REPUBLIC OF KENYA

High Court at Meru

Civil Suit 13 of 1996

M'RUKUNGA M'MBOROKI…….PLAINTIFF/RESPONDENT

VERSUS

JUSTUS M'INOTI M'MWAMBA ….....…1st DEFENDANT/APPLICANT

ATTORNEY GENERAL…….....……..2ND DEFENDANT

R U L I N G

The 1st defendant/applicant filed Notice of Motion pursuant to Order 45 Rule 1, Order 3 Rule 9A of the Civil Procedure Rules, Section 1, 1A and 3A of the Civil Procedure Act seeking to be granted orders of inhibition against title No. Nyaki/Thuura/1911 and Nyaki/Thuura/1912. The applicant further sought orders of review and setting aside of the ruling delivered on 3rd November, 2011 and all subsequent orders thereunder with costs of the application.

The grounds in support of the application are stated on the face of the application. The application is supported by supporting affidavit of the applicant deponed by himself. The applicant attached several annextures to the affidavit in support of his application. The application is opposed. The respondent swore a replying affidavit and annexed annexures in support of his affidavit. The respondent also filed grounds of opposition. The 2nd defendant/respondent on his part filed grounds of opposition.

When the application came up for hearing, this court heard oral submissions by Mr. Kimunya, learned Advocate for the applicant, Mr. Kirima learned Advocate for the plaintiff/respondent and Mr. Menge, learned State Counsel for the Attorney General, the 2nd defendant/respondent. This court has carefully considered the submissions. It has also read the pleadings filed by the parties herein in support of their respective opposing positions.

The issue for determination is whether the applicant has laid sufficient basis for this court to grant orders of inhibition and grant review of its orders dated 3rd November, 2011.

In the present application the facts are more or less not in dispute. The plaintiff/respondent filed this suit on 31st January, 1996 against the 1st defendant/applicant and 2nd defendant/respondent herein seeking inter alia a declaration that the transfer of land Parcel No.Nyaki/Thuura/1911 to 1st defendant/applicant was illegal hence null and void. The 1st defendant/applicant soon thereafter entered appearance on

12/2/1996 but failed to file defence, consequently interlocutory judgment was entered against 1st defendant on 16th October, 1996. That on 15th September, 2005 judgment was delivered in favour of the plaintiff/respondent in which the Honourable court held inter alia the transfer of land parcel Number Nyaki/Thuura/1911 by the Meru Land Registrar to 1st defendant/applicant was illegal, null and void. That five years down the line the applicant herein through the firm of M/S E. K. Ogoti Advocate filed an application seeking inter alia to set aside the judgment entered in favour of the plaintiff/respondent on grounds inter alia that he had belatedly discovered that his advocate on record(now deceased) had never filed defence. On 3rd November, 2011 the Honourable Court dismissed the 1st defendant/applicant's application holding inter alia that there was no valid defence on record and that the applicant had not disclosed the nature of his defence.

It was against the background of that ruling that the 1st defendant/applicant herein filed the instant application seeking review and setting aside of the ruling dated 3rd November, 2011 and all consequential orders therein on the ground inter alia that the instant suit was res judicata and that there was in existent of court orders in variance with courts judgment and decreed and that there is occasioned a miscarriage of justice by existence of these contradicting orders.

Under Order 45 Rule 1(a) 2(b) of Civil Procedure Rules it is provided:

"1. (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."

In the case of **SHAH –V- DHARAMCHI (1981)(Klr) 560** Hon. Justice Kneller, as he then was held:-

"1. An application for review can succeed only if the applicant proves; an error or mistake apparent on the face of the record, discovery of new evidence or any other sufficient reason.

2. There is no strict proof of the allegations about the discovery of the new evidence or any other sufficient ground for a review.

3. For an application for review to succeed the evidence must only be not new but the applicant must prove that he did not have them in his possession at the time and could not have obtained it despite due diligence."

Further in case of **Mwihoko Housing Co. Ltd –V-Equity Building Society (2007)2 KLR 171** Court of Appeal held:-

"1. 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.

2. There was no discovery of a new and important mater 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 addition to the above in the case of **NDIRANGU –V-COMMERCIAL BANK OF AFRICA(2002) 2 KLR 603**, Hon. Justice Oguk as he then was held:-

" An application for review on the ground of new evidence will succeed only if the applicant proves that he did not have it in his possession at the time and could not have obtained it despite due diligence."

In the instant application the applicant herein averred that the suit herein is res judicata vide Meru RMCC No.203 of 1980.

Under Section 7 of the Civil Procedure Act it is provided as follows:-

"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

From the parties pleadings and in particular paragraphs 11, 12 and 13 of the 1st defendant/applicant's supporting affidavit dated 14th April, 2012, it is averred the issues pertinent in this subject matter were subject of an earlier case namely **Meru RMCC No.203 of 1980 between himself and M'Inoti M'Mwambia M'Muguongo Karitho** and further contended that the same was consolidated with **Meru RMCC 472 of 1980 between Eugenio Thuranira and M. Muguongo Karithi.** It appears from the aforesaid cases the plaintiff/respondent in the instant suit M'rukunga M'Mboroki was not a party to the cases above-mentioned and as such the instant case cannot be said to be res judicata. The plaintiffs in the instant suit depones that he was not a party to those suits. Moreover the applicant had not annexed copy of the plaints in these suits and therefore it is very hard to tell what was the nature of the dispute.

The 1st defendant/applicant seeks a review of orders granted by court on 3rd November, 2011 on grounds that there are new and important matters that have now been discovered. In my view there is nothing new that the 1st defendant/applicant has discovered since the matters sought to be relied on have all along been in the 1st defendant/applicant's knowledge and as such he cannot now be heard to purport that they are new. The applicant has failed to prove that he did not have in his possession at the time of service of the summons to enter appearance or at the time of filing an application to set aside the exparte judgment the matters raised in this application nor has he proved that the same could not have been obtained despite due diligence.

It is trite law that an order of review can only be issued upon discovery of new and important matter or evidence which after due diligence was not within the knowledge of the applicant at the time the judgment/ruling was passed and in the instant case, the 1st defendant/applicant I find was all along aware of the existence of the cases referred to, and as such he cannot claim that this is a new matter that was not within his knowledge when the ruling that he now wants reviewed was delivered. The applicant did not prove any existence of court orders which are in variance with court's judgment and decree or the fact of the plaintiff being guilty of misleading the court on the circumstances surrounding the suit or subject matter nor the applicant having been denied his Constitutional rights of access of court and his fate determined according to law or any glaring errors of facts or mistake apparent on the face of record or any sufficient reason to warrant the review sought or the setting aside of the court's exparte judgment.

In this matter as of interest the applicant's Counsel in his further submissions, submitted that the court lacked jurisdiction to hear the applicant's application seeking to set aside the ex-parte judgment, which submission was opposed by the respondents who submitted if this court lacked jurisdiction, the option that was open to the applicant was to appeal but not seek review before this court. That the applicant's

ground that this court lacked jurisdiction when it heard an application to set aside exparte judgment, being an argument by the applicant's Counsel that the court misapprehended the law or acted without jurisdiction cannot be a ground for seeking a review. The applicant's option was and is only to appeal to Court of Appeal which he has not done.

In the circumstances the applicant's application dated 19/4/2011 is not meritorious and the same is dismissed with costs to the plaintiff/respondent and the 2nd defendant/respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF OCTOBER, 2012.

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

1.Mr. Kimunya for the applicant

2.Mr. Kirima for 1st plaintiff/respondent

3. Mr. Menge for 2nd respondent

J. A. MAKAU
JUDGE