



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 228 OF 2019

JOHN KENGO CHOME

KENGO NYAWA MWAJOTO

DOUGLAS CHIMAKO TSUMA

DINGO M WAJOTO NYAWA

CORNELIOUS MRISA TSUMA

SAID SIRIKO MWANYINGO.....PLAINTIFF/RESPONDENTS

VERSUS

GREENBELT WAREHOUSES LIMITED.....DEFENDANT/APPLICANT

RULING

The application is dated 31st January 2022 and is brought under Section 1 A, IB, 3 A of the Civil Procedure Act, Cap 21 Laws of Kenya, under Order 42 Rule 6, under Order 51 Rule 1 and under Rule 9 seeking the following orders:-

1. That this application be certified as extremely urgent and service hereof be dispensed with in the first instance.
2. That the honourable court be and is hereby pleased to order/direct that the injunctive orders issued in the matter herein on the 26th October, 2021 are hereby vacated/set aside forthwith.
3. That the honourable court be and is hereby pleased to order/direct that the suit herein and proceedings be stayed pending hearing and determination of this application.
4. That the honourable court be and is hereby pleased to order/direct the suit herein be struck out with costs in favour of the defendant/applicant herein.
5. That the honourable court be and is hereby pleased to order/direct that the respondents herein jointly and severally by themselves/agents/assignee have no claim/interest over the suit property in terms of the memorandum of understanding executed on 13th September 2018 and consequently the suit should be struck out with costs.
6. That the honourable court and hereby pleased to order/direct that the applicants herein are the legal/beneficial/registered oversees of the suit property and should be protected as persuaded under the constitution of Kenya Article 40.
7. That the honourable court be and is hereby pleased to issue a mandatory order restraining the plaintiffs/respondents herein jointly and severally by themselves agents, third parties, employees, and/or any other party claiming whatsoever from interfering claiming/trespassing/ developing/ selling/charging/mortgaging/constructing/plaintiing/farming/grazing/ploughing and/or interfering in any other manner with suit property.
8. That the honourable court be and is hereby pleased to order/direct the Kwale County Police Commander through the O.C.S Samburu Police do ensure that any person/party on the subject property if any are evicted/removed with their developments and ensure that the applicants/plaintiffs enjoy quite possession of the property.

9. That the honourable court be and is hereby please to order/direct the respondents/plaintiffs to pay/deposit the sum of Kshs. 5 million in court as security for costs of the suit.

10. That the honourable court be and is hereby pleased to order issue any other order(s) it may deem fit in the circumstances.

11. That costs of the application be provided for.

It is based on the grounds that the Honourable Court issued a Ruling on the 26th October, 2021 which orders are prejudicial to the Defendant since they are the Registered Owners. That the said order is punitive in its nature and drastic and highly prejudicial to the Defendant, considering that the Plaintiffs may temper with the suit property. That the Plaintiffs are not the owners of the suit property having admitted the same vide a Memorandum of Understanding dated 13th September 2018. That the Respondents have admitted that they are not the owners of the said property and they are not in occupation of the said property. That they have already received the agreed amount for removing the graves and vacating. That the Plaintiffs'/Applicants should be compelled to deposit the sum of Kshs. 5,000,000/= as costs.

The 1st Respondent stated that he is the lawful owner of all that piece of land measuring approximately 256 acres hereinafter referred to as the 'suit property' situate in Gora Village, Samburu, Kwale County. That the Defendant fraudulently acquired title to the entire suit property instead of a portion thereof measuring approximately 102 acres for which it has never completed the balance of the purchase price. That on 18th December, 2019 he sought among other orders, an order for a temporary injunction restraining the Defendant, its agents and/or servants or any other person acting under its authority from carrying out developments, trespassing upon, cultivating, fencing, selling and/or in any other way dealing with the suit property measuring approximately 256 acres pending hearing and determination of the suit herein. That on 26th October, 2021 this Honourable Court allowed the application dated 18th December, 2019 and issued injunctive orders. That the purpose of the said injunctive orders is to preserve the suit property and to allow parties to be heard on their grievances and not to oppress the Defendant pending hearing and determination of the suit. That the Defendant's application dated 31st January, 2022 is an abuse of the Court process and meant to delay the fair hearing and determination of the suit herein.

This court has considered the application and the submissions therein. 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 Mwhiko 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. The applicants submitted that ruling on the 26th October, 2021 was prejudicial to the Defendant since they are the Registered Owners. That the said order is punitive in its nature and drastic and highly prejudicial to the Defendant, considering that the Plaintiffs may temper with the suit property. 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. There is no new evidence that has come to light. I find the application dated 31st January 2022 is not merited and I dismissed it with costs. Parties are advised to take a hearing date in this matter.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD MARCH 2022.

N.A. MATHEKA

JUDGE