



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
ENVIRONMENT AND LAND COURT
LAND CASE NO. 85 OF 2012

GULAM MARIAM NOORDIN.....PLAINTIFF/APPLICANT

=VERSUS=

JULIUS CHARO KARISA.....DEFENDANT/RESPONDENT

RULING

Introduction:

1. What is before me is the Plaintiff's Application dated 4th March 2014, filed pursuant to the provisions of sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act and order 45 Rule 1 (1) of the Civil Procedure Rules. The Application is seeking for the following orders:
- a. **That this Honourable court be pleased to stay execution of decree issued on 5th September 2013 until further orders of this Honourable Court.**
 - b. **That this Honourable court be pleased to review and/or set aside judgment delivered on the 12th July 2013.**
 - c. **That this Honourable Court be pleased to order that the suit herein is re-opened for further hearing by granting the Applicant leave to call further witnesses.**

The Plaintiff's/applicant's case:

2. The Plaintiff/Applicant has stated in her affidavit that on 12th July, 2013, this court delivered its Judgment in favour of the Respondent; that the Applicant failed to avail her witnesses to tender evidence and that the Applicant has now traced her witnesses who have very vital evidence.
3. It is the Plaintiff's deposition that this court should review its Judgment delivered on 12th July 2013 and re-opens the suit for hearing.

The Defendant's/Respondent's case:

4. In his Replying Affidavit sworn on 19th March, 2014, the Defendant deponed that the Plaintiff was quick to close her case and that it was the court, on its own motion, that sought to have more witnesses to shed light on the issues at hand; that a delay of seven months to file an Application for review is inordinate and that the Applicant has not met the conditions for the grant of a stay of execution.
5. The parties appeared before me on 31st March 2014 and made oral submissions which I have

considered.

Analysis and findings:

6. The law relating to the review of a decree or order of the court is provided for under Order 45 of the Civil Procedure Rules. Order 45 Rule 1 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.”**

7. According to the Plaintiff's deposition, she has now discovered new and important evidence which she would wish to tender. The other ground that the Applicant is relying on in her Application is that there is an error apparent on the face of the record because the court, without the assistance of a surveyor, proceeded to take measurements of the road reserve adjacent to the suit property without the technical know-how on matters pertaining to survey.

8. The new evidence that the Plaintiff now claims she has come across is in the form of three witness statements by Hamit Salim Sulum, Nelson Gowa Mutengo and Joseph Kashuru Mumbo. All that the said prospective witnesses have stated in their statements is that the Plaintiff is the true owner of the suit property and that the Defendant is not in occupation of the same.

9. Hamit Salim has stated in his statement that he has known the Plaintiff for more than 20 years as a family friend. The Plaintiff has not stated why she never called the said family friend of 20 years to testify on her behalf during trial, or Mr. Nelson Gowa Mutengo, who surveyed the suit property in 1992. No reason has also been given why one Joseph Kashuru Mumbo, the Chief of Malindi town between 1963 to 1988 was not called to testify.

10. Indeed, the record shows that after the Plaintiff testified, the Plaintiff proceeded to close her case. She neither applied for adjournment to call more witnesses nor stated that she was unable to procure the attendance of the witnesses mentioned in the current Application.

11. In the absence of evidence that the Plaintiff was unable to procure the attendance of the said witness after exercising due diligence, I find that her claim is unmeritorious.

12. On the issue as to whether the measurements that the court took at the site to ascertain the distance of the Defendant's house from the road is an error apparent on the face of the record, I find and hold that it is not.

13. In the case of **National Bank Ltd Vs- Ndungu, Civil Application no. 211 of 1996**, the Court of Appeal defined what an error on the face of the record entails as follows:

“A review may be granted wherever the Court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omissions must be self-evident and should not require an elaborate argument to be established. It will not be a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for

review.”

14. The author of Chittaley & Rao in the Code of Civil Procedure, 4th Edn. Vol. 1 page 3227 while explaining the distinction between a review and an appeal had this to say:

“A point which may be a ground of appeal may not be a ground for an application for review. Thus an erroneous view of evidence or of law is no ground for a review though it may be good ground for an appeal.”

15. An erroneous view of the evidence or the law by a court pertaining to what is not a road reserve cannot therefore be a ground for a review. If the Applicant is aggrieved with the manner in which the court received evidence, then the only option she has is to file an appeal and not to file an Application for review as she has done.

16. For the reasons I have given above, I find that the Application for review of my Judgment of 12th July 2013 is unmeritorious.

17. Having disallowed the prayer for review of the Judgment, the Plaintiff's claim for a stay of execution cannot stand. In the circumstances, the Plaintiff's Application dated 4th March, 2014 is hereby dismissed with costs.

Dated and delivered in Malindi this 30th day of **May**, 2014

O. A. Angote

Judge