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| Case Number: | Environment and Land Appeal 15 of 2018 |
| Date Delivered: | 17 Dec 2020 |
| Case Class: | Civil |
| Court: | Environment and Land Court at Thika |
| Case Action: | Ruling |
| Judge: | Lucy Nyambura Gacheru |
| Citation: | James Thendu Gitau & another v John Nginga Magecha [2020] eKLR |
| Advocates: | Mr. Muthomi for the 1st Appellant/Applicants |
| Case Summary: | - |
| Court Division: | Environment and Land |
| History Magistrates: | - |
| County: | Kiambu |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Notice of Motion Application allowed entirely with no orders to costs. |
| History County: | - |
| Representation By Advocates: | One party or some parties represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 15 OF 2018

JAMES THENDU GITAU.....1ST APPELLANT/APPLICANT

RAPHAEL KINUTHIA KAMAU.....2ND APPELLANT/APPLICANT

VERSUS

JOHN NGINGA MAGECHA.....RESPONDENT

RULING

The matter for determination is the **Notice of Motion Application** dated **15th June 2020** by the Appellants/ Applicants seeking for orders that;

- 1. That the Judgment of the Court dated, signed and delivered on 4th June 2020 and all consequential orders thereof be and is/are hereby recalled, reviewed, reversed, vacated and set aside (quod judicium reverteretur).**
- 2. That the Lower file No. ELC 8/2018 Gatundu be returned.**
- 3. That Costs of the Application be borne by the Respondent.**

The Application is premised on the grounds that the Appellants/ Applicants acquired title over land parcel **No. Ngenda/Wamwangi/904 and 903**, pursuant to Petitions for Grant vide Succession **Causes No. 43 of 2012 and 44 of 2012**. That the Respondent sought to revoke the two grants vide summons for revocation filed as **Succession Cause No. 852 of 201 Muranga**, which was later transferred to **Kiambu High Court** and registered as Succession cause **No. 150 of 2017**. That the **Kiambu Succession Cause** was later transferred to Gatundu and registered as **Succession Cause No. 253 of 2019**. That in the year **2017**, the Respondent filed summons for revocation of grant in **Succession Cause No. 44 of 2018**. That in the year **2018**, the Respondent trespassed in the said land and started excavating stones. It was contended that the Appellants/ Applicants filed **ELC No. 8 of 2018 and** sought temporary injunctive orders which were not granted. That upon dismissal, the Appellants/ Applicants filed Memorandum of Appeal on **13th June 2018**. While the Appeal was pending, the Court dismissed the two Summons for revocation of grant and all the issue pending in **ELC 8 of 2018** and Appeal **No. 15 of 2018** were determined and the Court concluded that the Respondent is not a beneficiary of the two Estates.

That upon the delivery of the lower Court ruling, the Appeal herein became overtaken by events and the Applicants withdrew **ELC No. 8 of 2018** at Gatundu and Appeal **No. 15 of 2018**, on **4th May 2020** and on **6th May 2020** respectively. That the basis of the withdrawal of **ELC 8 of 2018** at Gatundu and **Appeal No. 15 of 2018**, was to avoid conflicting rulings and or Judgments since the issues had been heard and determined. That the Appellants/ Applicants were surprised to learn that a Judgment had been delivered on **4th June 2020**, yet there was no pending Appeal. Further that on **5th June 2020**, the Respondent, his son hired goons and forcefully entered into the parcel of land in a bid to unlawfully evict the Appellant's/ Applicants servants and inflicted near fatal injuries to the said servants. That there is an apparent error on the face of the record since the Judgment was delivered after withdrawal of the Appeal. Further there is sufficient reason to recall, review, set aside and vacate the Judgment delivered on **4th June 2020**, as the orders issued were to last pending determination of **ELC No. 8 of 2018**, which was withdrawn prior to delivery of the impugned Judgment.

The Application is supported by the Affidavit of **James Thendu Gitau** who reiterated the contents of the grounds in support of the Application and annexed bundle of documents attesting to the same.

The Application is opposed and the Respondent **John Nginga Magecha** swore a Replying Affidavit dated **29th June 2020**, and acknowledged that he filed Summons for Revocation of Grant in Gatundu Chief Magistrates Court which Summons were dismissed on **11th March 2020**. He averred that he has preferred an Appeal of the said Ruling which is pending before the High Court in Kiambu **Vide HCCA Appeal No. 52 of 2020**. It was his contention that it is untrue for the Appellants to claim that the dismissed revocation proceedings in Gatundu conflict with the Judgment of this Court as the said proceedings were determined through the requisite legal regime and separate from the injunctive proceedings instituted by the Appellants in **Gatundu ELC No. 8 of 2018** which were the basis for the appeal that was heard before this Court.

He further averred that the Appellant's/ Applicant's servants attacked his son and inflicted serious injuries upon him which matter was reported to the Gatundu Police station. That he has been advised by his Advocate which advise he believes to be true that the Application is bad in law, unmeritorious and an abuse of the Court process. That the **Notice of withdrawal** of the lower Court suit and Appeal was only served upon the office of his Advocate on record on **8th June 2020**, after the delivery of the Judgment. That the same would demonstrate that the Appellant's/ Applicant's actions of filing the Appeal before the Court and the intent to forestall the outcome was intent on abusing the Judicial process. That the Court orders are not in vain and issued only upon determination of the merit and the interest of Justice should reign supreme. He urged the Court to dismiss the Application.

