



REPUBLIC OF KENYA

High Court at Bungoma

Environmental & Land Case 91 of 2012

**EZEKIEL WEKHOMBA NANDULI(*Suing as administrator of the estate of*
NAMBILI WEKHOMBAPLAINTIFF**

VERSUS

TITUS MAONGA..... 1ST DEFENDANT

COSMAS SOITA 2ND DEFENDANT

RULING

The application before me is the one dated 10th July 2012 and filed in court on 11th July 2012. It seeks orders;

1. That service of this application be dispensed with in the first instance.
2. That this application be certified as urgent and that same be heard on priority basis and the same be heard *ex parte* in the first instance.
3. That pending the hearing and determination of this application there by a stay of execution and or enforcement of the decree herein and all consequential orders herein.
4. That this honourable court be pleased to review or vary its judgment delivered on the 2nd February, 2006.
5. That cost of this application be provided for.

The application is opposed and the respondent has filed a replying affidavit in opposition sworn on 17th July 2012.

When this matter came up before me on 10th December 2012, Mr. Kassim appearing for the plaintiff/respondent stated to the court that they had not filed their written submissions because the applicants had not served them with any. Mr. Juma for the defendant/applicant sought more time to file their written submissions. The matter was thus scheduled for further mention on 18.12.12.

On 18.12.12 Mr. Juma appearing for the defendant/applicant informed the court that they had not filed any submissions and asked the court to rely on the notice of motion and supporting affidavit to make a ruling. There was no representation for the plaintiff/respondent on this date. I did therefore give a ruling date for 22nd January 2013.

What the applicant seeks in his notice of motion is for this court to vary or review the judgment delivered on 2nd February 2006.

On perusal of the file, I note that the applicant had on 20th August 2006 made application to set aside the judgment but the same was dismissed by the judge on 7th July 2007 for the reasons set out in that ruling. Thereafter there were objection proceedings filed by the affected parties. The applicant didn't go on appeal on this judgment nor on the decision dismissing his application to set aside the judgment.

In his affidavit in support of the present application at paragraph 14 he states that he has got new and important evidence that was not before the court at the time of trial.

At paragraph 15, he says the new evidence is the exhibit produced by the plaintiff during the hearing was fraudulent, forged, mutilated, uttered or altered to suit the plaintiffs. He went further to explain the nature of fraud at paragraph 16 and 18 of that affidavit. This information was brought to his attention by previous counsel of the respondent vide his letter dated 13th April 2010 received by the applicants advocates Ms. Elizabeth Chungu & co. advocate on 29th April 2010 and shown to the applicant on 14th July 2012. What I miss out is, why the applicant was not shown this letter in 2010 by his counsel unless there was a mistake in typing of the dates on the affidavit yet the applicant was suffering from the execution processes being undertaken by the respondent.

Be that as it is, I wish to analyze the content of this letter if it warrants this court to review the judgment of 2nd February 2006. The said report was prepared by a Mr. P.M. Kinyanjui, Forestry Extension Officer, Kimilili.

According to the applicant, this report was meant for land title KIMILILI/KIMILI/1668 AND 1829 in favor of one Shem Nalinya Sibitali made on 28th August 2002 and not 28th December 2003. Other than this allegation in paragraph 16 of the supporting affidavit and the letter from Kraido & co. advocates, there is no sworn affidavit by Shem Nalinya that he ever had a similar complaint and that his report was lost while in the hands of his advocates Ms. Kraido & co. advocates. There is no report made by the said firm of advocates either against the respondent or generally reporting loss of documents to the police, the applicant has also not shown any communication from the forestry extension office disowning this report as having been prepared in favour of the respondent.

The applicant on his own words at paragraph 20 states that on investigation of O.B of divisional forestry office, there was nothing to support the plaintiff's report in their records. No copy of this O.B of this date has been shown to this court to verify this information. At paragraph 19, he avers the DCIO is ready to investigate this fraud if the court allows him. I do know the DCIO does not need this court's permission to investigate any complaints lodged by members of the public such as this one by the applicant. In summary, the applicant has presented to this court a document which only favors the respondent and no contrary evidence to verify the fraud allegations. This court does not have powers to do investigative duties to confirm whether the exhibit was forged or altered to suit the respondent.

On the face of it, the said exhibit does not show clearly the alleged alterations or forgery.

I agree with the respondent at paragraph 11 of his replying affidavit that the applicant is increasing the costs/interest on the decree by delaying the payment instead of negotiating for concessions from the respondent.

In Mulla on the Code of Civil procedure, 16th Edition at page 1191, the learned authors state that

“..... the scope of power to review envisaged under order 47 rule 1 of the CPC is very limited and the review must be confined strictly only to errors apparent on the face of the record.

Re-appraisal of the evidence on record for finding out the error would amount to exercise of appellate jurisdiction which is not permissible by statute.”

Further in the case of Kithoki Vs. Kioko (1982) KLR 177 at page 181 the court of appeal held that

“The civil procedure Rules order XLIV demands inter alia the application must strictly prove the grounds of mistake or error apparent on the record failing which the application will not be granted.

From the above citations, the present application has not proved or shown the error apparent on the record. The applicant has left loopholes which this court cannot fill on his behalf. There is no new evidence which he has presented to this court other than unsubstantiated allegations of fraud, forgery and alterations on a document. I do dismiss the application for failing to meet the grounds for review with costs to the respondent.

RULING read and delivered in open court this 22nd day of January 2013.

A. OMOLLO

JUDGE