



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 2 OF 2017

FAITH KARIMI MUCHANGI.....1ST PLAINTIFF

BRIAN BIKO MURITHI MUCHANGI.....2ND PLAINTIFF

CECILL MUTURI MUCHANGI.....3RD PLAINTIFF

VERSUS

PETER NJERU MVUNGU.....DEFENDANT

RULING

1. By a notice of motion dated 26th May 2017, the Plaintiffs applied for a review of my orders made on 10th May 2017 on the Plaintiffs' application dated 13th January 2017. The said application was expressed to be brought under Order 40 Rule 7 and Order 50 Rule 1 of the Civil Procedure Rules, 2010.
2. The said application was based on the ground that there was an error apparent on the face of the record in that the court in its ruling of 10th May 2017 referred to the property which the Defendant claimed to have purchased from his deceased brother as *Title No. Nthawa/Gitiburi/2698* (hereinafter referred to as 'parcel No. 2698') instead of parcel No. 2699.
3. It would also appear from the Plaintiffs' submissions that they are relying upon another ground namely, that there is sufficient reason to review the said judgement on the basis that the Defendant had no plausible claim to parcel No. 2698 which is the private property of the Plaintiffs and that he had presented no shred of evidence to demonstrate his claim.
4. The said application was opposed by the Defendant who filed a replying affidavit in opposition thereto. He denied that there was any error apparent on the face of the record to warrant a review. He also stated that the Plaintiffs wanted to take a short cut by concluding the suit through an interlocutory application. He therefore swore that the said application was misconceived and otherwise an abuse of the court process.
5. The parties filed their respective submissions on the said application as they consented to have it disposed of through written submissions.
6. The Plaintiffs' counsel submitted that the court denied the Plaintiffs the orders of eviction with respect to parcel No. 2698 because of the mistaken reference the court made in paragraph 11 of its ruling of 10th May 2017 that it was the property the Defendant had allegedly purchased from his deceased brother whereas the correct reference should have been to parcel No. 2699. In his view, if the court had made reference to parcel No. 2699 in paragraph 11 of its ruling, then it would have granted them the orders

sought with respect to parcel No. 2698.

7. The Plaintiffs' counsel also submitted that there was sufficient reason under **Order 45 of the Civil Procedure Rules** to review the said ruling and grant the Plaintiff the eviction orders sought in the earlier application because parcel No. 2698 was private property belonging to the Plaintiffs and not part of the estate of the deceased and that the Defendant had not made out a plausible case over parcel No. 2698 as he had not offered any evidence to support his claim. He, therefore, urged the court to allow the said application for review.

8. On the other hand, the Defendant's counsel submitted that the Plaintiffs' said application was fatally defective in that it was brought under the wrong provisions of the law, to wit, Order 40 instead of Order 45 of the Civil Procedure Rules. He was of the view that the review jurisdiction of the court had not been invoked and that on that account the application should be dismissed.

9. The Defendant's counsel also submitted that there was no error apparent on the face of the record which would warrant a review within the meaning of **Order 45 of the Civil Procedure Rules**. He submitted that it was clear that the Plaintiffs' application dated 13th January 2017 was denied because the court found that there were issues to be tried at the hearing and that granting the orders sought would dispose of the entire suit at the interlocutory stage. He, therefore, asked the court to dismiss the said application for review.

10. The court takes the view that the Defendant's objection to the application on the basis that it was brought under the wrong provisions of the law is not sustainable. It is true that the said application was brought under Order 40 instead of Order 45 of the Civil Procedure Rules but, in my view, that is not fatal. It is merely an irregularity which is curable under **Order 51 Rule 10 (2) of the Civil Procedure Rules, section 19 of the Environment and Land Court Act 2012, and Article 159 (2) (d) of the Constitution of Kenya, 2010**. This court is obliged to dispense justice without undue regard to procedural technicalities. That technical objection is therefore overruled.

11. The main question for consideration herein is whether the Plaintiffs have established or proved the two grounds for review as set out in their application and submissions. The court has perused the ruling dated 10th May 2017. It is true that there is an erroneous reference, in brackets, to parcel No. 2698 in paragraph 11 thereof. However, the earlier part of the ruling which refers to the Defendant's response to the application makes reference to the correct parcel number. See paragraph 7 of the ruling.

12. If one looks at paragraphs 10 and 11 carefully, the said paragraphs give the reasons why the orders for eviction and possession of the suit properties could not be granted at the interlocutory stage. The same reasons still apply today. In my view, the erroneous reference to parcel No. 2698 in paragraph 11 of the ruling is a clerical error which can be corrected under the slip rule as provided for under **section 99 of the Civil Procedure Act (Cap 21)** without affecting the substance of the ruling.

13. Section 99 of the Civil Procedure Act provides as follows:

Clerical or arithmetical mistakes in judgements, decrees or orders, or errors arising from 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."

This court is of the view that the said mistake having been brought to its attention and none of the parties having applied for its correction, the court may of its own motion amend the ruling to correct the clerical mistake. Accordingly, the court hereby makes the correction by deleting reference to parcel 2698 in brackets and substitutes it parcel No. 2699.

14. The second ground of review is an interesting one. The Plaintiffs are seeking to persuade the court to change its mind on the orders made on 10th May 2017. They are relying on the same evidence which was before court when the earlier application was heard and concluded. They are pointing out that the Defendant has no chance at all of succeeding in his claim for parcel No. 2698 since he has not tendered a

shred of evidence to support it. They are asking the court to revisit the matter and allow them to obtain the orders which were declined on 10th May 2017.

15. It is true that the court has wide powers to review its orders and decrees under **section 80 of the Civil Procedure Act (Cap 21) and Order 45 of the Civil Procedure Rules.** However, such discretion must be exercised judiciously and within the confines of the law. The law does not allow a court which has become *functus officio* to re-open a decided matter, sit on appeal over it and overturn its earlier decision. That is not permissible in law.

16. It is not every mistake of law or fact which would entitle a party to a review of an order or decree. It should also be borne in mind that the review contemplated in law is a review of the order or decree as opposed to a review of the ruling or judgement. A party who is aggrieved by various expressions in a ruling or judgement cannot legitimately apply for its review unless he is aggrieved by the resultant order or decree.

17. A party who fails to obtain orders in his favour upon a hearing because the court was wrong on a point of law or fact is entitled to appeal to higher court unless, of course, his case falls clearly within the parameters of Order 45 Civil Procedure Rules. This court is far from satisfied that the Plaintiffs have made out a case for review under Order 45 of the Civil Procedure Rules. There is no error apparent on the face of the record or any other sufficient reason to warrant a review of my orders made on 10th May 2017.

18. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' notice of motion dated 26th May 2017 and the same is hereby dismissed with no order as to costs.

19. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **27th** day of **SEPTEMBER, 2017**

In the presence of Mr Kamunya holding brief for Mr Kamunda for the Plaintiffs and Mr Momanyi for the Defendant.

Court clerk Njue/Leadys

Y. M. ANGIMA

JUDGE

27.09.17