



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 226 OF 2019

NEW DESIGN CONSTRUCTION LIMITED.....PLAINTIFF

VERSUS

LYNE KERUBO MANDIEKA.....DEFENDANT

RULING

(Application for review; principles to be applied; respondent being registered owner of the suit premises upon which was developed a house occupied by the applicant; respondent giving notice to the applicant to vacate which the applicant failed to comply with; respondent thus filing suit seeking to have the applicant evicted and filing an application for a mandatory injunction; applicant resisting the application on the basis that her late husband was a shareholder in the respondent company and thus has a right to reside in the house; respondent's position being that the late husband of the applicant had sold his shares and resigned from the company before his death; application for mandatory allowed on the basis that even if the late husband was a shareholder, the company, being a separate entity from its members would still have the right to possession of the house ; applicant seeking a stay of execution of the ruling pending appeal which was dismissed; applicant now seeking a review of the ruling dismissing her application for stay; applicant stating that she has a forensic report showing that the shares of her late husband in the respondent company were fraudulently transferred; irrelevant that there is a forensic report claiming a fraudulent transfer of shares as that would still not give the applicant the right to reside in the house; unreasonable delay; application filed after the applicant has already been evicted from the house thus applicant guilty of unreasonable delay; no error or mistake apparent on the face of record; any such error in analysis of the case would be an error to be subjected to appeal and not review; application dismissed with costs)

1. The application before me is that dated 9 February 2021 filed by the defendant. It seeks the review and setting aside of the ruling made by this court on 14 July 2020. This application is based on the grounds that the applicant has discovered new and important evidence that was not within her knowledge and she could not avail when the ruling was made; that there are material errors on the face of the record; that the order issues was extremely prejudicial to the applicant and that it is in the wider interest of justice that the ruling be reviewed. The application is opposed.

2. To put matters into context, the respondent, commenced this suit through a plaint filed on 17 December 2019. In the plaint, the respondent pleaded to be the owner of the land reference Subdivision No. 222 (Original No. 179/25) Section IV Mainland North CR No. 17917 and Sub Division No. 223 (Original No. 17926) Section IV Mainland North CR No. 17917 (hereinafter referred to as "the suit properties") on which it had erected a show house. It pleaded that the applicant was a girlfriend of one Mustafa Sahin Hakcil who was prior to 10 August 2018 a shareholder of the respondent. The respondent pleaded that on 10 August 2018, Mr. Hakcil resigned as director of the respondent company and transferred the 20 shares that he held to one Seyfullah Gurdal. It pleaded that it nevertheless allowed Mr. Hakcil to continue residing in the show house erected on the suit properties on non-rental basis owing to the nature of the relationship that they had. Mr. Hakcil died on 5 October 2018 and on 4 November 2019, the respondent issued a letter to the applicant demanding that she vacates the house. The applicant did not vacate the house and the respondent filed this suit seeking orders inter alia that she be evicted and be permanently restrained from the house.

3. Together with the plaint, the respondent filed an application dated 17 December 2019 seeking a mandatory injunction to have the applicant vacate the house or she be evicted pending hearing and determination of the suit. The applicant opposed that motion on the argument that she is the legal wife of the late Mr. Hakcil. She contended that Mr. Hakcil still held 20 shares in the respondent company at the time of his death and that he never resigned as shareholder or director of the respondent. She claimed that any letter of resignation purporting to have been signed by Mr. Hakcil was a forgery. On that basis she was of opinion that the notice to vacate are illegal. I heard that application which I allowed in my ruling of 4 June 2020. It was my view that for the purposes of the application, the issue of whether or not Mr. Hakcil had resigned was irrelevant, for even assuming that Mr. Hakcil was still a director of the respondent, and even if he was still alive, the company, being a separate entity from its shareholders and/or directors, could still demand vacant possession of its property from its shareholders and/or directors. I gave the applicant 30 days to vacate the subject house. Aggrieved by the ruling, the applicant filed a Notice of Appeal indicating intention to appeal to the Court of Appeal. She also filed an application dated 15 June 2020 for stay of execution of the ruling pending appeal. I heard that application for stay pending appeal but I did not find merit in it and I dismissed it on 14 July 2020. Upon dismissing the application, I gave the applicant 7 days to vacate the house or else she be evicted. It is this ruling declining stay of execution

pending appeal that is sought to be reviewed through this application which was filed on 9 February 2021.

4. The application is supported by the affidavit of the applicant. She has deposed inter alia that she is one of the directors of the respondent. She has further deposed that she has been residing on the suit property by virtue of being the legal wife of Mr. Hakcil who held 20 shares in the respondent company. She has averred that she has since commenced succession proceedings over the estate of the deceased. She has reiterated that her late husband never resigned as director or shareholder of the respondent and that the purported letters of resignation are forgeries. She has annexed a copy of a forensic report dated 27 November 2019 which supports this allegation. She claims that the orders sought to be reviewed are of a summary nature which then renders the pending suit an exercise in futility.

