Ringsview Apartments Ltd v Vishnu Builders Co. Ltd & another; Gikonyo (Contemnor) (Civil Suit 782 of 2014) [2024] KEELC 14235 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 14235 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL SUIT 782 OF 2014

AA OMOLLO, J

JULY 24, 2024

BETWEEN

RINGSVIEW APARTMENTS LTD ..... PLAINTIFF

AND

VISHNU BUILDERS CO. LTD ..... 1ST DEFENDANT

VIJAY MORJARIA ..... 2ND DEFENDANT

AND

DR BENJAMIN M GIKONYO ..... CONTEMNOR

RULING

1. For determination is the application by Dr Benjamin Mbira Gikonyo vide the notice of motion dated 27th January, 2025 and brought under the provisions of order 45 rule 1 of the *Civil Procedure Rules*. The Applicant seeks for orders:

    a. The application be heard on priority basis.

    b. That the honourable court be pleased to review its orders made in the ruling delivered on 24th October, 2024.

    c. Costs of the application be provided for.

2. The application was supported by the affidavit of Dr Benjamin Gikonyo sworn on even date and the further grounds listed on the face of the motion. The grounds listed include;

    i. There are apparent errors on the face of the record including the fact the court became functus officio after the delivery of the final judgement rendered on 9th February, 2023.

ii. That the interim orders issued on 1st of July 2014 and subsequently extended in favour of the defendants were limited to 29th July, 2014 and or 16th September, 2014

iii. That there is discovery of new and important evidence that could not have been presented alia as apartment A had already been sold prior to the filing of this suit.

iv. That this court should take judicial notice of the fact that the firm of Dr Mutubia Law Advocates ceased to exist upon the death of Dr Mutubia.

3. The application is opposed vide the replying affidavit of the 2nd Defendant where Vijay Morjaria deposes that this application is scandalous, frivolous and vexatious. That this court is functus officio and cannot sit on appeal on its decision. Secondly, they aver the application is an abuse of the court process as the Applicant has filed an appeal against the order sought to be reviewed as per the copies of notice and memo of appeal annexed as VM1 & 2.

4. The Respondents deposes that the fact of this court having locus to hear contempt application post judgement is a matter that touches on the jurisdiction of the court hence it is a matter that cannot form grounds for review but for appeal. They also state that the ground listed on whether there was interim order in favour of the Defendants or not was already raised by the Plaintiff in the replying affidavit to the contempt application. It is their contention that there is no new evidence adduced as the court already found that the registration in favour of Joram was done in 2016 long after the issuance of the impugned orders.

5. The applicant filed a supplementary affidavit sworn on 18th March 2025 reiterating that the application is premised on grounds of mistake/error apparent on the face of record and on discovery of new and important evidence that deserve audience before this honorable court. He respectfully deposed that the court's failure to fully consider the factual details concerning the sequence of events leading upto the ruling of 24.10.2024 has created a significant misunderstanding of the relationship between the Applicant, the Plaintiff and the Defendants.

6. The Applicant avers that the notice of appeal annexed by the Respondents was lodged on behalf of the Plaintiff and not on his behalf as the contemnor. He repeated that the sale of Apartment A which constitutes the basis of the finding of contempt was sold on 14th April 2014 before filing of this suit in June of 2016. He urged the court to grant the orders sought.

7. The Applicant filed written submissions dated 18th March 2025 which discussed the following four issues;

a. Whether the court has jurisdiction to hear and determine this application

b. Whether the court erred on the face of the record

c. Whether the application entails discovery of new evidence

d. Whether the Respondents were abusing the court process by filing the application for contempt

e. Costs

Analysis and Determination:

8. The current application is grounded on the provisions of order 45 rule 1 of the *Civil Procedure Rules* which state as follows:

> " 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 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."

9. In determining the application, I shall adopt the questions raised by the Applicant. There is no question that this court is bestowed with jurisdiction to hear and determine application for review pursuant to the provisions of section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. The Respondent questioned the jurisdiction of the court premised on the notice of appeal lodged before the Court of Appeal and the grounds adduced to support the mistake apparent on the face of the record.

