Lwande & 66 others v Registered Trustees of Telposta Pension Scheme (Environment and Land Case Civil Suit 1321 of 2013) [2024] KEELC 6878 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6878 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 1321 OF 2013

OA ANGOTE, J

OCTOBER 17, 2024

BETWEEN

MARIA LWANDE & 66 OTHERS ..... PLAINTIFF

AND

THE REGISTERED TRUSTEES OF TELPOSTA PENSION SCHEME ..... DEFENDANT

RULING

Introduction

1. Vide a Motion dated 20th March, 2024 brought pursuant to the provisions of Sections 1A, 1B & 3A and 80 of the *Civil Procedure Act*, Section 146 of the *Evidence Act*, Orders 18 Rule 10, 22 Rule 22, 42 Rule 6, 45 Rule 1, 12 Rule 7 and 32(2) of the Civil Procedure Rules, the Applicant seeks the following reliefs:

    i. That the Plaintiffs'/Applicants' Advocates M/S Amadi & Amadi Advocates, for Rachel Jeptanui Too, be granted leave to come on record after Judgement.

    ii. That the Honourable Court be pleased to review and/or revise his own orders on costs on the Judgement delivered on May, 24, 2022 [13th October, 2022].

    iii. That this Honourable Court be pleased to order the Plaintiffs case to be re-opened and heard for purposes of adducing evidence and documents that were not produced.

    iv. That this Honourable Court be pleased to recall the Plaintiffs' witness, Rachel J. Too, for further examination in chief, for further cross-examination and re-examination respectively for purposes of adducing evidence before this Court.

    v. That the costs of and incidental to the Application be provided for.

2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Racheal Jeptanui Too, the Applicant herein of an even date. She deponed that the Plaintiffs filed the present suit and Judgment herein was delivered on 13th October, 2022 dismissing the Plaintiffs' case.

3. According to the Applicant, she received a provisional house allocation from the Defendant to purchase the property known as Nairobi/Block/ 69/117 unit 35 at the sum of Kshs 1, 200,000; that the deposit of Kshs 120,000 was paid upon execution of the agreement and that the balance was to be paid on completion.

4. She deponed that she made several payments over a period of time to wit Kshs 40,000 on 19th October, 2005; Kshs 30,000 on the 27th January, 2006 and Kshs 410,000 on the 16th March, 2007; that she paid the total sum of Kshs 600,000 and that it was a term of the agreement that upon its execution, the Defendant had 90 days to furnish her with the completion documents which it failed to do.

5. According to the Applicant, when she went to deposit a cheque for the sum of Kshs 280,000 in favour of the Defendant, they refused to accept the same indicating that they were no longer willing to sell the house; that she and the Defendant have a legally binding sale agreement that should be enforced and that on 4th February, 2024, she was served with a demand letter by Kenstate Valuers Limited appointed by the Defendant to demand for the sum of Kshs 2,060,000 from her payable within 14 days failure to which she risked eviction from the property.

6. She posited that the Defendant is in breach of the sale agreement and the right to rescind has not arisen; that the purported rescission is malicious and intended to frustrate her efforts and rights to purchase the house; that she has not been refunded the sums paid and that she was never notified of the Judgment and only became aware of the same when she was served on the 4th February, 2024.

7. She urged that the Defendant should release the completion documents including the original title for the suit property, a duly executed transfer of the property, a discharge of charge, rates and rent clearance certificate, completed and signed stamp duty valuation form and all other documents relating to the property.

8. In response to the Motion, the Defendant through its Administrator/ Trust Secretary Peter K Rotich swore a Replying Affidavit on 12th April, 2024. He deponed that as advised by Counsel, the prayer for stay of execution is incapable of being granted, there being no positive order granted by the Court and that the Plaintiffs having filed a joint Plaint, the firm of Amadi & Co Advocates cannot seek to come on record for one of the Plaintiffs, the Applicant, herein without concurrence of the Advocates currently on record.

9. It was deponed that the Plaintiffs have filed an appeal being Civil Appeal E420 of 2022 and that the law does not permit an appeal and application for review to be filed simultaneously.

