REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURTAT MOMBASA

ELC JR NO. 7 OF 2017

SPIRE BANK LIMITED.....EX PARTE APPLICANT

VERSUS

LAND REGISTRAR.....RESPONDENT

AND

1. ABDULGADER SHARIFF SALEH

2. NUR SHARIFF OMAR.....INTERESTED PARTIES

RULING

The application is dated 17th June 2021 and is brought under sections 80 of the Civil Procedure Act Order 51 Rule 1 of the Civil Procedure Rules, the inherent jurisdiction of the court seeking the following orders;

1. That this Honourable court be pleased to review the ruling delivered on 26th May, 2021.

2. That the costs of the Application be provided for.

It is based on the grounds that in the ruling delivered on 26th May, 2021 the Court indicated that an Appeal was not filed against the earlier ruling of this Court of 30th January, 2018 for which the Applicant filed a Notice of Appeal on 12th February, 2018. The correct position is that the Applicant appealed this Court vide Civil Appeal No. 52 of 2018 SPIRE BANK LIMITED -VS- LAND REGISTRAR & 2 OTHERS (MOMBASA) in which Appeal the Court of Appeal reversed the decision of this Honourable Court and the said decision transmitted to this Honourable Court. That therefore there is an error apparent on the face of the record and this Honourable Court should review its ruling to correct the apparent error. It is the intent of Justice and the overriding Objective principle that the orders sought be granted.

The 1st and 2nd interested parties opposed the application stating that it is incompetent and an abuse of Court process in that the Court of Appeal pronounced itself and gave orders and directions on how this matter was to process. (The ruling is marked as DOA-1). The Court of Appeal gave orders inter-alia that; The Ruling and Order of the Environment and Land Court on 30th January, 2018 is set aside and Notice of Motion dated 17th May, 2017 hereby reinstated. That the Appellant do file and serve an authorization of such duly authorized officer under the seal of the company within 15th days from the date hereof. That based on the decision of the court filing and service of the authorized resolution to sue under the company seal from the date of the judgement ought to have been done on or before 6th August, 2019. That the Applicant is yet to comply with the said order, has not satisfied the binding orders of the Court of Appeal to date. That the trial Judge from his own wisdom noted the aspect of non-compliance with the Court of Appeal decision and therefore applied his knowledge to disallow the application. That because the Court of Appeal's decision is binding no other Courts apart from the Appellate Court itself or Supreme Court can set aside the ruling. That the entire application is an abuse of the court process because the Applicant never notified the Interested Parties on the happenings of the Court or directions litigated ex- parte and applied inexcusable delay tactics to circumvent the wheels of justice at the detriment of the interested parties who stand to suffer prejudice and embarrassments. That the Applicant also abused the court process by failure to disclose the material facts to this Honorable Court by attaching a judgement that he has deliberately and unwillingly omitted Page 5 which carries contents of the Court's order just to mislead this Court (the annexed judgment is marked as DOA-2).

This court has considered the application and the submissions therein. It is based on the grounds that in the ruling delivered on 26th May, 2021 the Court indicated that an Appeal was not filed against the earlier ruling of this Court of 30th January, 2018 for which the Applicant filed a Notice of Appeal on 12th February, 2018. That the Appeal the Court of Appeal reversed the decision of this Honourable Court and the said decision transmitted to this Honourable Court. That therefore there is an error apparent on the face of the record and this Honourable Court should review its ruling to correct the apparent error. In the case of Kwame Kariuki & Another vs. Mohamed Hassan Ali & 4 Others (2014) eKLR, the Court observed that:-

"It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal."

In the case of Mwihoko Housing Company Limited vs Equity Building Society (2007) 2 KLR 171 is relevant. It was held, that;

"A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;

"An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made…"

Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section 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."

The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. I have carefully perused the court file and the court of appeal decision dated 11th July 2019. Indeed it allowed the appeal and set aside the decision of the court dated 30th January 2018 with conditions. The Notice of Motion dated 17th May, 2017 hereby reinstated and that the Appellant do file and serve an authorization of such duly authorized officer under the seal of the company within 15th days from the date hereof. I see no mistake or error or omission on the part of the court as Yano J delivered his ruling on the 30th January 2018 and the second one on the 26th May 2021. The court of appeal decision was made on 11th July 2019 and supersedes any decision of this court before that. In Court of Appeal, Civil Appeal No. 2111 of 1996, National Bank of Kenya vs Ndungu Njau, the Court of Appeal held 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 evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law".

From the above provisions of the law, authorities cited and facts of this case I find that the applicant has failed to show any mistake or error apparent on the face of record and/or any sufficient reason to enable this court set aside its decision. The applicant needs to comply with the orders of the Court of Appeal as stated in its judgement and any variation should be sought in that court whose decisions are binding on this court. I find this application is not merited and I dismissed it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 18TH JANUARY 2022.

N.A. MATHEKA

JUDGE