



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC MISC APPLICATION NO. 2 OF 2021

BENARD DOEL MAKABUNI.....APPLICANT

VERSUS

LEONARD NDEMO OMBACHI T/A (Ombachi & Co. Advocates).....RESPONDENT

RULING

INTRODUCTION

1. Following the delivery of the ruling dated 21st October, 2021 in respect of the Applicant's Notice of Motion dated 17th March 2021, the Applicant filed a Notice of Motion dated 20th January, 2022 seeking the following orders:

- i. Spent
- ii. That the Honourable Court be pleased to review its orders in which the instant matter was dismissed on 21st October, 2021.
- iii. That upon not granting prayer (2) above, (sic) the Honourable Court be pleased to grant the Applicant leave to file an appeal out of time.
- iv. That the costs of this application be in the cause.

2. The application is premised on the grounds set out on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 20th January, 2022. One of the grounds raised by the Applicant is that upon perusal of the file, he had discovered that part of the proceedings filed in support of the application must have been intentionally removed after it was filed.

3. He also contends that the dismissal of his application is highly prejudicial to the Applicant who will be unfairly chased away from the seat of justice without being heard fully and the Respondent ambushed him by filing submissions without serving him. He also contended that the issue of *locus standi* had never arisen in the previous application where orders were issued in respect of an undisclosed Interested Party.

4. In his Supporting Affidavit, he deposed that there was a self-evident error apparent on the face of the record as part of the proceedings filed in support of the application dated 17th March, 2021 (page 5 of annexure BDM1) was missing from the court record. He further deposes that the Respondent did not serve him with his response to the application and therefore his application was not fully heard on its merits.

5. The application was resisted by the Respondent through his Replying Affidavit sworn on the 7th February, 2022 in which he deposes that the application is devoid of merit and is made in bad faith. He states that the application is an abuse of the court process. It is his deposition that contrary to what is deposed at paragraph 4 of the Applicant's Supporting Affidavit, there is no error as envisaged under order 45 of the Civil Procedure Rules to warrant the review of the court's ruling. He points out that the annexure "BDM1" annexed to the Supporting Affidavit demonstrates that page 5 of the proceedings in HCCC NO. 59 of 1996 wa

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7. s readily available to the Applicant but he chose to deliberately omit it from the earlier application.

8. He refutes the contents of paragraph 5 of the Supporting Affidavit and terms them as untrue, scandalous and dishonest. He adds that the Supplementary Affidavit filed by the Applicant was a direct response to the issues raised by the Respondent in his Replying Affidavit and

therefore the allegation that the Applicant was not served with the Respondent's response to the earlier application is not true.

9. He depones that under Order 45 of the Civil Procedure Rules, a party who has appealed as the Applicant has done cannot apply for review.

10. The court directed that the application be disposed of by way of written submissions and the Applicant filed his submissions. The Respondent opted not to file any submissions.

APPLICANT'S SUBMISSIONS

11. In his submissions, the Applicant submitted that he had filed a Notice of withdrawal and opted to apply for review. He contended that he had discovered that a crucial part of the proceeding containing the last page of the ruling by Justice Waweru was missing and claims that this was due to tampering by an undisclosed person. He is of the view that the application falls within the provisions of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules as there was something missing in the documents he filed earlier.

12. He has relied on the on the cases of **National Bank of Kenya Limited v Ndungu Njau Civil Appeal No. 2111 of 1996** and the case of **Sadar Mohamed v Charan Singh & Another** for the proposition that the court may review its decision for any sufficient reason as long as the reason is analogous to either an error apparent on the face of the record or discovery of new and important matter. He submitted that the application had been made without unreasonable delay. He maintained that he had not been served with the Replying Affidavit and that he was denied the opportunity to file a Supplementary Affidavit.

13. The only issue for determination is whether the Applicant has satisfied the conditions for review.

ANALYSIS AND DETERMINATION

14. The provisions that govern orders of review are found in Section 80 of the Civil Procedure Act and Order 45 (1) of the Civil Procedure Rules which provide as follows:

Section 80: Review

“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.

Order 45(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 a 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 review of judgment to the court which passed the decree or made the order without unreasonable delay”.

15. In the instant case, the Applicant has based his application on the ground that there is sufficient cause to review the ruling and orders issued on 21st October, 2021 as the said ruling was made in the absence of a crucial document which was not in the court file. The said document is page 5 of the proceedings in HCCC No. 59 of 1996 which were annexed to the Applicant's Supporting Affidavit as Annexure “BDM 1”.

16. Whereas it is true that the said page would have assisted the court in understanding why the decree in ELC Case No. 59 of 1996 was amended, it has not been demonstrated the said document that could not have been availed after the exercise of due diligence. The insinuation that someone plucked it from the court file is not supported by any evidence.

17. Be that as it may, in the ruling dated 21st October 2021, the court made a finding that the Applicant had not attached a Grant of Letters of Administration to demonstrate that he had *locus standi* to bring the said application on behalf of the estate of his late father. That position still obtains. Furthermore, the court held that there was no valid reason to have the Respondent (Leonard Ombachi T/A Ombachi & Co Advocates) made a party to the suit as he was merely representing his client.

18. Lastly, the Applicant has prayed for leave to file an appeal out of time without giving any reasons for the delay. In order to exercise its discretion to extend time within which an appeal should be filed, the court must be satisfied that there are sufficient reasons for the delay. The sum total of all these findings is that the Applicant has not made out a case for review of the ruling and orders of 21st October, 2021.

19. Accordingly, the application is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF APRIL, 2022.

J. M ONYANGO

JUDGE