10. He deponed that the issues raised by the Applicant with respect to their transaction over the sale and purchase of the suit property were issues raised and litigated before this Court and which the Court addressed with finality; that subsequently, the present Motion is an abuse of Court process; that contemporaneously with the appeal, the Plaintiffs filed a Motion seeking stay of execution and injunctive orders, which Motion was dismissed on the 17th March, 2023; that as a result of the foregoing, there being no orders restraining execution, the Defendant has duly instructed auctioneers to levy execution and that the matter before the Court of Appeal is pending.

11. According to the deponent, as advised by Counsel, the Applicant's demands for the return of the deposit is untenable, the Court having found that the Plaintiffs acted in breach of the agreement; that the Applicant was one of the 67 Plaintiffs who filed the suit and cannot seek to isolate her issues after

Judgment; that similarly, the Plaintiff cannot feign ignorance by pleading that she was not aware of the Judgment and that the Motion has been brought inordinately late being 1 year 5 months after delivery of the Judgment.

12. The Defendant urged that the Motion is a ploy by the Applicant to continue residing on the property which she and the other Plaintiffs continue to illegally occupy, which is an abuse of process; that should the orders be granted, the Defendant will be extremely prejudiced as it intends to sell the suit property and that the interests of justice dictate that the Defendant is allowed to enjoy the fruits of its Judgment. The parties filed submissions which I have considered.

Analysis and Determination

13. Before venturing into a determination of the matter, the Court notes that this application is in the nature of an omnibus application. It not only seeks different prayers, governed by different rules and judicial principles, but cannot co-exist. For example, a plea to review the Court's Judgment on costs cannot co-exist with a plea to re-open a case. One pre-supposes that the Applicant has no issue with the Judgment save for the issue of costs while the other essentially seeks to have the entire Judgment set aside and re-open the suit.

14. It is instructive to note that Courts have frowned upon applications of this kind and nature. The Court of Appeal in the case of Associated Construction Company (K) Ltd vs Kyamu Construction & Engineering Ltd [2022] KECA 872 (KLR) dealing with an omnibus application stated thus:

> " This is yet another of those untenable omnibus applications where the applicant, Associated Construction Co (K) Ltd, seeks, in the same application, an order for extension of time to file an appeal out of time and an order for stay of execution. This Court has decried this practice, which is taking root among some practitioners at an alarming rate. This practice has to stop forthwith. Recently in Abdulrazak Rageh Haji v. Mahadho Abdulrazak Adichare, CA No. E030 of 2020 , I stated as follows:
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> ...It is not rocket science to appreciate that under the Court of Appeal Rules an application for extension of time is the remit of a single judge whilst an application for stay of execution is the business of the full court. How exactly the same application can be heard in instalments, first by a single judge, and subsequently by the full Court, is not clear to me. Plus, a party cannot obtain stay of execution of a decree or judgment of the High Court without first filing a notice of appeal! This practice has to stop forthwith."

15. This alone renders this application ripe for dismissal. However, in deference to Article 159 (2) (d) of *the Constitution*, the Court will proceed to consider the same. Having considered the Motion, responses and submissions, the issues that arise for determination are:

    i. Whether this Court is functus officio?

    ii. Whether the firm of M/S Amadi & Amadi Advocates should be granted leave to come on record for the Applicant?

    iii. Whether the Court should re-open the Plaintiffs' case and allow the Applicant to testify and adduce evidence?

    iv. Whether the Court should review its orders on costs issued upon Judgement?

16. The Defendant asserts that this Court, having rendered its Judgment on the 13th October,2022, has been rendered functus officio and cannot, as sought by the Applicant, re-hear the matter. The Applicant did not respond or submit on this contention.

17. The functus officio doctrine is one of the mechanisms by which the law gives expression to the principle of finality. Discussing the same, the Supreme Court in Raila Odinga & Others vs IEBC & Others [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law" (2005) 122 SALJ 832 in the following words:

> "The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

18. This doctrine however has exceptions. These were highlighted by the Court in Silvanus Kizito vs Edith Nkirote Mwiti [2021] eKLR, thus:

> "It was thus incorrect for the trial court to have held as she did that the court had become functus officio. The court does not become functus officio merely because it has delivered a final decision in civil proceedings. The court retains its power to undertake several actions including but not limited to stay, review, execution proceedings and such other acts and steps .....In Leisure Lodge Ltd Vs Japhet Asige and another (2018) eKLR the court said and held:
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> "On the question that this court is functus officio, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings...That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act."

