



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 186 OF 2012

HARDEV KALSI SINGH.....PLAINTIFF

VERSUS

ILAM DIN S/O UMAR DIN.....1ST DEFENDANT

MOHAMED ASLAM S/O ILAM DIM.....2ND DEFENDANT

ASGIRI D/O ILAM DIN.....3RD DEFENDANT

MOHAMED AKHTAR.....4TH DEFENDANT

MOHAMED AZHAR S/O MOHAMED AKRAM.....5TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 5th August 2015 in which the 5th Defendant/Respondent seeks the orders made by Justice J.M. Mutungi in the Judgment delivered by him on 23rd July 2015 be reviewed, varied and/or set aside.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 5th Defendant/Applicant, Mohammed Azhar, sworn on 5th August 2015 in which he averred that he is an equal share owner of the property known as Land Reference Number 209/4931/21 Nyuki Close, Nairobi (hereinafter referred to as the “suit property”) and that Justice J.M. Mutungi delivered a judgment against him in this suit on 23rd July 2015 (the “Judgment”). He further averred that vide the Judgment, the Judge made orders that the Plaintiff be declared to have acquired title to the suit property by adverse possession. He further averred that the Judgment further ordered the Registrar of Titles to register the suit property in the Plaintiff’s name and the Deputy Registrar of the court was authorized to execute all appropriate documents necessary to vest the suit property in the name of the Plaintiff. He further stated that he was aggrieved with those orders hence this Application seeking a review of those orders. He averred that the orders were erroneous as the Plaintiff had not been in open and notorious possession of the suit property for an uninterrupted period of 25 years as alleged. He averred that he court issued the Judgment without giving the parties the chance to adduce viva voce evidence despite there being conflicting evidence adduced in the opposing affidavits. It was his averment that the court failed to appreciate that the Plaintiff did not take over possession of the suit property forcefully due to a private

debt owing to him and one Mohammed Aslam, that the Plaintiff was brought to the suit property by the said Mohammed Aslam as a tenant paying rent to him, that upon deportation of the said Mohammed Aslam he began demanding rent from the Plaintiff which the Plaintiff flatly refused to pay and that he moved to the Business Premises Rent Tribunal to enforce his right to rent. He also averred that the court failed to take cognizance of the fact that he was critically ill and indisposed and unable to pursue the suit property. On those grounds, he sought for the Application to be allowed.

The Application is contested. The Plaintiff/Respondent filed his Grounds of Opposition dated 12th July 2015 and filed on 14th July 2016 in which he stated that the Application amounts of a disguised appeal against the Judgment, that it is an abuse of the court process and that it is bad in law.

On the issue of the review of the Judgment, the applicable law is as follows:-

Section 80 of the Civil Procedure Act provides that,

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

Then **Order 45 Rule 1 of the Civil Procedure Rules, 2010** provides 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.”

Going by the legal provisions cited above, the 5th Defendant/Applicant is only entitled to a review of the Judgment if he has discovered 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 the order was made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. In this particular case, the 5th Defendant/Applicant has enumerated the various aspects of the case which, according to him, the court did not take into account while arriving at the Judgment. However, upon perusal of the Judgment, I can see quite clearly that all the matters raised by the 5th Defendant/Respondent were in fact considered by Justice Mutungi in the Judgment. Further to this, even if I was to say that the matters raised by the 5th Defendant/Applicant are new and important, those matters could have been raised before the Judge if the 5th Defendant/Applicant had exercised diligence. Overall, this court has not been convinced that it should review the Judgment in any manner.

The upshot of the above is that this Application is hereby dismissed with costs to the Plaintiff.

DELIVERED, SIGNED AND DATED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE