



Mwangi v Kiambu Dandora Farmers Company Ltd (Environment & Land Case 340 of 2018) [2024] KEELC 4627 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4627 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 340 OF 2018**

AA OMOLLO, J

JUNE 6, 2024

BETWEEN

MARGARET WAMBUI MWANGI PLAINTIFF

AND

KIAMBU DANDORA FARMERS COMPANY LTD DEFENDANT

RULING

1. The Defendant/Applicant has filed the application dated 25th September 2023 seeking for the following orders;

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`1}}`
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`2}}`
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`3}}`
4.

That this honourable court be pleased to review, vary and/ or vacate its judgement delivered on the 27th of October 2022 together with the resultant decree and consequent orders thereof.

5. That this honourable Court be pleased to order that this matter be heard on merit.

6. That this honourable court be pleased to grant any other orders and relief it deems just and expedient in the circumstances.

7. That the cost of this application be provided for.

2. The application was supported by an affidavit sworn on 25th September 2023 by Joseph Mwangi Karanja, a director of the Defendant/applicant outlining the grounds of the application. That the Defendant belatedly filed defense and counter-claim in this matter on the 14/07/2021 outlining their strong defense over the issue in dispute which is ownership of land L.R 11379/3. Hence, they



- instructed their Advocate to file an application dated 10/2/2022 to have the said defense admitted out of time.
3. That the said application was lodged before court on 10/2/2022 when the matter was coming up for hearing of the Plaintiff's case and the court directed that the same be heard on 28/4/2022. However, the Plaintiff's case proceeded calling three witnesses and closed her case. They stated that on 28/4/2022, their application was not heard and the court directed that a date be fixed for hearing after judgment. That the Court rendered its judgement on the 27th of October 2022 in favor of the Plaintiff/ Respondent before deliberating on their application and the Plaintiff is in the process of execution. That the Plaintiff has also started the taxation of the party and party bill of costs and which is slated to come up on the 27/09/2023.
 4. The Applicant further stated that they had filed ELC Petition 47 of 2011 Abdilahi Muigai & others V. The National Land Commission & others in respect to the various parties laying claim to L.R 11379/3 including the portion claimed by the plaintiff/ respondent. That the Petition was slated for hearing on the 9th and 12th of October 2023. That the issues in this suit ought to be canvassed by cross-examination and by extension full trial.
 5. The Applicant further posited that they had initially preferred an appeal in this matter but have since instructed their counsel on record to have the same withdrawn and now seek the court to afford them an opportunity to be heard as they stand to suffer prejudice if the judgement and resultant decree issued on the 27/10/2022 are not set aside/ reviewed or varied.
 6. The Plaintiff/respondent filed a Preliminary objection dated 21/1/2024 and grounds of opposition on the same date. The grounds stated that the application is incurable defective for want of form and it is not premised on proper legal principles and/or provisions. That the Applicant's Counsel has no legal basis to bring this application as he's a persona non-granta since the firm of MAW Advocates LLP are improperly on record for failure to comply with the provisions of Order 9 Rules 9 and 10 of the Civil Procedure Rules.
 7. They also contended that the application is incurably defective for trying to re-open a suit that has been concluded through the back-door and that the same does not disclose any issue that merits consideration in terms of the provisions of Order 42 Rule 6 and Order 45 of the Civil Procedure Rules 2010. Further that the application is incurably defective as this Court has determined the suit and it has no residual jurisdiction to re-open, rehear and then re-call its earlier decision and substitute it with another noting that there is no appeal pending in this Court.
 8. That this court's residual jurisdiction to review its decisions has to be exercised with great caution and circumspection. They state that the applicant has not satisfied that their application falls within the exceptional circumstances or within the purview of promoting public interest or enhancing public confidence in the rule of law. That the application is incompetent as it is based on the misconception of Article 159(2)(d) of *the Constitution* of Kenya 2010 and also the applicant has failed to attach the decision its challenging as required by law.
 9. The Plaintiff stated that the Applicants have not demonstrated this Court erred in its application of the law to the facts and in finding that the suit property belonged to them. That the Applicants seek to adduce new evidence to bolster their claim of ownership of the suit property but the court having rendered its decision; is functus officio and cannot grant the orders sought.
 10. In response to the Plaintiff's preliminary objection and grounds of opposition, the Defendant/ Applicant filed a replying affidavit sworn by Joseph Mwangi Karanja, its director on 21/2/2024. The Applicant stated that throughout the pendency of the suit, the firm on record for the Defendant/



