



Planet Foods Limited v Obonyo & another (Environment & Land Case 357 of 2009) [2023] KEELC 15881 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15881 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 357 OF 2009
AA OMOLLO, J
FEBRUARY 23, 2023**

BETWEEN

PLANET FOODS LIMITED PLAINTIFF

AND

VITALIS JAMES LUNYOLO 1ST DEFENDANT

JOSEPH SWATI OBONYO 2ND DEFENDANT

RULING

1. The Plaintiff filed a notice of motion dated April 23, 2014 seeking for the following orders;
 - a. That this Honourable Court be pleased to grant leave to the Plaintiff to amend paragraph 1 of the Court Order issued on the 3rd of August 2010 to state: -

“That Judgement be and is hereby entered in favor of the Plaintiff against the First and Second Defendants in accordance with the terms and provisions of the two Deeds of settlements dated 20th April 2010 and 16th September 2009 duly signed by the parties and filed on the court on the 27th of April 2010 and 1st of October 2009 and affirmed before the Honourable Justice Mbogoli Msagah on the 18th of May 2010 and the consent letters dated 26th of April 2010 and 16th of September 2009, in relation to all that piece or parcel of land situate in the City of Nairobi in the Nairobi area containing by measurement two decimal nine five two(2.952) hectares or thereabouts and known as L.R No.209/20529 which said piece or parcel is with the dimensions abutments and boundaries thereof delineated and described on the plan annexed to a Certificate of Title registered in the Land Titles Registry at Nairobi as number 63851 and thereon bordered in red and more particularly delineated and described on Land Survey Plan Number 191029 deposited in the survey Records Office at Nairobi aforesaid with the deed file for the property being



number I.R. 63851 as prayed for in the Plaintiff filed in the suit with the exception of prayers (e) and (g) only.”

- b. That this Honourable Court be pleased to adopt the draft Amended Court Order annexed hereto.
 - c. That costs be provided for.
2. The motion was supported by a supporting affidavit sworn by Mohamed Ali, a director of the plaintiff, on April 25, 2014. Mr Ali deposed that the plaintiff entered into a consent agreement with the 1st and 2nd defendants vide deeds of settlement dated September 16, 2009 and April 20, 2010 which was adopted as a court order issued on 3rd August 2010 settling the suit. The Applicant stated that the full description of the suit property and its registration number were omitted in the consent order though provided for in the introduction part of the deeds of settlement and so the Land Registrar has declined to implement the same.
 3. The applicant contended that the parties to the consent order intended that any extracted court order include the Land Registration Number and full description of the suit property from the deeds of settlement and so the Respondents will not suffer any prejudice if the court grants the orders sought and the Applicant will suffer loss and prejudice if the orders sought are not granted.
 4. The Defendants filed grounds of opposition dated April 5, 2018 stating that the application is defective and that the grounds relied upon by the Applicant do not warrant issuing of the orders sought.
 5. The applicant and respondents filed submissions dated November 15, 2022 and September 21, 2022 respectively. The applicant submitted that this court can amend the consent order to reflect the intentions of the parties as expressed in the settlement agreement because it has power to amend a defect or error in any proceeding in a suit as set out in sections 99 and 100 of the *Civil Procedure Act* so as to determine the real question or issue of the suit. The Applicants relied on the cases of *Leonard Mambo Kuria v Ann Wanjiru Mambo* (2017) eKLR, *Republic v Attorney General & 15 others, Ex-Parte Kenya Seed Company Limited & 5 others* [2010] eKLR, Civil Suit No. 386 of 2016 *Steve Onyango v Techspa General Supplies Ltd & 2 others* [2020] eKLR which stated that section 99 of the *Civil Procedure Act* can be invoked to correct “clerical or arithmetical mistake in judgments, decrees or orders, or errors arising therein from an accidental slip or omission.
 6. The applicant submitted that the amendment will give the full effect to the intention of the court orders issued. This was the position taken in the case of ELC Civil Suit No. 931 of 2013 *Superior Homes (Kenya) Ltd v East Africa Portland Cement Company Ltd* [2014] eKLR.
 7. The respondents submitted that the applicant is seeking to amend an order of the court yet a consent order can only be amended where fraud is pleaded, or when the consent is contrary to the policy of the court and if it was given without sufficient material facts. They cited the case of *Kajiado Multi-Transporters Sacco Limited v Governor, Kajiado County & 2 others* [2016] eKLR.
 8. The respondent stated that the court became functus officio after it pronounced itself in the orders issued citing the Supreme Court case of *Raila Odinga & 2 others vs Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR hence cannot be approached to sit on appeal of a final order it has issued.
 9. The respondent submitted that the applicant approached the court under the wrong provisions of the law having brought the application under provisions of sections 63(e) of the *Civil Procedure Act* an order 8 of the *Civil Procedure Rules* 2010 which provides for amendment of pleadings hence incurably defective.



Analysis

10. The plaintiff by its application seeks the insertion of the Land Registration number of the suit property omitted in the consent entered by the parties that was accordingly adopted as the court's judgement. Section 99 of the [Civil Procedure Act](#) can be invoked to correct clerical or arithmetical mistake in judgments, decrees or orders, or errors arising therein from an accidental slip or omission. As stated in [Steve Onyango v Techspa General Supplies Ltd & 2 others](#) [2020] eKLR, the court can either evoke the provisions of section 99 of CPA on its own motion or an application.

Section 99 of the CPA provides: -

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

11. Having looked at the deeds of settlement between the parties that led to filing of the consent, its intent was to settle the ownership dispute of the suit property in favour of the plaintiff/applicant and the court issued the Judgement on the same line. I am therefore in agreement with the applicant in submitting that the purpose of the amendment sought is to determine the real question or issue raised by the proceeding and such amendment is invoked in sections 99 and 100 of the [Civil Procedure Act](#).

Section 100 of CPA states as follows: -

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

12. The above given provisions (Sections 99 & 100 of [CPA](#)) were extensively discussed in the case [Leonard Mambo Kuria v Ann Wanjiru Mambo](#) (2017) eKLR as follows:

“The application of these two sections [Sections 99 and 100 of the [Civil Procedure Act](#), CAP 21] has been considered before in several decisions. They vest a general power to the courts to correct or amend their records. As such they are an exception to the doctrine of ‘functus officio’-- the principle that once a decision has been given, it is (subject to any right of appeal) final and conclusive. It cannot be revoked or varied by the decision-maker. As the court stated in the case of [Jersey Evening Post Limited vs. Ai Thani](#) [2002] JLR 542 at 550:-

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available”.

13. With regard to the respondent's contention that the Applicant's application is defective for approaching this court under the wrong provisions of law, [the Constitution](#) under article 159 (2) on judicial authority has urged courts to do justice without undue regard to procedural technicality. In the case of [Steve Onyango](#) (supra) on the procedure to be followed in seeking for correction of a decree



or judgement the Court held, “As for the procedure, none is provided for under the two sections and therefore, under order 51 rule 1 of the *Civil Procedure Rules* a ‘Notice of Motion’ is the prescribed procedure.”

14. It is therefore my opinion that the orders sought in the application should be granted. The application is hereby allowed without costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2023.

A. OMOLLO

JUDGE

In the Presence of

Mr Shikanda h/b for Osundwa for the Def/Resp

N/A for the Plaintiff/Applicant