5. The application is opposed by the replying affidavit of Mariam Abdikadir a director of the respondent. She has reiterated that the suit property belongs to the respondent. She has mentioned that despite filing a Notice of Appeal, no appeal has ever been filed by the applicant. She has deposed that after the ruling of 14 July 2020, the applicant did not vacate the house within the 7 days that she was given which forced the respondent to evict her thus incurring costs which the applicant is yet to pay. She avers that the issues raised in this application are the same as those raised by the applicant while resisting the application for a mandatory injunction. She does not think that the application discloses any error apparent on the face of the record and there is no discovery of any new facts. She was also of opinion that the application has been filed after undue delay and is overtaken by events as the execution of the orders of mandatory injunction is complete.

6. I directed that the application be canvassed by way of written submissions and I have taken note of the submissions of the applicant, now acting in person, and of counsel for the respondent. In her submissions, the applicant inter alia submitted that the orders issued were Orders of summary nature and finality which renders the pending suit an exercise in futility. She submitted that at the time of canvassing the application she did not have the forensic report which she claims confirms that the signatures on the documents purported to be resignation documents authored by her late husband were forgeries and that her late husband never resigned as a director of the respondent. She further submitted that had this material fact and evidence been in her possession, and if she had produced it during the hearing of the previous application that gave birth to the ruling of 14 July 2020, the court would have come up with a different ruling.

7. Mr. Abdulahi, learned counsel for the respondent, submitted that the matters which the applicant is claiming to be new and important are matters which the applicant raised in her defence to the main suit and in her response to the respondent's application for eviction hence there is no discovery of new matter. Counsel submitted that there is no error apparent on the face of the record and that what the application challenges is the court's assessment of the evidence. He referred me to various authorities which hold that such challenge is best suited for an appeal and not review. He concluded by submitting that this application was filed after inordinate delay. Counsel submitted that the defendant's claim that her late husband never resigned as a shareholder of the plaintiff was determined by the court in both rulings and the same cannot amount to a discovery as it was well within the knowledge of the defendant.

8. This is an application for review and the provisions of Order 45 apply. Order 45 Rule 1 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

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 the review.

9. It will be seen from the above, that to succeed in an application for review, one needs to demonstrate that there is discovery of new matter which could not be produced at the time the order was made or alternatively demonstrate a mistake or error apparent on the face of the record. The court may also allow an application for review where there is sufficient reason. In all this, such application must be filed without unreasonable delay.

10. In this application, the respondent alleges that the forensic report is a new and important matter or evidence and that if the court had taken it into account, the court's mind would have been swayed to arrive at a different decision. In both rulings, the one dated 4 June 2020 and that of 14 July 2020, I addressed the issue of the late husband of the applicant being a shareholder of respondent vis-à-vis the right to reside and keep possession of the house on the suit properties. My view was that even assuming that the applicant's husband was a shareholder of the plaintiff, that would not automatically have entitled him, and by extension the applicant, the right to reside in the suit house, since a company is separate from its members. I was alive to this legal position which holds true following the case of *Salomon vs Salomon (1897) AC 22*. The issue of whether the transfer of shares and resignation of the defendant's late husband was illegal or not is therefore not related to occupation of the suit land. Even assuming that the alleged transfer of Mr. Hakcil's shares was held to be illegal, I am not persuaded, at least at this stage of the proceedings, that, this, by itself, would entitle the applicant to reside and possess the house. The forensic report would therefore not have assisted the applicant and would not have swayed me to hold any differently. In other words, the forensic report does not qualify as material to the rulings of 4 June 2020 and 14 July 2020. My unsolicited advice to the applicant is that if she wishes to challenge the transfer of the shares that belonged to her late husband then she should consider filing suit over that issue, which, as I have taken the trouble to demonstrate, is completely different from the issues at hand.

11. Even if I had found that there is new evidence which was material, I would still have dismissed the application for reason that it has been filed after unreasonable delay. The applicant has already been evicted from the premises. If she had wished to have some reprieve, she ought

to have filed her application before her eviction.

12. The applicant further based her application on the reasoning that the orders delivered on 14 July 2020 were of summary nature, which then renders the pending suit an exercise in futility. For the record, I was alive to the fact that the orders sought by the respondent were drastic. My analysis of the facts however led me to the finding that the respondent is entitled to an order of a mandatory injunction. This was upon my assessment of the evidence presented before me, and if the applicant feels that my assessment was wrong, that would be a ground for appeal but not review. In other words, a court's perceived error, in the manner in which it has analysed the facts and evidence, and the conclusion that it has subsequently reached upon such analysis, is not an error apparent on the face of the record so as to support an application for review. That would be an error on merits which can only be subjected to an appeal but not a review. If this was not the case, then it would negate the very principle upon which appeals are based. It will also bring upon the unpleasant scenario where parties go back to the same court ad infinitum asking the court to change its mind. This would make a mockery of the process of court and the administration of justice.

13. It will be seen that I see no merit in this application and it is hereby dismissed with costs.

14. Orders accordingly.

DATED AND DELIVERED THIS 20TH DAY OF JANUARY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA