



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC NO. 240 OF 2014

ERASTUS NDEGE MACHUKE.....1ST PLAINTIFF
SIMON KITHU MACHUKE.....2ND PLAINTIFF
BENSON NTHIGA MACHUKE.....3RD PLAINTIFF
JOHN MURIUKI MACHUKE.....4TH PLAINTIFF

-VERSUS-

JOHN KIURA NGARI.....1ST DEFENDANT
JOHN NJERI JULIUS.....2ND DEFENDANT
GISOVI WA MUNYL.....3RD DEFENDANT
EZEKIAH NYAGA.....4TH DEFENDANT
DAVID MWANIKI NGUKU.....5TH DEFENDANT
DANSON KIURA NGUYA.....6TH DEFENDANT
JACOB NJUE MUTEMBEL.....7TH DEFENDANT

RULING

1. By a notice of motion dated 2nd March, 2021 grounded upon **Section 80 of the Civil Procedure Act (Cap. 21)** and **Order 45 Rules 1 & 2 of the Civil Procedure Rules, 2010 (the Rules)**, the 1st Defendant applied for review of the judgment and decree dated 18th December, 2020 to include a judgment on his counter-claim against the Plaintiffs. The 1st Defendant also prayed for costs of the application to be provided for.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1st Defendant on 2nd March, 2021 and the exhibits thereto. The gist of the application was that there was an error on the face of the record in the judgment in that the court had determined the Plaintiffs' claim only and omitted a determination on the 1st Defendant's counter-claim even though both the suit and counter-claim were heard together.

3. The Plaintiffs filed a replying affidavit sworn by the 1st Plaintiff Erastus Ndege Machuke on 22nd March, 2021 who swore it on his own behalf and on behalf of the 2nd, 3rd and 4th Plaintiffs. The Plaintiffs contended that they had already filed an appeal against the decree dated 18th December, 2020 hence the 1st Defendant ought to have filed a cross-appeal instead of filing the instant application for review.

4. The 1st Plaintiff contended that he and his family members have been residing on some of the suit properties for over 60 years hence it would be prejudicial to have them evicted before his appeal is heard and determined. The Plaintiffs further contended that their appeal had high chances of success hence the instant application for review and determination of the counter-claim should be dismissed with costs.

5. It would appear that on 6th May, 2021 the parties appeared before Hon A. Kaniaru J whereby they agreed to canvass the application through written submissions. The record shows that the 1st Defendant filed his submissions on 30th June, 2021 whereas the Plaintiffs filed theirs on 7th September, 2021 after which it was directed that the application for review be placed before me for determination.

6. The court has considered the 1st Defendant's notice of motion dated 2nd March, 2021, the Defendants' replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the main issue for determination is whether or not the 1st Defendant has made out a case for review of the decree dated 13th December, 2020.

7. The statutory provisions governing applications for review are contained in **Section 80 of the Civil Procedure Act and Order 45 of the Rules. Order 45 Rules 1 & 2 of the Rules** stipulate that:

(1) 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 hereby 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.

(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 review.

8. Whereas the 1st Defendant submitted that there was an error on the face of the record and that he had demonstrated a case for review of decree, the Plaintiffs contended otherwise. The Plaintiffs contended that the 1st Defendant had lost his right of review the moment they (*the Plaintiffs*) filed an appeal even though they did not cite any judicial authorities in support of that proposition. The 1st Defendant, on the other hand, relied on the case of **County Government of Kilifi v Mombasa Cement Limited [2017] eKLR, Joseph Wanyama Kibira v Board of Management St.Teresa Secondary School & Another**, and **George Kianda & Another v Judith Katumbi Kathenge & Another [2018] eKLR** in support of the application.

9. It is apparent from the material on record that apart of the Plaintiffs' suit for a declaration of trust over the suit properties, the 1st Defendant also had a counter-claim for eviction of the 1st Plaintiff who was said to be in occupation of one of the suit properties (*i.e. Parcel 3683*) as well as a counter-claim for a permanent injunction with respect to *parcels Nos. 3683 and 3684*. It is clear from the judgment dated 18th December, 2020 that the court only considered and determined the Plaintiffs' suit but made no mention or determination of the counter-claim was made.

10. The suit and counter-claim were heard together hence the judgment dated 18th December, 2020 ought to have considered and determine both of them. The court is thus satisfied that the 1st Defendant has demonstrated a classic case of error apparent on the face of the record in the instant case. The court must have omitted reference to the counter-claim purely due to inadvertence which can be corrected through review.

11. In the case of **National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR**, an error apparent on the face of the record was

described as follows:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established...”

