



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

**Civil Case 29 of 2002**

**LYDIAH MUTHONI NDUNGU.....PLAINTIFF**

**VERSUS**

**FRANK KADENGE LIJODI.....DEFENDANT**

**RULING**

On the 14<sup>th</sup> May, 2004, this court did enter Judgment against the defendant and in favour of the plaintiff as prayed in her plaint. At page 5 of the judgment, this court stated as follows;-

***“From the evidence on record it is clear that the plaintiff is the legal owner of the suit land. Even if the defendant was to prove that the said same was fraudulent, the plaintiff being an innocent purchaser for value cannot be held responsible. The plaintiff wants to exercise her right of ownership over the said parcel of land. The defendant cannot resist the plaintiffs claim. I do find that the plaintiff has proved her case on balance of probabilities. If indeed the defendant is aggrieved by the transfer of the suit land to the plaintiff, he can file suit against the bank for damages. He cannot ask that the suit land be re-transferred back to him. The provisions of Section 77(3) of the Registered Land Act are clear. I therefore enter judgment for the plaintiff as prayed in her plaint. The defendant is hereby ordered to give vacant possession to the plaintiff of the suit parcel of land known as Laikipia/Marmanet/485 thirty (30) days after he has been served with Notice in default the defendant be evicted from the said parcel of land.”***

The hearing of the case proceeded in the absence of the defendant after this court was satisfied that the defendant was duly served and failed to attend court on the day the case was scheduled to be heard.

On the 26<sup>th</sup> July, 2004, the defendant made an application to set aside the ex-parte judgment entered against him by the court. By its ruling dated the 22<sup>nd</sup> October, 2004, this court disallowed the application to set aside the said judgment. At page 7 of its ruling, this court stated that;

***“The defendant did not challenge the said sale by public auction. The defendant only moved to court when the plaintiff had taken the initiative to file this suit to evict him from the suit land. Pursuant to the judgment of this court, the defendant has already been evicted from the said suit land. This court will not act in vain. The defendant having been evicted from the said suit land, it would serve no useful purpose if the application is allowed. The defendant’s application has already been overtaken by events. No useful purpose would be served if an order is made that the case be heard on merit when the circumstance on the ground is such that this court would be acting in vain.”***

Subsequent to the delivery of the said ruling, the defendant filed a notice of motion under the provisions of **Order XLIV Rule 1, 2, 3 and 4** of the **Civil Procedure Rules** and **Sections 80 and 3A** of the **Civil Procedure Act** seeking to review the ruling order of this court delivered on the 22<sup>nd</sup> October, 2004. The defendant set forth seven grounds in support of the application. He stated that he was the legal owner of the developed parcel of land known as **Laikipia/Marmanet/485**. He contended that the plaintiff had purchased the suit land through a fraudulent sale exercise and thereafter filed suit to evict the defendant from the suit land. He stated that he was evicted from the suit land, which was his home, after the suit

was heard exparte. He stated that he should not be made to suffer on account of the mistake of his counsel and should be given a chance to be heard. He contended that he had been condemned unheard. In the plaintiff's view, there were strong and sufficient grounds to warrant the review of the order of this court refusing to grant the application to set aside the exparte judgment. The application is supported by the annexed affidavit of Frank Kadenge Lijodi – the defendant.

The application is opposed. The plaintiff filed grounds in opposition to the application. She further filed a replying affidavit in further opposition to the application. In summary, she deponed that she had purchased the suit land in a public auction which was conducted by a bank in exercise of its powers of sale by chargee. She deponed that the allegation by the defendant that she had colluded with the bank to enable the said sale to take place was far-fetched since she had participated in a public auction and had been declared the successful bidder. She deponed that there were no new issues being raised by the defendant in his application for review which were not addressed by the court when it dismissed the defendant's application to set aside the exparte judgment. She urged the court not to grant the application as it would cause her to suffer inconvenience and irreparable damage.

At the hearing of the application, I heard the submission made by Mr. Gai on behalf of the defendant and by Mr. Karanja Mbugua on behalf of the plaintiff. Both counsel basically reiterated the contents of the application and the replying affidavit filed respectively by the plaintiff and the defendant. The issue for determination by this court is whether the defendant has advanced sufficient reasons to enable this court review its said ruling dated the 22<sup>nd</sup> October, 2004. Under **Order XLIV Rule 1 of the Civil Procedure Rules**, a person aggrieved by a decree or an order of a court may apply to have the decree or order reviewed on the grounds of discovery of new and important matter or evidence which was not within his knowledge at the time the order or decree of passed. A review would be granted if an applicant establishes there was an error or mistake apparent on the face of the record. He may be granted on order of review if he establishes that there is sufficient reason which may justify the court to review its order or decree.

In the present application, the defendant has made an application for review on the grounds that there are sufficient reasons to justify this court to review its order refusing to set aside the judgment entered against the defendant in default of attendance during the hearing of the case. I have carefully considered the reasons advanced by the defendant in support of the application for review. It is evident that the defendant is of the view that this court did not give due consideration to the reasons that he had put forward in support of his application to set aside the exparte judgment. The defendant has not presented any new argument which he had not earlier presented when he argued his application to set aside the exparte judgment. It is apparent that the defendant is seeking to re-argue the application to set aside the judgment under the guise of an application for review. The defendant is seeking to have a second bite at the cherry.

I think the defendant is asking this court to sit on appeal against its own decision. If the defendant was dissatisfied with the ruling of this court, he ought to have filed an appeal to the Court of Appeal instead of canvassing the same application for re-consideration by this court. I am of the view that the issues raised by the defendant in this application for review are issues which ought to be raised on Appeal. The jurisdiction of this court in granting an application for review is limited. This court can only review its order or decree if it is satisfied that there was an error or ground which would have made the court rule otherwise than it did. As was held by Tanui J, in **Njoroge & others vs Savings & Loan Kenya Ltd [1990] KLR 78** at page 83,

***“In the circumstances an application for a review should not be taken as a form of appeal. To warrant a review of an error alleged on the face of a record, such an error ought to be so clear as to be without dispute. Where the very existence of an error on a record is contestable by parties, I think, such a matter is a ground which should be canvassed on appeal.”***

In the present application, the defendant has not raised any ground or reason which falls within the limited jurisdiction of this court to entertain an application for review. There are no sufficient reasons to enable this court review its order issued pursuant to the ruling of this court delivered on the 22<sup>nd</sup> October,

2004. The grounds raised by the defendant in this application are suitable grounds for appeal and not for review. This court would be embarrassed if it considered the said grounds advanced by the defendant as it would amount to this court sitting on appeal against its own ruling.

I think I have said enough. From the foregoing reasons, it is clear that the application for review is for dismissal. It is hereby dismissed with costs to the plaintiff.

**DATED at NAKURU this 26<sup>th</sup> day of OCTOBER 2007**

**L. KIMARU**

**JUDGE**