



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL CASE NO. 57 OF 2005

SAMUEL MUINDI.....PLAINTIFF/RESPONDENT

-VERSUS-

MALILI RANCH LIMITED.....DEFENDANT/APPLICANT

RULING

1. This is an application for Review of the ruling of this court entered on 21.9.2020. The grounds of the application are that a ruling was rendered on 21.9.2020 however the applicant had attained new evidence that there was a notice of appeal that could not be produced at the time when the ruling was delivered.
2. The application was supported by an affidavit deponed by James Kituku Munguti on 5.10.2020. He reiterated the grounds in the application and annexed copies of the ruling of this court, ruling of the court of appeal dated 25.9.2020, a notice of appeal and a draft copy of the memorandum of appeal.
3. The application was opposed vide a replying affidavit deponed by Samuel Muindi who took issue with the delay in filing the instant application that to him was an abuse of the court process. It was pointed out that there was a consent dated 21.7.2006 where the applicant was directed to allocate the respondent 2 plots and the consent had not been set aside. The deponent was apprehensive that the applicant had already transferred the plot Malili/254 Commercial Plot and Malili/2219 agricultural plot contrary to the consent dated 21.7.2006.
4. The application was canvassed vide written submissions and it is only the applicant's submissions on record. Learned counsel for the applicant cited the provisions of Section 80 of the Civil Procedure Act as well as Order 45 of the Civil Procedure Rules as well as the case of **Khalif Sheikh Adan v A.G. (2019) eKLR**. It was submitted that the notice of appeal and the draft memorandum of appeal qualify to be new evidence within the ambit of Order 45 Rule 1 of the Civil Procedure Rules. It was pointed out that the trial court agreed that the draft memorandum was meritorious hence the applicant met the conditions for review of the ruling of this court.
5. I have considered the application as a whole and submissions by learned counsel. As can be deduced from the notice of motion and submissions, the summary of the applicant's case is that my ruling was an error for I overlooked the fact that there was a notice of appeal and memorandum of appeal that was yet to be filed in the court of appeal. On the other hand, the respondent opposes the application arguing that this application is incompetent and that he was not sure that the consent dated 21.7.2006 was complied with by the applicant.
6. The issues for consideration are:
 - a) ***Whether the applicant has satisfied the grounds to warrant an order of review.***
 - b) ***Whether the applicant is entitled to the orders sought in the application.***
7. It is trite law that just like the right of appeal, an order in review is a creature of statute which must be provided for expressly. In considering an application for review, court exercises its discretion judicially as was held in the case of **Abdul Jafar Devji v Ali RMS Devji [1958] EA 558**. The law under which review is provided is rule 63 of the Probate and Administration Rules, Section 80 of the Civil Procedure Rules and Order 45 of the Civil Procedure Rules.
8. Order 45 states that :

(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.

9. In order for an application for Review to succeed, the Applicant must convince the court of the existence 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. The applicant is obliged to clearly and specifically state the new evidence or matter and strictly prove the same. In the case of **James M. Kingaru & 17 others v J. M. Kangari & Muhu Holdings Ltd & 2 Others (2005) eKLR** the court rendered itself as follows: -

“Applications on this ground (review) must be treated with caution. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial.

10. Review cannot be an avenue to supplement or introduce introducing new evidence. In the case of **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR (Civil Application 211 of 96); (27 May 1997)** the court of appeal observed that wrong decision in law was a ground for appeal and not review.

11. Having looked at the Applicants pleadings I find that there was no explanation why this court ought to have been held at ransom at the time of filing the application that was the subject of the ruling dated 21.9.2020 to wait for the Court of Appeal to make its determination. The applicant was free to wait for the Court of Appeal to render its decision then thereafter institute its application. I am not convinced that there is new evidence that could not have been made available at the time of conducting proceedings for the application for stay of execution; from the record, the notice of Appeal was filed on 23.1.2020 and that the leave was granted on 25.9.2020 way after this court had already rendered its decision. It appears to me that the Applicant was taking its sweet time and failed or neglected to make out its case before this court. I am not persuaded that there has been some new discovery of evidence which was not within the knowledge of the applicant as it is clear that all the facts had been in the knowledge of the applicant all along and hence the review application lacks bonafides.

12. When directions were taken for the hearing of the application dated 17.3.2020, the applicant vide their affidavit pointed out that there was an application in the Court of Appeal that was pending determination and that the court was not satisfied with the same even though there was a notice of appeal and memorandum of appeal before the court. At that point in time, the mentioned documents were well within the knowledge of the applicant. Further, the said documents have no significance as the mandatory provisions of Order 42 Rule 6 of the Civil Procedure Rules are that there ought to be in existence an appeal that has been filed. At the time of the hearing of the application for stay of execution the applicant knew that it had already an appeal and it is thus rather dishonest for the applicant to purport to feign ignorance of that fact yet it was within its knowledge. In any case there was no hard and fast rule that the existence of an appeal automatically entitles one a right of an order of stay. The new and important evidence limb in the review application thus fails.

13. Regarding the element of sufficient reason, this means a reason sufficient on ejusdem generis to those in Order 45. In the instant case, a sufficient reason put forward by the applicant is that failure of the court to display cognitive abilities as it were and accept that the application for leave to file a notice of appeal had already been granted and that the notice of appeal was in existence. I disagree that there is sufficient reason raised and in any event the decision rendered on 18.9.2019 is already the subject of appeal in the Court of Appeal and that the applicant is free to approach the said court and invoke Rule 5(2)(b) of the Court of Appeal Rules by seeking the desired remedy. I decline to grant prayer No. 3 of the application

14. The upshot is that the application dated 5.10.2020 lacks merit and is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 27th day of January 2021.

D. K. Kemei

Judge