The Appellant's applicant filed a further affidavit sworn by **James Thendu Gitau** sworn on **9th July 2020** who averred that his Advocates have never been served with the Memorandum of Appeal. That all the numerous suits and summons were based on one issue of ownership of the suit properties and the summons of revocation of grant concluded the issue of ownership of the suit properties. He contended that it was not prudent to have multiplicity of suits over the same subject matter.

The Application was canvassed by way of written submissions which the Court has carefully read and considered and finds that the issue for determination is whether the Appellant/Applicants are entitled to the orders sought.

The Appellants/ Applicants have sought for the review of the Judgment of this Court based on the fact that the Judgment was delivered after the Appeal had been withdrawn and the lower Court suit had also been withdrawn. The Court must then first determine whether the Appeal had been properly withdrawn. The Appellant/ Applicant have stated that the lower Court suit had been withdrawn and the Appeal had also been withdrawn by the time Judgment of this Court was being delivered. The provisions of law that relates to the withdrawal of suits is order 25 Rule 1 of The Civil Procedure Rules which states:-

“At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action”.

In the case of **Beijing Industrial Designing & Research Institute vs. Lagoon Development Ltd** (2015) eKLR. The Court held that;

“The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the Plaintiff is to give notice in writing to that effect and serve it upon all the parties. In that scenario, the Plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit has been set down for hearing. In such a case the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filling a written consent of all the other parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the Plaintiff must obtain leave of Court to discontinue the suit or withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the Plaintiff's right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the Court. That such leave is granted on terms suggests that it is not a mere formality”. (my emphasis)

With above decision in mind, it is the Court's considered view that the instant Appeal had not been properly withdrawn. This is so

because the Appeal had already been set down for hearing and was pending Judgment by the time the Notice of Withdrawal was filed on **6th May 2020**, and therefore the Appellant's / Applicants required the leave of this Court before they could withdraw the said Appeal.

Therefore, the Court finds and holds that the Appeal was not properly withdrawn since **leave** of Court had not been sought. Therefore, the Appeal was not discontinued.

However, with regards to the lower Court suit, the Notice of Withdrawal was filed on **4th May 2020**. It is not in doubt that the said suit was still in its preliminary stage as only an interim Application had been heard. The same had not been set down for hearing. It therefore follows that upon the filing of the Notice of Withdrawal on **4th May 2020**, the subordinate Court's suit **ELC 8 of 2018**, was automatically withdrawn. See the case of **Kofinaf Company Limited & another ... Vs... Nahashon Ngige Nyagah & 20 others [2017] eKLR** where the Court held that;

“From the two decisions of the Court of Appeal (which needless to say are binding on this Court) the law can be stated to be that as a general proposition the right of a Plaintiff to Discontinue a Suit of or Withdraw a Claim under the provisions of order 25 Rule 1 (that is where the suit has not been set down for hearing) is an absolute and untrammelled right. Also, again as a general proposition, it takes effect upon the filing of the Notice. No leave of Court is required nor a Court endorsement necessary to give effect to this withdrawal.”

Though the Court has held that by the time Judgment was being delivered, the instant Appeal had not been withdrawn, the Court further notes that the Judgment delivered granted orders pending the hearing and determination of the Case **No. 8 of 2018**, which had already been withdrawn. The Court has power to review its own decision. However, such power must be exercised within the framework of Section **80 of the** Civil Procedure Act and Order **45 Rule 1**. Section **80** of the Civil Procedure Act provides as follows:-

“ 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order **45 Rule 1** of the Civil Procedure Rules, 2010 provides 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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The Appellant's / Applicants seek to review the Judgment on the fact that there was an error apparent on the face of the record. In **Nyamogo & Nyamogo ...Vs... Kogo {2001} EA 170**, discussing what constitutes an error on the face of the record, the court rendered itself as follows:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real

distinction between a mere erroneous decision and an error apparent on the face of the 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 a long drawn process of reasoning 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 apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

The Court delivered Judgment and gave orders pending the hearing and determination of a non-existent suit as the lower Court suit had already been discontinued. It is the Court's considered view that the same amounts to an error apparent on the face of record as the Court while delivering Judgment was not aware of the said withdrawal.

Therefore, this Court finds and holds that it will only be proper that it reviews and set aside the said Judgment. As the orders granted would not have any anchor to hold unto. Consequently, this Court finds and holds that the Appellants/ Applicants are entitled to the orders sought.

Having now carefully considered the instant Notice of Motion Application dated **15th June, 2020** and the annexures thereto and the Written Submissions, this Court finds it merited and the same is allowed entirely with no orders to costs.

It is so ordered

Dated, signed and Delivered at Thika this 17th day of December 2020

L. GACHERU

JUDGE

17/12/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Muthomi for the 1st Appellant/Applicants

No appearance for the 2nd Appellant/Applicant

L. GACHERU

JUDGE

17/12/2020



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