19. Indeed, the prayers sought herein are in the nature of matters incidental to the Judgement and those that this Court is specifically vested with jurisdiction to entertain. The Court is thus not functus as regards this Motion.

20. The rules and procedure for engagement of an Advocate post Judgment are set out under Order 9 Rule 9 of the Civil Procedure Rules which provides as follows:

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
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> (a) upon an application with notice to all the parties; or
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> (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

21. It is clear from the foregoing that after Judgment has been entered, where there was an Advocate, a new Counsel can only come on record through an order of the Court upon an application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate.

The reasoning behind the provision was well articulated by the Court in S. K. Tarwadi vs Veronica Muehlmann [2019]eKLR where the Judge observed as follows:

> " ...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away."

22. Earlier on in Connection Joint vs Apollo Insurance [2006] eKLR, the Court persuasively stated:

> " ...Furthermore, it may be recalled that the mischief which was targeted by the introduction of that rule, was the replacement of advocates who had worked hard to enable a case get to the stage of judgement. In my understanding, some unscrupulous persons used to either appoint new advocates or take over the personal conduct of cases, as soon as judgement had been granted in their favour. Thereafter, the advocates who had been replaced were left chasing after their legal fees, which was not fair to them, especially when the said advocates only learnt about their own replacements, after the same had taken effect.
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> By making it mandatory for the party who seeks to replace his advocate, after judgement was passed, to apply to the court, with notice to his said advocate, the rules committee addressed two concerns. First, it was no longer possible for the advocate to be taken by surprise, by his ouster, as he had to be served with the application seeking to remove him from record: secondly, the fact that the court had the opportunity of giving due consideration to the reasons for and against the application, implied that the court was able, if necessary, to impose terms and conditions. For instance, if it transpired that the advocate's fees had not yet been paid, the court could impose appropriate conditions to the order enabling the party to either act in person or alternatively, to engage another advocate..."

23. The Applicant seeks to have the firm of Ms Amadi & Amadi come on record for her post Judgment. The Defendant asserts that the aforesaid firm cannot seek to come on record for one of the Plaintiffs without concurrence of the previous Counsel.

24. The Court has considered the record and notes that the Applicant herein was one of the 67 Plaintiffs [No 59] who instituted the suit against the Defendant. During the pendency of the suit, the Plaintiffs were represented by the firm of Letangule & Co Advocates. This means that at the time of the Judgment, the Applicant was presented by Counsel and the provisions of Order 9 Rule 9 above come into play.

25. Having considered the pleadings, no consent has been presented to the Court between Ms Amadi & Amadi Advocates and Letangule & Co Advocates. Similarly, no evidence has been adduced showing service of the present Motion to previous Counsel, Letangule & Co Advocates.

26. Whereas the Applicant has a constitutional right to be represented by Counsel of her choice, where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under order 9 Rule 9 of the Civil Procedure Rules above is mandatory and thus cannot be termed as a mere technicality.

27. Ultimately, the Applicant has not met the threshold as set out in Order 9 Rule 9 of the Civil Procedure Rules, 2010 and the Court declines to grant this prayer. Whereas this is sufficient reason to dismiss the application, the Court will for purposes of completion consider the other substantive prayers herein.

28. The Plaintiff asks this Court to re-open the case and allow her to testify and give evidence. The law with respect to the conduct of trial and production of evidence are found in the Civil Procedure Rules and the *Evidence Act*.

29. Apart from the general provisions granting the Court the power to recall a witness found in Section 146(4) of the *Evidence Act* and Order 18 Rule 10 of the Civil Procedure rules, there is no express provision on the re-opening of a case. It follows therefore that this is one of the orders in which the Court calls upon its inherent jurisdiction and exercises its discretionary mandate.

30. It is common ground that where a Court is called upon to exercise discretion, the same must be exercised judiciously and in the interest of justice. This was as aptly expressed by the Court of Appeal in *Patriotic Guards Ltd vs James Kipchirchir Sambu, Nairobi CA No. 20 of 2016*, [2018] eKLR as follows:

> "It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."

31. Speaking to the principles that guide the Court in exercising its discretion while considering whether or not to re-open a case and receive evidence, the Court in Susan Wavinya Mutavi vs Isaac Njoroge & Another [2020] eKLR, persuasively stated thus:

> "Over the years, Kenya's superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a party's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on the part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible."

