



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 404 OF 2013

NAFTALY NGUGI GAKERA PLAINTIFF

VERSUS

ASENWA KIPCHAKEA TIROP1ST DEFENDANT

KIPRONO MWEI2ND DEFENDANT

RULING

(An application seeking amendment of a ruling under Section 99 of the Civil Procedure Act; applicant arguing that there was mistake in the ruling; application opposed on ground that the court had rendered itself on the merits; held that it was not possible for the court to ascertain, so as to give effect to, any intention of the learned judge beyond what was plainly stated in the ruling; application dismissed)

1. Before the court for determination is plaintiff’s Notice of Motion dated 27th November 2015 brought under Sections 3A and 99 of the Civil Procedure Act and Order 40 rules 1, 2, 3, 4 and 5 and Order 37 rule 8 of the Civil Procedure Rules. The application is supported by an affidavit sworn by the plaintiff and seeks the following orders:

1. *(Spent).*
2. *(Spent).*
3. *THAT time for applying for amendment of ruling by the plaintiff/Applicant herein be enlarged.*
4. *THAT the ruling read herein on 9th May, 2014 be and is hereby amended in the last paragraph to read as follows “22. Accordingly, I do allow the Notice of motion dated 4th June, 2013 and grant prayers 2 and 3 contained therein. Costs in the cause”.*
5. *THAT inhibitions/restrictions be placed over the 2nd suit premises being L.R DUNDORI/MUGWATHI BLOCK 2/297 until this application is heard and determined.*
6. *THAT costs be provided for.*

2. Considering the orders sought in the application, a brief background of the matter is necessary. On 4th June 2013 the plaintiff filed Notice of Motion dated 4th June 2013 in which he sought the following orders:

1. THAT service of this application be dispensed with the first instance, the same be heard ex-parte and be certified urgent and temporary orders be given in terms of prayers 2 and 3 herein.

2. THAT the 1st defendant/respondent be and is hereby restrained by way of an injunction whether by himself, servants, agents, assigns or in any other manner howsoever from alienating or dealing in the 1st suit premises L.R NO. TULWET BLOCK 3 (RIRONI)/15 until this suit is heard and determined.

3. THAT the 2nd defendant/respondent be and is hereby restrained by way of an injunction whether by himself, servant, agents, assigns or in any other manner howsoever from remaining in or continuing in occupation or possession of or from entering, interfering with alienating, dealing in the 2nd suit premises L.R.NO. DUNDORI/MUGWATHI BLOCK 2/297 until this suit is heard and determined.

4. THAT inhibitions be placed over the 1st and 2nd suit premises being L.R. NO.S TULWET/TULWET BLOCK 3 (RIRONI)/15 & DUNDORI/MUGWATHI BLOCK 2/297 until this suit is heard and determined.

5. THAT the defendants/respondents do pay the costs of this application.

The application was heard inter partes and a ruling delivered on it by Hon. Lady Justice L. N.Waithaka on 9th May 2014 as follows:

22. Accordingly, I do allow the Notice of Motion dated 4th June 2013 and grant prayers 1 and 2 as contained therein. Costs in the cause.

3. The plaintiff now contends that the ruling contained clerical errors in the paragraph quoted above and that the said mistake was occasioned inadvertently by human error by stating that the prayers granted were prayers 1 and 2 instead of 2 and 3. That the mistake has given a wrong impression and has made the order ineffective.

4. The application is opposed by the second defendant through his replying affidavit sworn and filed on 5th May 2017. The second defendant contends that the application dated 4th June 2013 was heard and determined on its merits and that the court consciously rendered itself through the ruling dated 9th May 2014. That there is no clerical mistake to warrant the present application and that in any case the application is res juricata.

5. I have considered the application, the affidavits in support and in response thereto and submissions of counsel. I have also perused the record and I note that this matter was certified ready for hearing on 13th October 2016. Should the suit now be heard on the merits or should the parties still be stuck at the stage of an interlocutory injunction and its interpretation? I will return to that issue later.

6. The application is brought inter alia under Section 99 of the Civil procedure Act and Order 37 rule 8 of the Civil Procedure Rules. I think Order 37 rule 8 may have been cited in error as the said provision has nothing to do with the prayers sought. That only leaves section 99 of Civil Procedure Act. The section provides:

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.

7. Can it be said that the granting of prayer 1 of Notice of Motion dated 4th June 2013 was a clerical or arithmetical error arising from an accidental slip or omission? The ruling dated 9th May 2014 is a considered ruling. The court fully addressed its mind to the matter before it. That included a

determination on which prayer to allow and which one not to allow. The application before the court had prayers numbers 1 all the way to 5. There is no valid basis on which to conclude that the specific mention of prayer 1 in the ruling is a mistake.

Worse still, there is no basis upon which to conclude that the court intended to allow or ought to have allowed prayer 3 instead of prayer 1. I therefore find that there is no clerical or arithmetical errors in the ruling dated 9th May 2014 which can be corrected under section 99 of the Civil Procedure Act.

8. There is real danger that revisiting the matter in the manner sought would amount to sitting on appeal from the said decision. Obviously, this court has no jurisdiction to do so. Further, it is not possible for this court to ascertain, so as to give effect to, any intention of the learned judge beyond what is plainly stated in the ruling. The Court of Appeal stated as follows in **Republic v Attorney General & 15 others Ex-Parte Kenya Seed Company Limited & 5 others [2010] eKLR**:

27. The starting point is the construction of section 99 of the CPA which we must now reproduce:

“99. 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.”

It is a codification of the common law doctrine dubbed “the Slip Rule”, the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the court, which would otherwise become functus officio upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section....

.....the predecessor of this Court in Lakhamshi Brothers Ltd v R. Raja & Sons [1966] EA 313 endorsed that application of the rule, that is, to give effect to the intention of the court when it gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted. Spry JA in Raniga Case (supra) also stated as follows:

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“A court will, of course, only apply the slip rule where it 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.”

30. What is certainly not permissible in the application of section 99, is to ask the court to sit on appeal on its own decision, or to redo the case or application, or where the amendment requires the exercise of an independent discretion, or if it involves a real difference of opinion, or requires argument and deliberation or generally where the intended corrections go to the substance of the judgment or order.

9. This matter having been certified ready for hearing, it ought now to be heard and determined on its merits. The injunction which was initially sought was meant to be a bridge to the hearing of the suit. Parties should not keep litigating the issue of the interlocutory injunction endlessly. I will therefore give directions to facilitate the hearing and determination of this suit upon delivery of this ruling.

10. From the foregoing discourse, it is clear that Notice of Motion dated 27th November 2015 must fail. It is dismissed with costs to the 2nd defendant.

Dated, signed and delivered in open court at Nakuru this 13th day of June 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Ikua holding brief for Mr. Njogu for the plaintiff/applicant

Mr. Imbwaga holding brief for Ms. Njoroge for the defendants/respondents

Court Assistant: Gichaba