REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO.168 OF 2011

(Being an appeal against the Ruling dated 28th October 2011 of the Senior Principal Magistrate, S. Mungai in Machakos CMCC No. 1495 of 2010)

STEPHEN KAVOO MWAU.....1ST APPELLANT

MBAKA KITHUKA.....2ND APPELLANT

FRANCIS MATIVO MANG'OKA.....3RD APPELLANT

VERSUS

JOSEPH MATHUKILU KIVUNGI.....RESPONDENT

RULING

1. The application dated 8th July, 2013 seeks the following orders:

   (1) ..... *(spent)*

   (2) That an interlocutory order of stay do issue suspending the effect and operation of the ruling delivered on 28/10/2011 in CMCC No. 1495 of 2010 pending the hearing and determination of this application.

   (3) That the Honourable Court be pleased to review its ruling delivered on 31st October, 2012.

   (4) That costs of this application be provided for.

2. The background facts to the application emanate from the lower court case in CMCC No. 1495 of 2010 which is still pending. Orders were issued by the lower court barring the Applicant's herein from accessing the said premises or undertaking any activities therein pending the hearing and determination of the suit.

3. The applicants herein were dissatisfied with the said ruling and appealed to this court. Subsequently the Applicants filed the application dated 11th November 2011 seeking orders of stay of the lower court orders pending the hearing and determination of the appeal. The applicant also sought orders for stay of the lower court proceedings. The application was heard and a ruling delivered on 31st October, 2012 by

this court *(Asike Makhadia J – as he then was).* The said ruling dismissed the application dated 11th November, 2011.

4. The Applicant then proceeded to file the current application. A preliminary objection was raised against the application. The preliminary objection was dismissed on 25th November 2014, thereby paving the way for the hearing of the application.

5. According to the affidavit in support of the application, the import of this court's ruling dated 31st October, 2012 is that the Applicants are unable to access their homes. It is further deponed that the Applicants have been arrested on allegations of contempt of court and risks being taken to court. It is contended that there is an apparent error on the face of the court record as the High Court ruling referred to prayer No. "b" of the application when there was no such prayer.

6. The application is opposed. It is deponed in the replying affidavit that the issue of stay is now *res judicata* by virtue of the ruling already delivered herein. That the application has been filed after inordinate delay which has not been explained. That the application is an afterthought and an abuse of the court process as it was filed following the initiation of contempt of court proceedings by the Respondent. It is asserted that there is no error on the face of the court record capable of being reviewed.

7. When the application came for hearing, the parties left it to the court to determine the matter based on the affidavit evidence on record.

8. Under **Order 45(1)** of the **Civil Procedure Rules** –

> ***(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 or judgment to the court which passed the decree or made the order without unreasonable delay."***

9. It has been argued by the Applicant's side that there is an error apparent on the court record. The only error that can be discerned on the face of the court record is the referral to prayer No. "b" instead of prayer No. "2" of the application dated 11th November, 2011. That error is accordingly corrected.

10. However, on the other matters raised in respect of lack of access to the Applicant's home and being cited for contempt of court and the natural consequences of the ruling dated 21st October 2012, it is noted that the application at hand is for review. Some of the matters raised by the Applicant could have only been addressed by way of appeal against the ruling complained about. As stated by the Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** while referring to the case of **National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996** *(unreported)* where it was held:

> ***"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. I will not be a sufficient ground for review that another judge could have taken a different view of the matter. More can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached n erroneous conclusion***

of law. Misconstruing a statute or other provision of law cannot be ground for review."

"... the learned judge. He made a conscious decision on the matters in controversy and 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. Otherwise we agree that the learned judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it."

11. With the foregoing, I find no merits in the application and dismiss the same with costs.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 28th day of May, 2015

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B. THURANIRA JADEN

JUDGE