12. The court has noted that the Plaintiffs have submitted that there was undue delay on the part of the 1st Defendant in filing the instant application. It was contended that there was a delay of 3 months in filing it. The court has noted that the judgment sought to be reviewed was delivered on 18th December, 2020. The court is aware that the period between 21st December, 2020 and 9th January, 2021 is not to be reckoned in the computation of time under the Rules. (See **Order 50 Rule 4 of the Rules**). So, the actual period of delay is between 9th January, 2021 to 1st March, 2021 which comes to about 1 month and 2 weeks. The court does not consider the same to constitute unreasonably delay for purpose of **Order 45 of the Rules**.

13. The court is thus inclined to allow the Defendant’s application for review. Since the 1st Defendant is seeking for judgment on his counter-claim, the court shall consider the merits of the counter-claim herein instead of preparing a separate judgment. The pleadings and the Plaintiffs’ evidence on record show that the Plaintiffs were claiming the various suit properties on the basis of trust hence the reason they sought a declaration, and determination, of the alleged trust.

14. The 1st Defendant’s counter-claim, on the other hand, was straightforward. He sought the following orders in the amended defence and counter-claim:

(i) That the 1st Plaintiff Erastus Ndege Machuke do remove himself, his family members, servants, agent and/or properties from Land Parcel Number Mbeere/Kirima/3683 within 30 days from the date of judgment and in default the 1st Plaintiff, his family members and properties be evicted and/or forcefully removed from Land parcel Number Mbeere/Kirima/3683.

(ii) The Plaintiffs jointly and severally and specifically the 1st Plaintiff by themselves, their servant, agents, family members or anybody acting under their instructions be permanently restrained from entering upon, utilizing, occupying, cultivating, preventing the 1st Defendant from utilizing or in any other way interfering with the 1st Defendant use, occupation and exercise of his proprietary rights over Land Parcel Number Mbeere/Kirima/3683 and 3684.

(iii) That the Defendants be awarded costs of the suit and the 1st Defendant further be awarded costs of the counter-claim against the 1st Plaintiff.

15. The 1st Defendant sought an eviction order and injunction against the 1st Plaintiff on the basis that he was the registered proprietor of **Parcels Nos. 3683 and 3684**. There is adequate evidence on record to demonstrate that the 1st Defendant is the registered proprietor of the two properties. In fact, the Plaintiffs conceded as much in the plaint and evidence at the trial. The Plaintiffs’ contention was that the 1st Defendant was registered as such in trust for them. The court having found in the judgment that the Plaintiffs had failed to demonstrate the existence of the alleged trust and having dismissed their claim, it would follow that the 1st Defendant’s counter-claim for eviction ought to succeed. The court is consequently inclined to allow prayer (a) of the counter-claim.

15. The court has considered the pleadings and evidence on prayer (b) seeking a permanent injunction to restrain the 1st Plaintiff from entering, utilizing, occupying, cultivating or interfering with the 1st Defendant’s use or occupation of **Parcel 3684**. The court has noted that there was no averment in the amended defence and counter-claim that the 1st Plaintiff was intending to enter, occupy, utilize, cultivate, or interfere with **Parcel 3684**. The evidence on record only shows that the 1st Plaintiff was occupying and utilizing **Parcel 3683**. The court is of the opinion that since the 1st Defendant is already occupying **Parcel 3683** the only effective remedy available to the 1st Defendant is an eviction order for removal of the 1st Plaintiff and not an injunction. There was no evidence at the trial to demonstrate that the Plaintiffs had threatened to interfere with the 1st Defendant’s proprietary rights over **Parcel No. 3684**. Accordingly, the court is not inclined to grant a permanent injunction with respect to either **Parcel 3683** or **3684** since it would not serve any useful purpose at this juncture.

16. The upshot of the foregoing is that the court finds merit in the 1st Defendant’s application for review and makes the following orders for disposal thereof.

- (a) The 1st Defendant's notice of motion dated 2nd March, 2021 for review is hereby allowed.
- (b) The judgment dated 18th December, 2020 is hereby reviewed by allowing the 1st Defendant's counter-claim in the following terms only:
- (i) The 1st Plaintiff, Erastus Ndege Machuke, shall remove himself, his family members, servants, agent and properties from Title No. Mbeere/Kirima/3683 within 30 days from the date hereof in default of which he and his family members, servants and properties shall be forcibly removed therefrom.
 - (ii) The prayer for a permanent injunction with respect to Titles No. Mbeere/Kirima/ 3683 and 3684 is hereby declined.
 - (iii) The 1st Defendant is hereby awarded costs of the counter-claim against the 1st Plaintiff only.
 - (iv) An amended decree shall issue incorporating the counter-claim.
- (c) There shall be no order as to costs of the application for review since the error was occasioned by the court.

Ruling dated and signed in Chambers at Nyahururu this 16th day of February, 2022 and delivered via Microsoft Teams platform.

In the presence of:

Ms. Nzekele holding brief for Mr. Okwaro for the Defendants

No appearance for the Plaintiffs

CA - Carol

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Y. M. ANGIMA

JUDGE



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