



**NO. 371**

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**

**CIVIL CASE NO. 177 OF 2004**

**JOSEPH OTIENO**  
**OCHERE.....PLAINTIFF**

**-VERSUS-**

**AKONGO**  
**OWINO.....DEFENDANT**

**RULING**

This ruling is in respect of two applications dated 18<sup>th</sup> February, 2009 and 15<sup>th</sup> September, 2009. When the two applications came before me for interpartes hearing on 1<sup>st</sup> November, 2010 parties involved agreed that the two applications be consolidated and heard simultaneously by way of written submissions. An order to that effect was duly made. Subsequently parties filed and exchanged written submissions which I have carefully read and considered.

I think it would appropriate to deal with the application dated 15<sup>th</sup> September, 2009 first for its determination will have a direct bearing on the application dated 18<sup>th</sup> February, 2009. The application dated 15<sup>th</sup> September, 2009 is by way of Notice of Motion and seeks that this court reviews and sets aside the orders given by **Justice Tom Mbaluto** dated 5<sup>th</sup> November, 1998 together with all consequential orders. Yet the application dated 18<sup>th</sup> February, 2009 seeks for an order of eviction against the plaintiff

with respect to Land Parcel number Gem/Kajulu/37 pursuant to the order **Mbaluto J.** aforesaid and which is sought to be reviewed by the application dated 15<sup>th</sup> September, 2009, hence the need to address the latter application first.

The application for review is anchored on Section 80 of the Civil Procedure Act and Order XLIV of the Civil Procedure rules. Two grounds were advanced in support of the application. One, that there was an error apparent on the face of the record as there was no judgment in favour of the defendant upon which the application dated 23<sup>rd</sup> July, 1998 could be successfully mounted. Secondly, the judgment in this case did not award to the defendant Land Parcel No.Gem/Kanjulu/37, *“the suit premises”* to warrant the orders of transfer to him.

From the record, it appears that the defendant did not file any papers in opposition to the instant application. It must therefore be taken that what the plaintiff has deponed to is correct.

Section 80 of the **Civil Procedure Act** as well as Order XLIV of the Civil Procedure rules allows for a review of a court decree or order on the grounds that there has been a discovery of new and important matter or evidence, some mistake or error apparent on the face of the record, or for any other sufficient reason and that such application must have been made without unreasonable delay.

It is as clear as snow that the order given by **Mbaluto J.** dated 5<sup>th</sup> November, 1998, was made in error. In other words there is an error apparent on the face of the record. That order could only have been made if there was judgment and decree to that effect in favour of the defendant. The judgment on record delivered by **Mbaluto J.** merely dismissed the plaintiff's suit against the defendant and did not award the suit premises to the defendant to warrant the orders of transfer of the suit premises to him made by **Mbaluto J.**

From the record, the plaintiff filed this suit against the defendant seeking to evict him from the suit premises. The defendant filed his defence. In the defence filed, there was no counterclaim by the defendant seeking to have the suit premises transferred and registered in his name. The suit was heard in the plenary and it was dismissed with costs. There was no appeal lodged. At best therefore and what the defendant could have legally executed for against the plaintiff was the costs awarded to him by the court. However on 20<sup>th</sup> August, 1998, the defendant filed an application wherein he sought that the Executive officer of this court be authorized to sign transfer documents of the suit premises to him. On 26<sup>th</sup> June, 1998 **Mbaluto J.** surprisingly granted the order. That order as already stated is an error on the face of it as it is not supported by the pleadings, evidence, judgment and or decree. In the premises a

review of the same is the appropriate remedy for the plaintiff.

The application for the eviction of the plaintiff by the defendant was filed in court on 18<sup>th</sup> February, 2009. According to the affidavit of service filed in court on 5<sup>th</sup> March, 2009, the plaintiff was served with the application on or about 27<sup>th</sup> February, 2009. I would imagine that this is when the plaintiff came to know the machinations of the defendant. The plaintiff then instructed the firm of **Messrs Kerario Marwa & Co. Advocates** to act for him in the matter. Since judgment had been given, that firm required leave of court to come on record before it could file the application for review. Taking into account the circumstances, it cannot be said that the application for review was not made timeously.

That being my view of the matter, I would allow the application by way of Notice of Motion dated 15<sup>th</sup> September, 2009 in its entirety. Having so held it is not necessary to deal with the application by way of Chamber Summons dated 18<sup>th</sup> February, 2009.

**Ruling dated, signed and delivered** at Kisii this 31<sup>st</sup> January, 2011.

**ASIKE-MAKHANDIA**

**JUDGE**