



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 296 OF 1990

OGENDO KEROSI JASON.....PLAINTIFF

VERSUS

DANIEL AKOYA NYAMBEGA.....DEFENDANT

RULING

1. Before me for ruling is the defendant's application dated 13th February 2013 though it is stated to be signed by S. M Sagwe advocates for the plaintiff. The application is expressed to be brought under Order 45 Rule (1) and (2) of the Civil Procedure Rules and Section 80 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and seeks the following orders:-

- 1. That this Honourable court be pleased to review its judgment herein and set aside.**
- 2. That there be a stay of execution pending the hearing and determination of the application.**
- 3. That the costs of the application be provided for.**

2. The defendant/applicant grounds his application on the ground that there is a mistake or error apparent on the face of the record and urges the court to exercise its discretion to review the judgment. The defendant/applicant has sworn an affidavit dated 13th February 2013 in support of the application where he depones that the hearing of the suit proceeded ex parte in the absence of his advocate whom he had instructed to represent him in the suit. The defendant avers that the suit proceeded to hearing without him filing a defence and that prejudiced him as critical facts relating to the suit property **Majoge/Magenche/373** which he would have raised in his defence were omitted leading to judgment being entered against him. The defendant states the suit property was ancestral land where he had lived all his life and was dependent on the said land for his livelihood.

3. The plaintiff/respondent filed a replying affidavit sworn on 4th November, 2013 in opposition to the defendant's application for review. The plaintiff/respondent depones that the defendant's application has been overtaken by events as the defendant was evicted from the plaintiff's parcel of land and annexes an order of eviction given on 25th March, 2013 and issued on 15th April 2013. The plaintiff further states the defendant is guilty of inordinate delay in bringing the application and that the application lacks any merit and is an abuse of the court process and should be dismissed with costs.

4. The parties filed written submissions with the defendant/applicant filing his submissions belatedly on 5th October 2015. The plaintiff for his part filed his submissions on 9th January 2015. The

defendant/applicant argues in the submissions that the land decreed to the plaintiff was ancestral land and that the judgment would occasion injustice if not reviewed. The defendant further submits it was an error on the part of the court to proceed with the hearing when the defendant was not represented and/or not to allow the plaintiff to engage the services of an advocate with the result that the defendant was not afforded an opportunity to properly present his case with the result that crucial evidence and facts were omitted to the defendant's prejudice.

5. The plaintiff reiterates the facts as set out in his replying affidavits and asserts that the defendant's application has been overtaken by events, is unmeritorious and is an abuse of the court process and that the same has not been brought without undue delay. Order 45 rule (1) provides the conditions that an applicant on an application for review must satisfy in order to succeed.

Order 45 rule (1) of the Civil Procedure Rules provides as follows:-

45. 1 (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, deserve 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.

6. From the above provision it is clear an applicant for review must prove and demonstrate the following in order to succeed:-

i. The judgment, order or decree sought to be reviewed has not been appealed from;

ii. That there has been discovery of new and important matter or evidence which was not available and could not after exercise of due diligence have been available at the time the ruling/order was made; or

iii. There was a mistake or error apparent on the face of the record; or

iv. There is some other sufficient cause, and

v. The application has been made without unreasonable delay.

The judgment that the defendant/applicant wishes to have reviewed was entered by **V. V. Patel J.** on 16th December 1992. The court record shows that the plaintiff and the defendant were both in court on the 16th December 1992 and testified in support of their respective cases. The record does not show that the defendant applied to be represented by an advocate. The record further shows there have been various applications for execution of the judgment and on 28th June 1994 an eviction order was issued against the defendant and a further eviction order was issued on 2nd April 2003. There is yet the further eviction order issued on 15th April 2013 which the plaintiff avers was executed and that the defendant is no longer in the plaintiff's parcel of land.

7. The defendant basis his application for review principally on the ground that there was a mistake and/or error apparent on the face of the record. I have reviewed the record and I am unable to discern any mistake or error apparent on the face of the record to warrant a review of the judgment. The defendant

was present in court and the record does not show he applied for time to engage an advocate and was denied. The record infact shows the defendant participated at the hearing, cross-examined the plaintiff and gave evidence in support of his defence. There is no glaring mistake or error on the face of the record. I take judicial notice that there are many parties who are not necessarily represented by advocates in court proceedings and ably present their cases and courts are able to dispense justice on the basis of the evidence and cases before them.

8. The application by the defendant appears in my view to have been an afterthought. There is no explanation why the defendant took well over 20 years to bring the instant application yet he was all the time aware of the judgment and the various applications for execution of the judgment. I hold the view that the defendant's application has not been brought without unreasonable delay. The delay in bringing the application is not explained and the same is inordinate and would disentitle the defendant the discretion of the court. There is however no basis upon which the court would have exercised the discretion to review the judgment as no condition upon which review may be granted under Order 45 Rule 1 of the Civil Procedure Rules 2010 has been satisfied.

9. The defendant's application dated 13th February 2013 lacks any merit and the same is ordered dismissed with costs to the plaintiff/respondent.

Ruling dated, signed and delivered at Kisii this 27th day of November, 2015.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant

J. M MUTUNGI

JUDGE