



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 372 OF 2012

DAVID NJOGU KARANJAPLAINTIFF

VERSUS

THE COMMISSIONER OF LANDS1ST DEFENDANT

THE PRINCIPAL REGISTRAR OF TITLE2ND DEFENDANT

NJUGUNA NGUJIRI.....3RD DEFENDANT

AGNES MUMBI NGUJIRI.....4TH DEFENDANT

RULING

The application before this court for determination is the Notice of Motion dated 25th June 2013 brought under order 45 Rules 1(1) of the Civil Procedure Rules section 1A, 1B and 3A of the Civil Procedure Act and Article 159(1) (d) of the Constitution seeking for orders that this court reviews its judgment delivered on 14th June 2013 and set aside the orders of dismissal of the suit. The applicant is also seeking this court to consider the summons and the plaint served on the 1st and 2nd Defendant as properly served.

The application is premised on the grounds stated on the application and the supporting affidavit of David Njogu Karanja who stated that judgment in this suit was delivered on 14th June 2013 and the same has been read to him by his advocates. He says that the basis of the court's decision was founded on the fact that the 1st and 2nd defendant s were never served with the court papers. He avers that the 1st and 2nd Defendants were served with the plaint and summons and that the failure to include that information in the affidavit of service was not deliberate but inadvertent. He therefore persuades this court to review the Judgment as there was an error or mistake on the face of the record of not informing the court of such service to the 1st and 2nd defendants. He avers that he has been greatly affected by the judgment and honestly believes that the mistake his advocates should not be visited upon him as the said suit property in the pleadings accommodates his home and the defendants connived to deny him ownership by failing to issue him with title documents he therefore stands to lose his home and other investments in the suit parcel of land unless the court reviews its judgment as prayed for in the application.

The applicant filed his written submissions on 18th November 2013 in which he reiterated the contents in his supporting affidavit .He relied on Article 159 (2) (d) of the Constitution where it states that justice shall be administered without undue regard to procedural technicalities.

I have considered the plaintiff's affidavit and his submissions. I have also carefully gone through the court record paying studying every detail in the court record and noted the following:

This suit was commenced vide a plaint on 25th June 2012, summons were ready by 27th June 2012. There is an affidavit of service on record dated 23rd July 2012 deposed by Paul K. Mwanja who stated that he served the 4th Defendant. It is also noted that he did not find the 3rd Defendant from his averment in the affidavit. On 17th September 2012 the plaintiff requested for judgment against all the defendants under Order 10 Rule 6 which request was declined for the reason that he had not served all the defendants. He later filed another request for judgment against the 3rd and 4th Defendants on 2nd October 2012 and on 4th October 2012 interlocutory judgment was entered against the 3rd and 4th Defendants and the plaintiff was directed to set down the matter for formal proof. On 10th April 2013 the Plaintiff and his witness testified in court and a judgment was rendered on 14th June 2013.

The decision of the court at page 3 paragraph 4 the court noted that there was no evidence that the 1st and 2nd Defendants were served with summons to enter appearance therefore interlocutory judgment was not entered against them without evidence of service of summons the court cannot find and hold that the 1st and 2nd Defendant were served with served with summons to enter appearance and they failed to do so. The court also noted that the orders sought by the plaintiff were directed to the 1st and 2nd Defendants. If the 1st and 2nd Defendants were not served with summons to enter appearance then the sought cannot make orders against them without allowing them an opportunity to be heard and noted that failure to serve summons to enter appearance goes to the root of the case.

But before delving into the substantive issues that have been placed herein for determination, this court wishes to point out that it has been held in previous cases that an application that has no order or decree which a party intends to review attached to it, is fatally defective and ought to be dismissed right at the outset. In the case of **Uhuru Highway Development Limited vs Central Bank of Kenya & 2 others, HCCC No 29 of 1995** Mbaluto J stated thus:—*“The most fatal aspect of this application is however, the fact that the Plaintiff has not even attempted to comply with Section 80 of the Civil Procedure Act with respect to the extraction of the relevant order the failure by the applicant to extract a formal decree was fatal to the application and it should, on that ground fail”*. Evidently, the Plaintiffs did not annex a copy of the decree they intended this court to rely. Nevertheless, in view of **Article 159 (2) (d) of the Constitution of Kenya, 2010** which mandates the court to hear and determine matters without undue technicalities, this court will go into the court record to establish what exactly the learned judge said with a view to expeditiously disposing the business of the court as has been stipulated in Section 1B (1) (b) of the Civil Procedure Rules, 2010.

Section 80 of the Civil Procedure Act states that *“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, rule 1 in which this application is anchored states that *“(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”.

The scope for review of a decree or order is therefore limited to a situation where an applicant has discovered new and important evidence which was not available at the time the decree was passed or where there is a mistake or error apparent on the face of the record or for any other sufficient reason. The Court of Appeal in this case of **National Bank of Kenya v Ndung'u Njau Civil Appeal No. 211 of 1996** stated that, ***“A review will be granted whenever the court considers it is necessary to correct an 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. 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.”***

After a careful analysis of this matter, this court has come to the conclusion that the summons to enter appearance annexed to the applicant’s supporting affidavit could not be deemed to have been new or important fact or evidence, which after the exercise of due diligence, was not within the Plaintiff’s knowledge or could not be produced by them at the time when the learned judge delivered her ruling on 14th June 2013.

Consequently, this court hereby rejects the plaintiff’s application noting that this is not a proper case for a review of the judgment in question with costs to the Respondent.

It is so ordered.

Dated, signed and delivered this **23rd** day of May , 2014

L.GACHERU

JUDGE