Applicant has been the firm of Murunga & Associates which was registered as a sole proprietorship with the registered owner being Kennedy Murunga Murere. It is deposed that the said firm has since changed its legal form and is now registered under the Limited Liability Partnerships Act as MAW ADVOCATES LLP which in full reads Murunga Adipo Wangila Advocates LLP with Kennedy Murunga Murere as a partner. Therefore, it would be untenable to file an application as contemplated under Order 9 rule 9 and 10 of the Civil Procedure Rules since it is not a case of change of Advocates but a case of the firm on record changing its name form and address.

11. The Applicants also contended that they had not attached the impugned judgement as the same is attached as annexure "JMK-6" in their application dated the 25/9/2023. They stated that they were condemned unheard despite their repeated request and that the application carried weighty issues.

Submissions.

12. The Plaintiff filed submission in support of the preliminary objection and another one in opposition to the application dated 2/2/2023 and 20th February 2024 respectively. The Plaintiff submits that the principles upon which the court may stay the execution of orders appealed from are well settled under Order 42 Rule 6 of the Civil Procedure Rules and in support cited the decision of Court of Appeal in Butt vs Rent Restriction Tribunal [1979]eKLR which itemised what ought to be considered in determining whether to grant or refuse stay of execution pending appeal.
13. They submitted that the Applicant has not stated what loss, if any, they stand to suffer and that also the application having been filed on 25/9/2023 after judgment was entered on 27/10/2022, means it was not filed timeously. Further, they submitted that the Applicant ought to satisfy the condition of security for due performance of the decree and in support cited the decision of Gianfranco Manenthi & Another vs Africa Merchant Assurance Co. Ltd (2019)eKLR.
14. The Applicant submitted that the court's jurisdiction to review a Judgment or Order is donated by Section 80 of the Civil Procedure Act and Order 45 Civil Procedure Rules and this application does not meet the required threshold for this Court to consider it. That the only way out for the Applicant was to appeal the said Judgment if aggrieved. That the instant application has been brought after along "delay" of more than 17 Months after the said Judgement was pronounced, and no explanation has been offered. The Plaintiff cited the discussion of the "slip rule" by the Supreme Court in the case of Fredrick Otieno Outa vs, Jared Odoyo Okello & 3 Others [2017] eKLR where it was held inter alia that the slip rule does not confer upon a court any jurisdiction to sit on appeal over its own judgment or to extensively review such judgment as to substantially alter it.
15. The Plaintiff also submitted that contrary to the provisions of Order 9 Rule 9 of the Civil Procedure Rules, the Appellant's advocate was improperly on record and he placed reliance on cases of John Langat v Kipkemboi Terer & 2 others [2013] eKLR and Florence Hare Mkaha v Pani Tawakal Mini Coach and Another [2014] eKLR among others which held that a party must seek leave of the court once judgement has been rendered. Therefore, unless and until a notice of change of Advocate is filed and duly served an Advocate on record for a party remains the Advocate for that party subject to removal from record at the instance of another party under Rule 12 or withdrawal of the Advocate under Rule 13 of the same Order.



Analysis & determination:

16. It is trite law that a preliminary objection must consist of a point of law and is self-explanatory as was established in the case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696* where Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.
17. The grounds of the instant PO avers that the Defendant/Applicant counsel is not in compliance with Order 9 Rules 9 and 10 of the Civil Procedure Rules having not issued a notice of change of advocates. In response the Defendant/Applicant contended that the Advocate on record is the same and that it is the law firm that changed its name, form and address.
18. The purpose of Order 9 rule 9 Civil Procedure Rules was comprehensively discussed in the case of *Serah Wanjiru Kung’u v Peter Munyua Kimani [2021] eKLR* which was relied upon by the court in *[Gitau v Gitbinji & another \(Environment and Land Appeal E006 of 2022\)](#)* [2022] KEELC 152 (KLR) (16 June 2022) (Ruling), where the Court struck out an application by Advocates who were not properly on record:

