Ngahu & 2 others v Adan & another (Environment & Land Case E021 of 2024) [2024] KEELC 3889 (KLR) (14 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3889 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E021 OF 2024

JA MOGENI, J

MAY 14, 2024

BETWEEN

STANLEY KAMAU NGAHU ..... 1ST APPLICANT

ALEX NJENGA NGAHU ..... 2ND APPLICANT

SAMUEL NDUNG'U NGAHU ..... 3RD APPLICANT

AND

MUSDAFA SUGULE ADAN ..... 1ST RESPONDENT

IBRAHIM ADDE GROUP ..... 2ND RESPONDENT

RULING

1. This is an application by the second Defendant, Ibrahim Adde Group to stay, review and/or set aside the Ruling delivered on 26/02/2024 against it. The application was made under Section 1B, 3, 3A, 63 &80 of the *Civil Procedure Act* and Order 40 Rule 7, Order 45 Rule 1 and Order 51 Rule 1 of the *Civil Procedure Rules* 2010.

2. The application is supported by an affidavit sworn on 26/02/2024 by one Abdullahi Ibrahim Mohammud who is a Director of the Applicant company. The background of this matter is that the Plaintiffs filed a suit against the first and second Defendants on through a plaint dated 24/01/2024 seeking to rescind the Agreement for Sale dated 17/04/2020 and that the 1st defendant forfeits the deposit of the purchase price and the plaintiffs are declared the beneficial owners of the suit property. Further that the 2nd defendant gives vacant possession of the suit property to the plaintiffs.

3. Together with the plaint the plaintiffs filed a Notice of Motion seeking a temporary injunction to issue against the 1st and 2nd respondents stopping them from trespassing, excavating and constructing permanent structures on the suit property.

4. The court on 26/02/2024 issued the order for temporary injunction claimed under prayer 3 of the application, stopping the 1st and 2nd respondents from continuing to wrongly enter and trespass, excavate and construct permanent structures on the suit property until the main suit is heard and determined.

5. The 2nd Respondent being dissatisfied with the court ruling filed the instant application seeking stay, review and or setting aside of the court ruling on 26/02/2024.

6. The plaintiff/respondents opposed the application. They filed a replying affidavit sworn by the 1st plaintiff/respondent with authority from the other plaintiffs on 4/03/2024. When the parties appeared in court on 06/03/2024 they agreed to canvas the application by way of written submission. The court granted the applicant a further three days to file a further affidavit and submissions following the filing of the plaintiff/respondents' replying affidavit.

7. The application for review is founded on the grounds set out in the application from ground (i) to (xii). The Applicant says the plaintiffs have not challenged the sale agreement but only sought to have the sale agreement cancelled and the suit property reverted to them for failure by the 1st defendant to clear the balance of the purchase price.

8. That the sale agreement between the 1st and 2nd defendant is unchallenged and it remains enforceable and that the order issued by this court constituted a limitation of the 2nd defendant's right to its property in violation of Article 40 of the Constitutions and Section 26 of the *Land Registration Act*. That the right was being limited through falsehoods and material non-disclosure.

9. The Applicant alleged that they are losing upto Ksh. 500,000 and annexed a copy of a construction contract to demonstrate this and stated that this is a cost that the plaintiffs are not able to refund as they are persons of unknown means.

10. I have considered the application, supporting affidavit and replying affidavit.

11. Order 42 rule 6 (2) of the *Civil Procedure Rules* directs that;

    (2) No order for stay of execution shall be made under sub rule (1) unless

        (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

        (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

12. This threshold is not met. See *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR and the case of *Vishram Ravji Halai v Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR.

13. The applicant has not made any effort to address the conditions laid down for grant of an order of stay of the decisions of this court. The laid down conditionalities are meant to secure the rights once confirmed that there is good cause and matter to justify stay of execution which is not done in this case.

14. On the issue of review and setting aside, the court's jurisdiction to review a decree or order emanate from section 80 of the *Civil Procedure Act* and Order 45 of Rule 1 of the *Civil Procedure Rules*. The Applicant has invoked the said provisions. The said Rule reads as follows:-

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(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 was 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."

15. The Court of Appeal in the case of *Kitho -Vs- Kioko* [1982] KLR 177, gave a guidance of how this provision should operate. Justice of Appeal Miller at P.181 said:-

> " The operation of Order 45 in the execution of Section 80 above demands, inter alias, that an application for a review must be based on the discovery of new and important matter of evidence which after due exercise of due diligence, was not within at the time of the decree was passed or the order made or on account of some mistake or error or any other sufficient reason. The court to which the review application is made shall dismiss the application if satisfied that there is not sufficient of the grounds seeking review, except for mistake or error appearing on the face of the challenged record; and the Applicant must strictly prove the grounds for review (excepting mistake or error on the record) failing which the application will not be granted."

16. The requirement for strict proof is provide for in the *Civil Procedure Rules* in the proviso to Rule 3:-

> " ..... provided that no such application shall be granted on the ground of discovery of new matter or evidence which the Applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegations".

17. Counsel for the Applicant submitted that there is an error on the face of the ruling that the court had not taken into consideration the replying affidavit and the submissions of the 2nd defendant which according to the applicant are dated 23/02/2024 but not date is provided as to when the said documents were filed in court. The ruling being challenged was delivered on 26/02/2024.

18. The applicant has pleaded through the affidavit that the Judge did not appreciate that the contract between the 1st defendant and the plaintiffs had been determined and was no longer in operation since all parties to this contract had discharged their responsibilities under the agreement.

19. I have relooked at the ruling I gave and noted that it has the character of preserving the suit property as it is until the main suit is heard and determined. In my understanding this will ensure that no party who is rightly entitled to own, access and have quiet possession is denied that right and neither will the

suit property be alienated from any party to the suit. In coming up with that decision I considered the documents that were filed in court relating to the suit and to the application.

20. I do not see any error apparent from the ruling as it is. As to whether the interpretation and conclusions I made are correct or proper as a matter of law or fact, that is a completely different issue that cannot be deliberated by this court and would need to be presented before the Court of Appeal which will address the question correctiveness of the decision I made and merits thereof.

21. I was referred to the decision of *Nyamogo & Nyamogo Advocates-vs- Moses Kipkolum Kogo*, Civil Appeal No. 322 of 2000 in which the Court in a unanimous decision said:

> " ..... An error on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined Judicially the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the fact of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two options, a clear case of error would be made out An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error on the face of record. Again, if a review adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view is possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal".

22. Applying the above principles to the present case, I am satisfied that there were no errors apparent on the face of the record that would justify review.

23. I am further fortified by the decisions in *National Bank of Kenya Limited -vs- Ndungu Niau*, Civil Appeal No. 211 of 1996 in which the Court of Appeal said as follows,

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be aground of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be aground for review."

24. Once again the said principles applied to this case demonstrate that the Applicant is aggrieved by the decision and reasoning of this court in its ruling of 26/02/2024. In all, I am of the opinion that this is not a suitable case for review and I hold that the application has no merits and does not meet the requirements of Order 45. I therefore do hereby dismiss the application with costs to the Plaintiffs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY MAY 2024.

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MOGENI J

JUDGE

In the Virtual presence of:

Kemanja holding brief for Mr. Abdullahi for 1st Respondent

Mr. Njue holdibg brief for Mr. Ochieng for 2nd Applicant

Mr. Saad for 2nd Defendant

Ms. C. Sagina: Court Assistant

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MOGENI J

JUDGE