



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL SUIT NO.3A OF 1999

JAMES OTIENO ODERAAPPLICANT/PLAINTIFF

VERSUS

IBRAHIM OLOO

MUKEL AWUOR

RESPONDENT/DEFENDANTS

R U L I N G

The application before this court is a Notice of Motion dated 6.6.2008 brought by the Plaintiff, James Otieno Odera. It was filed on 9.6.2008. It seeks for the review of the judgment of Serگون, Judge dated 4.8.2006. It also surprisingly, seeks that the suit be heard afresh. It is brought under Order 44 rule 1 subrule (1) and (2) and rule 2 and 4 of the Civil Procedure Rules.

Order 44 rule 1 and 2 under which the application is made state as follows:-

“1 (i) 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 the judgement to the court which passed
the decree or made the order without unreasonable
delay.

(2)

2. An application for review of decree or order of court,
upon some ground other than the discovery of such
new and important matter or evidence as is referred to
in rule 1, or the existence of a clerical or arithmetical
mistake or error apparent on the face of the decree,
shall be made only to the Judge who passed the decree,
or made the order sought to be reviewed.”

I have carefully perused the application for review before me. The grounds upon which the application is based as shown on the face of the Motion include the following-

That the Judge did not decide the matter on merit but proceeded to decide it on technicality, that justice would demand that a matter such as this be heard and determined on merit; that there is an error on the face of the record; and that the court gave orders that had not been prayed for in the pleadings. Clearly, these are grounds for appealing and not a single one of them is a new or important matter or evidence discovered after the judgement was delivered. Nor do the grounds contain any matter which was not available during the hearing of the suit or matter which with diligence could not be discovered before judgement.

I have also carefully perused the applicant/plaintiff's written submission. He fails to refer to Order 44 rule 1 and 2 under which he approaches this court, to fit in the arguments or evidence he discusses under the provision. His arguments are clearly arguments against the judgement impugned and are clearly trying to show that the judgement of Seron, J is not right on merit. Such argument could only be available and be made to the Court of Appeal, which this court is not.

I have also perused the submissions of the applicant to pick out the errors on the face of the judgement. I find none. What the applicant calls an error on the face of the record, as shown in the last paragraph but one on page one of his written submissions, is the failure by the court to “consider the matter on merit”. This is twisting the “matters on merit” meaning to become at the same time “an error on the face of the record”. In my view, and with great respect to the Plaintiff's counsel, this is a deliberate attempt by the plaintiff, to twist this court's mind. I will say no more of it.

Finally, it is the view of this court that the application, which took two years before it was filed, was belatedly filed. Order 44 under which this application is brought, clearly frowns on any application for review brought after inordinate delay. This application was filed too late in the day.

The result that must follow the above findings is that this application for review has no merit. It is dismissed with costs to the Respondents/Defendants. Because this application should not have been brought and was filed to waste this court's time, and delay the ends of justice, the costs to the Respondents are ordered to be taxed on the higher scale by one quarter.

Orders accordingly.

Dated and delivered at Busia the 9th day of February 2011.

D.A. ONYANCHA

J U D G E