



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 108 OF 2010

CHARLES KIMAITA MWITHIMBU.....1ST PLAINTIFF

JANE GAUKU M' RITHARA.....2ND PLAINTIFF

-VS-

EDWARD MUTUA M' MWITHIGA.....DEFENDANT

RULING

Review

[1] The Notice of Motion Application dated 26th November 2012 and expressed to be brought pursuant to Order 45 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act is essentially one for review. It specifically seeks this court:-

- 1. To review its judgment/orders dated 25th October 2012;***
- 2. Reinstate all its prior orders; and***
- 3. Order Costs of the application to be in the cause.***

[2] The said Application is premised upon the grounds set out in the application, the affidavit as well the submissions filed by the Applicant. More specifically, the Applicant argues (in the Applicant's own words) that:

- 1. That there is some important mistakes or errors on the face of the whole record with all sufficient reasons for review.***
- 2. That a new and important matters of evidence which after exercise of dire negligence was not within the Applicant's knowledge or could not be produced at the time when orders were made has been discovered.***
- 3. That the application has been made without due delay.***
- 4. That this matter being a land one is a sensitive issue and ought to be taken into consideration of justice and fairness.***

[3] The Applicant's main concern is that, in the plaint he had prayed that the defendant had obtained L.R Ntima/Ntakira/1864 and L.R Ntima /Ntakira 1965 by fraudulent means and so he thought that by calling

PW3 he would satisfy the court of the existing record by the Land Registrar who was at the time in charge. But, in the judgment delivered on 25th October 2012, Makau J stated at page 16 of the judgment, that he did not call the Land Registrar who witnessed the execution of the transfer instruments at the time. According to the Applicant, the said statement was not in his knowledge as what was in his knowledge was that by calling PW3 he would satisfy the court of the existing record by the Land Registrar who was at the time in charge.

[4] The Applicant continued to submit that the Learned Judge applied Section 7 of the Limitations of Actions Act and declared the suit to be time barred and that further he did not apply for leave to file the suit out of time because of reasons which were beyond his control. On the basis of the reasons he gave, he applied for review of the entire judgment.

Respondent opposed the application

[5] The Application was opposed through a replying affidavit sworn by the Respondent on 21st December 2012. The Respondent averred *inter alia* that the Application offends the express provisions of Order 45 of the Civil Procedure Rules in that; (1) it does not raise any ground for review as set out in Order 45 of the Civil Procedure Rules; and (2) the Applicant had already filed a Notice of Appeal pursuant to Rule 74 of the Court of Appeal Rules and the notice has not been withdrawn. It was also submitted for the Respondent that what the Applicant was now calling new evidence was actually the real issue before the court. As such his application is incompetent and a blatant abuse of the court process and it ought to be dismissed with costs.

DETERMINATION

Directions

[6] When the matter came up for hearing on 3rd March 2016, it was agreed that the application be disposed of by way of written submissions of parties. Directions were accordingly given. I will, therefore proceed to examine those submissions and the law.

Review as a remedy

[7] I have carefully considered this Application, the rival submissions by the parties and the authorities relied upon by the Respondent. I take this view of the matter. Review of judgment of the court as a remedy is provided for in section 80 of the Civil Procedure Act. The attendant procedural law and the grounds for Review are provided in Order 45 of the Civil Procedure Rules which in essence requires the Applicant to satisfy either of the following thresholds;

(a) That there is a 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

(b) On account of some mistake or error apparent on the face of the record, or

(c) For any other sufficient reason, desires to obtain a review of the decree or order.

But of course also, the Applicant must show that he applied for review without unreasonable delay; and where appeal is allowed, that he has not filed an appeal on the matter.

[8] The judgment was delivered on 25th October, 2012 and this application was filed on 26th November 2012. There was, therefore, no delay in filing it. But besides that, the Applicant seems to rely on the ground of ***discovery of new and important matter or evidence***. It is not enough to merely state that there has been a discovery of new and important matter or evidence. You must show that, at the time of the decree, the new and important matter or evidence which has now been discovered, was not within your

knowledge or could not have been produced even after exercising due diligence at the time of the decree. This strict proof is a requirement of the law. See the proviso to Order 45 Rule 3 (2) of the Civil Procedure Rules which states;

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

This threshold is meant to prevent attempt by unscrupulous parties to reopen lost cases with aim of mending the weak areas which were exactly the Achilles of the lost case. See the case of **KAIZA vs. KAIZA [2009] KLR**.

[9] Applying this test, I note that the Applicant's contention *inter alia* is that, at page 16 of the judgment the Learned Judge stated that he did not call the land registrar. He said that this statement was not in his knowledge. He further stated that he had seriously disputed the issue of the identity card. A careful perusal of the record indicates that the issues that the Applicant is now raising were the very issues before the judge and were fully addressed at page 16 of the judgment. Therefore, the said issues cannot and are not new matters even if one uses a very magnanimous yardstick. There can never be discovery of such matters which were already before and were determined by the court. Accordingly, the matters he is relying upon in his application were within his knowledge and a diligent suitor would have no difficulties in knowing that. I do not even understand what the Applicant meant when he formulated this ground in this manner:

That a new and important matters of evidence which after exercise of dire negligence was not within the Applicant's knowledge or could not be produced at the time when orders were made has been discovered. [Underlining mine]

The least I can say here is that, I see an attempt to reopen this case and seal loopholes which made the case to collapse; that kind of practice should never be countenanced by a court of law. See what the Court of Appeal said in the case of **D.J. LOWE & COMPANY LTD v BANQUE INDOSUEZ CIVIL APPL. NAI. 217/98 (UR)** that:

“Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

That ground fails.

[10] The Applicant also stated that there were some important mistakes or errors on the face of the whole record *with sufficient reasons for review*. It is particularly necessary that an application for review which is based on this ground should disclose the specific errors or mistakes on the face of the record. In this case, the Applicant did not state or set out the particular errors he was alleging were on the face of the record. That ground fails. Nonetheless, it is imperative to know that an error or mistake on the face of the record for which a review will be granted must be one which is readily discernible from the record and does not require much probing or copious explanations to ascertain. Again, such error should be one which goes to the integrity of the proceeding or judgment as to impel the court to correct it in order to maintain the integrity of its process. On this see the Case of **MWIHOKO HOUSING COMPANY LIMITED v EQUITY BUILDING SOCIETY [2007] 2KLR**, where the court stated that:

“It is trite law, and we reiterate, that 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. It will not be a sufficient ground of review that another Judge could have taken a

different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. See Nairobi City Council v Thabiti Enterprises Ltd [1995 – 98] 2 EA 251 (CAK).

In the instant case it is plain that the matters in dispute had been fully canvassed before the learned Judge. It is plain from his ruling that he made a conscious decision on the matters in controversy and correctly exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.”

[11] I also note that an appeal has been filed herein. That aspect divests this application of any legitimacy or competence. Now, therefore, after taking into consideration all the circumstances in this case, I find that the Applicant’s Application awfully falls short of the legal threshold provided in Order 45 of the Civil Procedure Rules. Consequently, I dismiss the application dated 26th November, 2012 for being devoid of merit. I award costs of the application to the Respondent. It is so ordered.

Dated, signed and delivered in open court at Meru this 21st day of July 2016

F. GIKONYO

JUDGE

In the presence of:

M/s. Mbaikiata advocate for defendant.

Plaintiff in person – present

F. GIKONYO

JUDGE