“13. The above framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often for the purpose of unfairly dislodging previous advocates without settling their costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of effecting change of advocates post-judgment. In my view, once the consent is executed and filed and a notice of change is filed, the new law firm is properly on record. The adoption of the consent as an order of the Court is merely intended to make the Court record clear for avoidance of doubt...” (underline mine for emphasis).
19. A look at the court record confirm that Mr. Murunga has been counsel appearing for the Defendant. He satisfactorily explained that he was practising as a sole proprietor which proprietorship has now changed to a limited liability partnership. In the circumstances, the non-compliance with the provisions of Order 9 rule 9 of the Civil Procedure rules does not prejudice the previous counsel (in the instant, the previous counsel does not exist as it is one and the same). The objection raised by the Plaintiff on this ground is not sustainable.
20. Secondly, the Plaintiff also based her P.O on the ground that the application does not disclose any issues that merits consideration in terms of the provisions of Order 42 Rule 6 and Order 45 of the Civil Procedure Rules 2010. Order 42 Rule 6 deals with granting orders of stay in case of appeals. The instant application is seeking for review of the judgment entered thus Order 42 Rule 6 does not apply. As to whether the Applicant has met the threshold to grant a review, it is my view that the court has to delve in the contested facts to ascertain if the grounds relied on are sufficient and a ground raised on this point cannot be treated as a preliminary objection.



21. Thus, the issue for determination is whether or not the Applicant has satisfied any of the conditions set out in Order 45 of the Civil Procedure Rules. The said order provides that a court can only review its orders on the grounds that there is discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made or there was a mistake or error apparent on the face of the record or there were other sufficient reasons and the application must have been made without undue delay.
22. In the case of Alpha Fine Foods Limited V Horeca Kenya Limited & 4 Others (2021) eKLR, Mativo J quoted the Supreme Court of India thus:-

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”
23. The Applicant did not file any submissions in support of the application and so the Court in its determination shall consider the grounds raised in support of the motion. The key reason given in the grounds is that the Applicant has a good defence to the claim and that they failed to file a statement of defence because they thought this was one of the files stayed pending determination of Nairobi ELC Petition 47 of 2011. Thus, on the face of the application, it can be said that the review is premised under the heading of “any sufficient reason”
24. From the pleadings by the Defendant/Applicant, the Petition ELC 47 of 2011 is not yet concluded as it was indicated to be coming up for hearing on 9th and 12th October 2023. The draft annexed defence also pleads to facts of the Applicant challenging acquisition by the government of their title L.R. No 11379/3 which they argue included the Plaintiff’s title L.R. No. 209/10416. They also denied transferring part of their land to the Plaintiff they plead who is not their member. They are seeking orders inter alia that the subdivision of their land which created the Plaintiff’s title was illegal, null and void.
25. The Applicant admits that their Petition challenging the acquisition by the government is still pending. They also admit that there was no order issued in Petition 47 of 2011 staying the prosecution of this particular suit neither did they apply in these proceedings to have this suit stayed. Consequently, their pleadings reveal that the basis of their defence of the illegality of the Plaintiff/Respondent’s title depends on the success or otherwise of their claim in Petition 47 of 2011. Thus, the reasons presented in the draft defence to this claim can adequately be dealt with in Petition 47 of 2011. Although the claim by the Applicant contained in Petition 47 of 2011 makes a ground for sufficient cause shown to review the judgement, I find that it is premature on account of the pendency of the Petition which is yet to settle the contested issue of acquisition. The Applicant shall have liberty to apply.
26. The Pendency of the said petition in my view would have made a good ground to stay the prosecution of this case. Unfortunately, the Applicant was indolent and equity does not aid the indolent. The indolence is expressed by the actions of the Applicant thus; in February 2022 it filed an application seeking leave to file a defence out time. They are pleading that the trial judge then directed them to



prosecute their application after judgement if they were still keen to pursue it. However, the reasons shown on record was because that application had been brought late and so the Judge refused to postpone the hearing. The Applicant despite being aware of the status of the suit and the date set for delivery of the impugned judgement did not move the court until one year from the date its delivery.

27. In conclusion, I hold that the application dated 25th September, 2023 is found to be without merit as it is premature, and guilty of laches. It is struck out with costs to the Plaintiff/Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH OF JUNE, 2024

A. OMOLLO

JUDGE

