

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

CIVIL SUIT NO 26 Of 1992

NDEFFO CO LTD.....

PLAINTIFF

VERSUS

M H SHAW (Administrator Of The Estate Of The Late J T Obelhozer)....1st DEFENDANT

JOHN WACHIRA KAMAU.....2ND DEFENDANT

**LUCY WANGARI KAMAU3RD
DEFENDANT**

RULING

(Application for review to direct that an order made was against 2nd and 3rd defendants; previous application for injunction; application for injunction as drawn seeking orders against 3rd and 4th defendant; error apparent on the face of the record; genesis of error being from amended plaint; application allowed but plaint be further amended to reflect correct description of parties)

The application before me is that dated 8 December 2014. It seeks orders to Review the ruling made on 10 October 2014. That ruling was made pursuant to an application for injunction, dated 9 May 2013, filed by the plaintiff against the defendants. As drawn, the application sought orders of injunction, against the 3rd and 4th defendant, to restrain them from subdividing, portioning, leasing, selling, charging, or dealing in any other way with the land parcels L.R numbers 449 and 6501. It will be noted however, that this suit only has 3 defendants.

The application was allowed as drawn, and the court (Waithaka J), issued orders restraining the 3rd and 4th defendants from the said parcels of land. In this application, the plaintiff wants the said order reviewed, so that it may reflect that the injunction is against the 2nd and 3rd defendants.

The 2nd and 3rd respondents filed Grounds of Opposition to the application, but they did not appear at the inter partes hearing of the application. In the Grounds of Opposition, it is inter alia argued that there exists no land title touching on the subject matter and the same cannot be subdivided, that the application is misconceived and that this is a desperate attempt to breathe life to a dead suit.

I have considered the matter. Order 45 Rule 1 is drawn as follows :-

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

Any person considering himself aggrieved—

(1) *(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.

A party who is not appealing from a decree or order may apply for a review of judgment (2 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.

It will be seen that in appropriate cases, the court has power to correct an error apparent on the face of the record.

I have considered the application. What the plaintiff wants is to rectify, what it believes to be an error in the ruling, which issued the orders of injunction as against the 3rd and 4th defendants. Mr. Lawrence Karanja for the applicant, submitted that the error was occasioned by the manner in which they drew their application, wherein they cited the 3rd and 4th defendants instead of the 2nd and 3rd defendants, as being the subjects of the application.

However, my perusal of the file shows otherwise, and if there is any error, such error will be traced to the manner in which the Amended Plaintiff filed on 2 May 2012 was drawn.

When the suit was first initiated, it had two defendants. The first defendant was Florence Nyambura and the 2nd defendant was M.H. Shaw. Florence Nyambura died, and an application for substitution was made and allowed. This necessitated an amendment to the plaint. This brought in John Wachira Kamau and Lucy Wangari Kamau into this suit as defendants, for they are the administrators of the Estate of Florence Nyambura. Since Florence Nyambura was 1st defendant, John Wachira Kamau and Lucy Wangari Kamau, ought, for the sake of maintaining a flow to the pleadings, either to have been described in the Amended Plaintiff as joint 1st defendants, or, as 1st and 2nd defendants. In the former, M.H. Shaw would remain as 2nd defendant, and in the latter case, M.H. Shaw would become 3rd defendant. But the Amended Plaintiff as filed, still held the name of Florence Nyambura as 1st defendant, M.H. Shaw as 2nd defendant, and John Wachira Kamau and Lucy Wangari Kamau as 3rd and 4th defendants. It is through that, that I believe counsel for the plaintiff sought orders against the 3rd and 4th defendants. Strictly speaking, following the Amended Plaintiff as drawn, there was no error in the manner in which the order sought to be impugned was made and extracted, for it was directed at the 3rd and 4th defendants, which is their correct description as stated in the Amended Plaintiff.

But I think continuing the suit as drawn in the Amended Plaintiff is prone to create confusion, since Florence Nyambura is deceased and she can't be mentioned as 1st defendant, for she is no longer in existence. To correct the anomaly, I direct the plaintiff to file a further amended plaintiff, and name John Wachira Kamau and Lucy Wangari Kamau sued as administrators of the Estate of the late Florence Nyambura as joint first defendants, and M.H. Shaw to be retained as 2nd defendant. To avoid confusion, where necessary, the further amended plaintiff should use the names of the persons rather than their numbered position in the suit, when making the pleadings.

Back to the order. As I have stated earlier, strictly speaking, following the manner in which the Amended Plaintiff was drawn, there is no error in the order, for it is directed at John Wachira Kamau and Lucy Wangari Kamau, named in the amended plaintiff as 3rd and 4th defendants. But since I have ordered a further amended plaintiff to be drawn and have given directions on how to go about it, to avoid confusion, let the order be amended so as to name the persons John Wachira Kamau and Lucy Wangari Kamau as the ones affected by the order, rather than merely stating "3rd and 4th defendants".

I therefore direct that the Order issued on 10 October 2014, do reflect that the order therein was issued as

against John Wachira Kamau and Lucy Wangari Kamau. That, I think, will clear any confusion that may have been caused.

To that extent only, I allow the application. But the plaintiff should take note about my direction on the filing of the further amended plaint. I make no orders as to costs.

Orders accordingly.

Dated, signed and delivered at Nakuru this 4th February 2015 .

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

NAKURU

In presence of

Mr Lawrence Karanja for plaintiff/applicant

N/A for Mr B N Kipkoech for 1st defendants

N/A for 2nd defendant

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

NAKURU