32. It is undisputed that Judgment was entered in this matter on 13th October, 2022. Vide the Judgment, the Plaintiffs' case was dismissed with costs to the Defendant. This being so, it is not open for this Court to simply re-open the case as sought. There is in essence, no suit to re-open, on account of the Judgment.

33. The first port of call in this respect is a plea for the setting aside of the Judgment. The law provides only two instances where a Court may set aside its own Judgment. The first is found under Order 10 of the Civil Procedure Rules, 2010 which addresses the issue of consequences of non-appearance, default of defence and failure to serve by a party. Order 10 Rule 11 provides thus:

> "Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

34. The second instance is found under Order 12 of the aforementioned Rules, which deals with hearing of suits and non-attendance by parties. It empowers the Court to dismiss a suit where a party fails to attend Court with full notice of the hearing date. Order 12 Rule 7 of the Rules provides that:

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

35. The Applicant has not specifically sought to have the Court set aside its Judgment. Nonetheless, the Motion is set out as having been brought under Order 12 Rule 7 of the Civil Procedure Rules and the Court will consider the same.

36. As aforesaid, Order 12 deals with situations of non -attendance by parties and gives the Court the mandate to among others dismiss a suit for such non-attendance. Order 12 Rule 7, provides a savings provision, stating that the Court may set aside a Judgment or dismissal made under the Order.

37. The Applicant submits in this respect that she did not attend Court and was not given an opportunity by the Advocate to testify and subsequently her evidence was not taken. It is noted that this suit was instituted by 67 Plaintiffs, the Applicant being one of them. During the hearing, the Plaintiffs case was presented to the Court vide their witnesses PW1 and PW2. The Court rendered its determination after fully hearing the parties.

38. It is noted that the Applicant does claim not to have been unaware of the hearing neither does she contest that PW1 and PW2 duly represented all the other Plaintiffs, including herself in this regard. The Plaintiffs' strategy as to who would testify on their behalf was an internal matter. The Applicant cannot on the basis thereof tell this Court that her failure to testify warrants the setting aside of the Judgment of the Court. This plea fails.

39. The law governing the framework of review is set out in Section 80 of the *Civil Procedure Act* and Order 45, Rule 1(1) of the Civil Procedure Rules. Section 80 of the Act provides as follows:

> "
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> " 80. Any person who considers himself aggrieved-
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this Act,
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> 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."

40. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows;

> " 1 (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 review of judgment to the court which passed the decree or made the order without unreasonable delay."

41. A reading of the above provisions make it clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by limiting review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

42. The Court of Appeal in Benjoh Amalgamated Limited & another vs Kenya Commercial Bank Limited [2014] eKLR observed that:

> "In the High court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review".

43. The Applicant has prayed that this Court reviews its orders on costs. The Defendant contends that this plea is not available to the Applicant, having filed an appeal. This fact is undisputed by the Applicant. Considering Sections 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules and Act, it is apparent that the avenue of review remedy is only available to a party who, though has a right to challenge the decision in question by an appeal, is not appealing or to whom there is no right of appeal. In other words, a person cannot concurrently exercise the right of appeal and review.

44. This position was affirmed by the Court of Appeal in Multichoice (Kenya) Ltd vs Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR which observed that:

> "It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal."

45. In view of the foregoing, it is not open to the Applicant to seek to have the Court review its Judgment on costs while having appealed against the entirety of the Judgement.

46. Even if the Court were to consider the same, it is noted that the Judgment herein was rendered on 13th October, 2022 and the present Motion filed on 24th March, 2024, approximately 1 year 5 months later. This is an inordinately long period. Counsel on record for the Plaintiffs was present when the Judgment was rendered, and there being no evidence of why it took long for the current application to be filed, the Court rejects the assertion that the Applicant was unaware of the Judgment.

47. Further still, the Applicant has not stated whether the plea for review is founded on mistake, error on the face of the record, or sufficient cause.

48. In the end, the Court finds that the Motion dated 20th March, 2024 falls in its entirety and proceeds to dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF OCTOBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Mathenge for Defendant

Ms Ndungure holding brief for Mr. Amondi for Plaintiffs

Court Assistant - Tracy