Sulubu (Suing as the Legal Representative of Morris Sulubu Hare (Deceased)) v Munyaya & 3 others (Environment & Land Case 136 of 2015) [2024] KEELC 7160 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7160 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 136 OF 2015

FM NJOROGE, J

OCTOBER 30, 2024

BETWEEN

ANDREW KIBONI SULUBU ..... APPLICANT

SUING AS THE LEGAL REPRESENTATIVE OF MORRIS SULUBU HARE (DECEASED)

AND

ANDERSON MOLE MUNYAYA ..... 1ST DEFENDANT

ISAAC JILO ONOTO ..... 2ND DEFENDANT

DANIEL KITSAO BAYA ..... 3RD DEFENDANT

MJANAHERI SELF HELP WATER PROJECT ..... 4TH DEFENDANT

RULING

1. For determination is the Notice of Motion dated 7th February 2024 seeking the following orders:

    1. That the honourable court be pleased to review the judgment/decree given on 15th January 2024 so that in place of dismissal of the suit, there be a permanent injunction order restraining the defendants, their servants, agents and/or employees and representatives from trespass, occupation and/or utilization of parcel of land number Ngomeni Settlement Scheme/1295 in whatever way and/or interference with the plaintiff's peaceful enjoyment of the said parcel of land can (sic) be issued together with costs of the suit.

    2. That the costs of this application be paid for by the defendants.

2. The Application is founded on the grounds set out on its face and on the supporting affidavit of Nicholas Sumba counsel for the Plaintiff/Applicant who avers that there is sufficient cause to review

the judgment/decree because other than the fact that the parties were in agreement that the defendants/respondents had vacated the water wells, it was clear they still continued to trespass in the suit premises, crossing therein with their trucks while proceeding to other wells adjacent to the suit land for which evidence was adduced and not controverted in court.

3. It was further averred that the judgment herein is erroneous as is apparent on the face of the record as the prayer for injunction is not only tied to the utilization of the water wells but also to general trespass to the suit premises as clearly set out and reproduced by honourable judge prayer (a) in the first page of her judgment. Further, that once the said erroneous omission is corrected, the costs of the suit should follow as a matter of course.

4. At the time of writing this opinion, there was no response on record by the Respondents by way of a replying affidavit though I do note that they filed written submissions in respect of the application.

Disposition

5. I have considered the submissions herein and the referenced case law. The issue arising for determination is whether the order for review is merited.

Review is provided for under Section 80 CPA which provides that:

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

6 Section 63 (e) CPA provides as follows:

> In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient."

7. Order 45, rule 1 CPR provides for review of decree or order as follows:

(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 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.

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

8. Therefore, Order 45 CPA, 2010 is very explicit that a court can only review its orders if the following grounds exist: -

   (a) 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

   (b) Mistake or error apparent on the face of the record; or

   (c) Other sufficient reason(s); and

   (d) Lodging of the application must have been without undue delay.

9. The pertinent issue for determination herein, therefore, is whether the Applicant has established any of the above grounds to warrant an order of review

10. In Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

> In Nyamogo & Nyamogo -vs- 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

11. On discovery of new evidence and important matter which was not within the knowledge of the Applicant, the Court of Appeal in Pancras T. Swai v Kenya Breweries Limited [2014] eKLR held as follows:

In Francis Origo & another v. Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated: -

> "...Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."

12. We do not find it necessary to comment on the exercise of Court's discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesiit, J. was correct, it was however not based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi, J.

13. We think Bennett J was correct in Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557 when he held that:

> a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal"

14. I have considered the reasons advanced by the Applicant for review. The Applicant states that the judgment is erroneous as is apparent on the face of the record as the prayer for injunction is not only tied to the utilization of the water wells only but also general trespass. Further that once the erroneous omission is corrected, costs of the suit should follow as a matter of course.

15. The amended plaint in the present case sought a permanent injunction against the defendants restraining them from the use of the waterwells, trespass, occupation or utilization of the suit land, general damages for trespass, exemplary and aggravated damages and costs. The hearing proceeded orally and both sides called evidence of witnesses. The court stated that the issues were whether there was a breach of the agreement between the parties and whether the plaintiff is entitled to damages for loss. This court found that there was no dispute that an agreement had been entered into between the parties under certain terms. The court observed that the plaintiff claimed breach for non-payment as agreed in the contract while the defendant claimed that the plaintiff's land was illegally acquired and the entry into and the use of water from the suit premises did not amount to trespass. However, this court dismissed "ownership" as a non-issue in the matter and focused on another issue: alleged breach. The court found that the plaintiff had issued a termination notice to the defendants and the defendants agreed to move out of the suit property to another one. Further the court noted that the plaintiff had not established that at the time of moving out the defendant owed any outstanding monies or the amount so owed. The court also observed that the defendants were no longer utilizing the water wells and that it would be an academic exercise to restrain the defendants from interfering with the wells yet they were neither on the suit property nor utilizing the wells. On the basis of that reasoning the case was dismissed with each party bearing their own costs.

16. I am of the view that the court in its judgment dated 15th January 2024, rendered itself within the confines of the material placed before it and made a reasoned judgment on the issues arising for determination. In respect of alleged trespass while proceeding to other neighbouring plots, I note that the it is an issue as to whether or not the same is supported by pleading in the plaint, or whether that trespass in the claim was strictly attached to the failure to adhere to the contract between the parties and nothing else. It is this court's view that it properly construed the pleadings and evidence and framed the issues for determination and issued its verdict thereon by way of extensive reasoning. If there is any flaw in the reasoning of the same ought to be raised on appeal. Also, whether or not there was material evidence to support the claim that the defendants still trespassed on the suit property after the agreement was terminated is an issue that the court was alive to while making its determination. Perchance it was adduced, failure to consider that evidence, or to construe it in a manner that would support a claim for injunction or damages, does not automatically entitle the applicant to a review but to an appeal.

17. I am thus of the view that the court in its judgment dated 15th January 2024, rendered itself within the confines of the material placed before it and made a reasoned judgment on the issues arising for determination.

18. For the foregoing reasons, this court finds that there is no apparent error on the face of the judgment nor is there any other sufficient cause to warrant review. The reasons raised in the present application

are material for an appeal and not review. In the premise, I find that the application dated 7/2/2024 lacks in merit and it is hereby dismissed with costs to the respondents.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 30TH DAY OF OCTOBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.