. The claim in the counterclaim remained that the 1st defendant never took any loan with KCB and that any charge registered against the suit land was fraudulent, and so too any exercise of a purported statutory power of sale, and the subsequent transfer of

the land to the plaintiff. The 1st defendant sought a cancellation of the title of the plaintiff and restoration of the same in the name of the 1st defendant.

10. The plaintiff did file a reply to the further amended defence and a defence to the counterclaim. However, in respect of the 2nd, 3rd, 4th and 5th defendants in the counterclaim, no summons were ever extracted and they were never served with the pleadings. The plaintiff and defendants thereafter proceeded to prepare their respective cases for trial by filing the usual witness statements, documents to be relied on at trial, and issues for determination. The matter came up for mention and on 3 March 2016, I gave 21 March 2016 for hearing.

11. On this day, both Mr. Lawrence Karanja for the plaintiff and Mr. Arusei for the defendants stated that they are ready to proceed. However, Mr. Karanja questioned whether the 2nd - 5th defendants in the counterclaim had ever been served. He asked that they be struck out of the proceedings. In his response, Mr. Arusei inter alia submitted that Paul Chemirmir, the 2nd defendant in the counterclaim was deceased. I considered the issue raised and was of the view that the same was adequately covered by the provisions of Order 5 Rule 1. I considered that the duty to prepare and collect summons was upon the defendants. The defendants also had a duty to serve the summons. I considered that under Order 5 Rule 2 (7), if service is not effected within 24 months, the suit may be dismissed. I noted that it was over 4 years since the counterclaim was filed and deemed it appropriate to strike out the parties named as 2nd, 3rd, 4th and 5th defendants in the counterclaim. I directed that the matter do proceed with the plaintiff being the sole defendant in the counterclaim. It is this order which the defendants now want reviewed.

12. Through this application, the defendants now seek a review of my orders of 21 March 2016 striking out the defendant's counterclaim against the 2nd - 5th defendants named therein. The main ground upon which the application is based, is that the failure to serve the said parties was a mistake and that any prejudice suffered by the plaintiff may be remedied by costs. It is averred that the court ought to do justice to the parties. The supporting affidavit is sworn by the 1st defendant. He has stated that he has been advised by his advocate on record that failure to serve the defendants in the counterclaim was a mistake. He has averred that the case is yet to start and no prejudice will be suffered by the plaintiff which cannot be remedied by an award of costs.

13. The plaintiff has filed a replying affidavit to oppose the motion. She has in her affidavit cited the provisions of Order 45 Rule 1 which provides the grounds for review. She has inter alia deposed that the application is an afterthought considering that it was filed on 3 October 2016 yet the order sought to be reviewed was made on 21 March 2016. It is averred that the applicants have not explained their delay of over 6 months. It is deposed that the applicants have not brought to the attention of this court any discovery of new facts or error on the face of the record, and neither have they brought themselves within the ambit of any sufficient reason to warrant a review. She has deposed that the proper avenue should have been to appeal the ruling.

14. A supplementary affidavit was filed by the applicants vide which it is explained that the applicants have come for review under the ground of "any other sufficient reason." He has reiterated that failure to serve was an excusable mistake. He has admitted delay but has stated that justice can still be done despite the delay.

15. Both Mr. Arusei and Mr. Karanja filed written submissions which I have considered. Mr. Arusei relied on several authorities which acknowledge that mistakes will sometimes be made in the course of judicial proceedings and that there is need to do substantive justice to parties. On the other hand, Mr. Karanja relied heavily on authorities which expound on the grounds for review. He submitted that the applicants have not explained their delay in lodging the application for review. He submitted that the applicants have not demonstrated any discovery of new matter or an error apparent on the face of record. He also submitted that no formal order has been extracted of the ruling of 21 March 2016.

16. I have considered the matter. This is an application for review and the provisions of Order 45 Rule 1 apply. The same is drawn as follows :-

1. Application for review of decree or order [Order 45, rule 1.]

(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.

17. It will be seen from the above that one may seek review if there is discovery of new matter; or where there is an error apparent on the face of record; or for any other sufficient reasons. Whatever the pigeon hole one attempts to fit himself/herself, such application must be made without unreasonable delay. In our instance, the applicants acknowledge that there is no discovery of new matter and that there is no error apparent on the face of record. They have explicitly stated that they have come before court on account of the ground "any other sufficient reason." They do argue that there is reason to review the ruling at hand because the failure to serve was a mistake and that it is only just that they be heard on their case.