10. The Applicant stated that the notice of appeal annexed was not lodged on his behalf. I have perused a copy of the notice which speaks for itself that it was the Plaintiff who lodged the appeal against the decision not sought to be reviewed. The Respondent said that Order 45(1)(2) speaks to where the grounds raised for review are similar to the grounds raised in appeal then the jurisdiction of the court is ousted.

11. The appeal is challenging the same ruling of this court which the Applicant wants reviewed. On the face of the memorandum of appeal lodged, the grounds raised are similar to the present appeal. However, the wordings of subrule 2 does not say that a party is barred from filing an application for review where the grounds are similar. I am alive to the intention of the subrule 2 inter alia, to cure the issuances of contradictory decisions. In this instance, the subrule should not be interpreted to the disadvantage of the Applicant who is affected by the order of contempt and was not a direct party to the proceedings. I proceed to consider the merits of his application.

12. The Applicant asserts that there is error or mistake apparent on the face of the record of the ruling rendered on 24th October, 2024. The Applicant proceeded to give chronology of events from the date the suit was filed on 18th June 2014 until when Judgement was rendered. To be more specific, the Applicant argues that I did not take note of the court record that showed the interim order of injunction in favour of the Respondents lapsed on 16th September 2014. Thereafter, there was no order barring the Plaintiff from dealing with Apartment A and or the suit property.

13. The narration of when and how the interim orders of injunction was issued and extended are replicated in paragraphs 13 to 16 of the impugned Ruling. At paragraph 20, I elaborated on the import of interim orders when I stated thus,

> " My opinion and I so hold that the order issued on 1st July 2014 was specific requiring the Plaintiff not to deal with any apartments the Defendants claimed to have purchased. The Defendants' pleadings included apartment A4 as amongst those purchased."

14. This court went further to state that the impugned entry was made in 2016 without any variation to the orders of 1st July and 30th October 2014. Was this an error on the face of the record that this court failed to take note the orders restraining the Plaintiff from dealing with Apartment A4 lapsed on 16th September 2014? Is the argument by the Respondent correct that such ground should be presented in appeal and not a ground for review?

15. Following the contrary arguments, I have gone back to the record to analysis whether or not the error/ mistake alleged has been proved. It is not dispute that it was the Plaintiff who had an application and was granted interim relief exparte on 18th June, 2014. When the matter came up on 1st July, 2014, the orders were extended with some variations that allowed access to the impugned premises.

16. However, the order made on 30th October, 2014 read thus;

> " By consent of the parties, the plaintiff's application is dispensed with on the terms the interim orders already in force are sustained until the suit is heard and determined on merits."

17. The orders in force as granted on 18th June 2014 were in terms of prayer 4 of their application dated 17th June, 2014. The 2nd Defendant/Respondent may want the court to go by the interim orders as varied on 1st July, 2014 which then would bring to contest which orders were sustained while dispensing the Plaintiff's application. This would bring ambiguity in terms of the order the contemnor would be guilty of disobeying. To this extent, I am persuaded that there was omission/mistake in the ruling dated 24th October, 2024 for determining the application premised on the orders of 1st July, 2014 without taking into context the orders of 30th October 2014.

18. The argument by the 2nd Defendant this should be a ground of appeal and not review does not hold as the Applicant in this instance is only asking the Court to review what is already on record and which record speaks for itself.

> " ...In *Nyamogo & Nyamogo v Kogo* (2001) EA 174 this Court said that an error apparent 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 on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record."

19. The error as pointed out in para 17 above is one that this court made a ruling premised that the Plaintiff's application was settled in terms of the orders of 1st July 2014 yet the record of 30th October

2014 raises the question: was the application dispensed granting interim orders in terms of prayer 4 thereof or in terms of the orders of 1st July 2014.

20. Consequently, I find the Applicant has met the threshold to warrant review of the orders of finding of contempt made on 24th October, 2024. Having reviewed the record as already stated, I find the ambiguity in terms of the order the Applicant is accused of disobeying. Therefore, set aside the orders finding Dr Benjamin Gikonyo of guilt of contempt of said orders and replace it with an order dismissing the application dated 9th June, 2023. Each party to bear their costs of the application dated 9th June, 2023. The costs of this application to the Applicant in any event.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2024

A. OMOLLO

JUDGE