18. I have gone through the affidavits in support of the application. The affidavit is loud in stating that it was the advocate's mistake and oversight. However, I have no affidavit from Mr. Arusei elucidating how the mistake or oversight came to be. There is absolutely no explanation of what may have transpired after the Further Amended Defence and Counterclaim were filed on 4 November 2011. Did the advocate move to extract the summons to enter appearance ? If not, why ? Did the advocate make any move to serve the summons ; if not why ? It is not in my view enough to simply say that "it was a mistake" without elaborating how that mistake came to be and without the person who was responsible for that mistake owning up to it and giving some form of explanation as to how that mistake came about and why it should be excused. If we do not insist on this, then any litigant will simply come to court and say, "it is a mistake" and get away with almost anything without offering any sort of explanation. I am afraid that without giving details on how "the mistake" if any, occurred, and why it should be excused, I am not persuaded that the applicant has tabled any sufficient reason to warrant a review of the order of 21 March 2016.

19. I have looked through the authorities tendered by Mr. Arusei where the court has acknowledged that a mistake may be excusable, and I have noted that in all the authorities, the mistakes were explained and found to be justified. For example, in the case of **Savings & Loan Kenya Ltd vs Onyancha Bwomote, Civil Appeal No. 70 of 2004**, a motion before the court of appeal was dismissed for non-attendance. An application to reinstate was allowed. However, the applicant did demonstrate that the matter was not brought to the attention of the advocate who was handling the matter hence his non-attendance. So too in the case of **Commissioner of Income Tax vs Kencel Communications Ltd, Civil Appeal No. 84 of 2007**. That is very different from the scenario before me; absolutely no reasons have been tendered on what may have brought about the omission to extract and serve summons as stipulated in the rules.

20. I already mentioned that to be able to seek shelter under the umbrella of review, one must file his application without unreasonable delay. The order herein was made on 21 March 2016. This application was filed on 3 October 2016 more than 6 months after the order was made. The applicants have not given

any account of this period and indeed in his affidavit, the 1st applicant does acknowledge that there has been some element of delay. The provision that one needs to move the court promptly while seeking a review order, was not placed in the rules without reason. I do note from the record that after 21 March 2016, this matter was mentioned on 12 May 2016. On that day, Mr. Arusei did state from the bar that he has instructions to apply for review. I did state that the applicants are free to file an application for review which will be considered on merits. Again, no explanation has been given as to why the applicants waited for close to 5 months without filing the application.

21. In my view, the delay of more than 6 months in the circumstances of this case is unreasonable and that bars the applicants from seeking relief under a review application.

22. I have no reason whatsoever to allow this application in so far as it is one for review and I am unable to accept that there are sufficient grounds to review the orders of 21 March 2016.

23. That said, this court has inherent jurisdiction to make such orders as may be deemed fit so that justice is served to all parties and in my own discretion I am persuaded to utilize the provisions of Section 3A of the Civil Procedure Act, which provides as follows :-

3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

24. I do take very seriously the right of every party to be heard. The applicants herein feel that they have a case against the plaintiff and several other parties. I do not want, in exercise of my inherent jurisdiction, to deny them that right. I do however note that this case has been pending in court since the year 2006. From the pleadings, the plaintiff filed this suit because the defendants were interfering with her possession of the suit land. By their conduct, the applicants have caused considerable delay in the disposal of this case and they cannot have their cake and eat it.

25. I will allow the defendants to proceed with their counterclaim as against the 2nd - 5th defendants named therein, but this will be on condition that they cede possession of the suit land to the plaintiff until this case is heard and determined. If they are unable to cede possession, then they must deposit a sum of Kshs. 1 Million as security so that in the event that they lose the case, the plaintiff is not prejudiced for the time lost while not in possession. If they are unable to meet these two conditions, within the next 30 days, then I am afraid that I cannot allow them leave to reinstate the counterclaim which was dismissed. In as much as the applicants seek justice, I must also balance the interests of the plaintiff. Indeed I am bending over backwards to accommodate them.

26. In addition to the above condition, the applicants will also have to pay thrown away costs of Kshs. 25,000/= within 30 days. Again, if these are not paid, the orders of 21 March 2016 will stand.

27. For the avoidance of doubt, I have made these orders while utilizing my inherent powers to do justice to the parties and not because I am persuaded that the applicants deserve a review of the orders of 21 March 2016 which will stand unless the above conditions are met.

28. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 16TH day of March 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

3rd and 4th defendants : Present

1st and 2nd defendant : absent

Mr. Gatonye for the plaintiff

Ms.Kiget holding brief for Mr. Arusei for defendants

Court Assistant : Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU