



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC NO. 323 OF 2010**

**KENYA BROADCASTING CORPORATION.....PLAINTIFF**

**VERSUS**

**MUNICIPAL COUNCIL OF MOMBASA.....1<sup>ST</sup> DEFENDANT**

**OLD BAY LIMITED .....2<sup>ND</sup> DEFENDANT**

**RULING**

*(Application seeking to review orders of the court summoning the Land Registrar to attend court and testify on the title of land in dispute; 2<sup>nd</sup> defendant contending that it was erroneous for the Judge to order such attendance, without an application being made by any of the parties, as the court would be descending into the arena of litigation; prerequisites in applications for review; unreasonable delay; application having been filed more than one year since the order was made; nothing to explain the delay; view of the court that the application was filed after inordinate delay; error apparent on the face of the record; position of the court that if there was an error, this would be an error going to the merits of the decision which may be the subject of appeal but not review; conditions for review not met; application dismissed)*

1. The application before me is that dated 1 February 2020 and filed on 4 February 2020 by the 2<sup>nd</sup> defendant. The application seeks the following orders :-

*(i) That this Honourable Court do review and reverse its order made on the 4<sup>th</sup> day of December 2018, whereby it sua sponte summoned the Mombasa County Chief Land Registrar.*

*(ii) That there be a stay of the said orders issued on the 4<sup>th</sup> of December 2018, summoning the Mombasa County Chief Land Registrar, pending the hearing and determination of this application.*

*(iii) That the plaintiff/respondent be condemned to pay the costs of this application.*

The application is opposed.

2. To place matters into perspective, in the year 2010, the plaintiff filed this suit claiming ownership of the land registered as Plot No. 1476 (Original No. 464/60) /1/MN. The plaintiff averred that the defendants are illegally interfering with its possession of this land. The defendants contested this claim, and asserted that out of this land, two plots, identified as Plots No. MN/I/10771 and 10772, were carved out and titles over the same granted to the 2<sup>nd</sup> defendant/applicant by the Commissioner of Lands. They averred that the two plots were then sold to the 1<sup>st</sup> defendant for valuable consideration sometime in the year 1997 and that the 1<sup>st</sup> defendant is therefore entitled to possession of the same.

3. The matter had yet to proceed by the year 2018, and given its age, it was fixed for hearing on 4 December 2018 before Waithaka J, who was visiting the station during service week (a programme where judges visit a particular court station to assist in clearing case backlog). At the hearing, the plaintiff presented two witnesses, Velma Kwanga, its legal officer, and Charles Ndeto, its acting Administration Manager, and after they had testified, Mr. Saende, learned counsel for the plaintiff, stated that the plaintiff has closed its case. The court then inquired whether any party wished to call the National Land Commission (NLC) or the Director of Surveys as their witnesses. Upon this inquiry, Mr. Saende applied for summons to issue to Mr. Brian Ikol, a Director at the NLC. This was opposed by Mr. Ochieng, learned counsel for the applicant. The Court upheld the objection and made a direction that the plaintiff's case is closed and thereafter invited the defendants to present their witnesses. Only the 2<sup>nd</sup> defendant presented a witness, one Mr. Taib, its Managing Director, upon which, the 2<sup>nd</sup> defendant closed its case. The court then made the following directions as recorded :-

*“Before I declare the hearing closed, I have found it necessary to summon the County Land Registrar Mombasa to produce the parcel files for CR 13088/1 and all records relating to its history and the parcel files for land parcels No. MN/I/10771 and MN/I/10772. Counsels (sic) for the plaintiff and 3<sup>rd</sup> defs (sic) will be at liberty to ask the Land Registrar any questions. The DR (meaning the Deputy Registrar) to urgently before the close of business today issue summons to the County Land Registrar Mombasa to produce records relating to the aforesaid parcels name. The Land Registrar to produce these records on 6/12/2018.”*

4. Immediately, the above directions were made, Mr. Ochieng, applied for leave to appeal. Leave to appeal was duly granted and I observe that a notice of appeal was filed on 7 December 2020.

5. On 6 December 2018, the matter did not proceed, the information relayed being that the notice issued to the Land Registrar was too short, and he could not be able to retrieve the records in time. The court then adjourned the matter to 19 March 2019 for purposes of taking the evidence of the Land Registrar. I have no record of the matter being in court on 19 March 2019 and subsequently, directions were taken that the matter can proceed before any other judge.

6. The matter was thus placed before me on 22 October 2019 for hearing. On that day, Mr. Saende was present for the plaintiff whereas Mr. Taib, Senior Counsel, was present for the 2nd defendant/applicant. There was no appearance on the part of the law firm of M/s L.M Momanyi & Company Advocates for the 1st defendant. Mr. Taib took the opportunity to revisit the directions of Waithaka J, and urged me to disregard the same. He more or less submitted that it was wrong for the learned Judge to call for the evidence of the Land Registrar without any application having been made by any of the parties after they had closed their respective cases. He asked me to review the said orders. Upon hearing the submissions of counsel, I held that I do not have jurisdiction to sit on appeal against the order of Waithaka J. I found however that I have jurisdiction to entertain a review application but could only do so upon a formal application being filed. Subsequently, this application was filed.

7. The application is based on grounds inter alia that neither party applied for the calling of the Land Registrar as a witness; that the Civil Procedure Act does not provide for the summoning of a witness or production of documents *sua sponte* by the court; that our judicial system is adversarial in nature and the parties are supposed to present their respective claims, defences and evidence in proof thereof; that if the orders are allowed to stand, the court will be descending into the arena of the dispute which is not proper and contrary to the express provisions of the Constitution; that after close of the defence case, the plaintiff did not apply to call evidence in rebuttal. The application is supported by the affidavit of Abdalla Ali Taib, a director of the applicant. He has more or less reiterated the above.

8. The application is opposed by both the plaintiff and the 1<sup>st</sup> defendant who filed replying affidavits sworn by Margaret Ochieng and Jimmy Waliaula respectively. Their view is that there is nothing wrong with the orders given by the court as it relates to production of Government records which have nothing to do with the court descending into the dispute. They do not see why the applicant is opposing the directions, since in their view, they will aid justice rather than impede it.

9. Counsel agreed to dispose the application by way of written submissions and I have seen the submissions of Mr. Saende, learned counsel for the plaintiff, and Mr. Ochieng, learned counsel for the applicant. No submissions were filed by Mrs. Momanyi for the 1<sup>st</sup> defendant. I have taken these submissions into consideration before arriving at my decision.

10. The application before me is one for review and is brought pursuant to the provisions inter alia of Order 45 Rules 1 of the Civil Procedure Rules, 2010. The said provisions provide as follows :-

*(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.*

11. From the above, it can be discerned that a court can entertain an application for review based on the following grounds :-

(i) Discovery of new and important matter or evidence;

(ii) On account of some mistake or error apparent on the face of the record;

(iii) For any other sufficient reason.

It should also not be forgotten that the application must be made without unreasonable delay and it is on this aspect of delay that I opt to start my analysis of the matter.

12. The order in issue was made on 4 December 2018. This application was filed on 4 February 2020, more than one year since the order was made. Is that delay unreasonable? My view, is that the delay is unreasonable. Why it took more than one year for the applicant to file this application has not been explained at all in the affidavit of Mr. Taib. Nowhere has he deposed why it took the applicant more than one year to file this application. I further observe that after the court made its directions on 4 December 2018, the matter was in court on 6 December

2018, and only failed to proceed because the time given to the Land Registrar to avail his records was too short. It means that if the Land Registrar had his records, he would have testified and the issue of review would not have arisen at all. I note that the matter was subsequently placed before Yano J on 9 May 2019 and Omollo J on 18 June 2019 for directions. At no time did the applicant state that it intended to file an application to review the orders of Waithaka J. It is therefore apparent to me that the issue of review is an afterthought.

13. There is certainly a considerable length of delay between the time the order was made and the time this application was made, which delay, as I have mentioned, is not explained at all. There is a reason why the rules provide that applications for review ought to be made without unreasonable delay. In my opinion the delay of more than one year is inordinate and unexplained and therefore this application, on that ground alone, must fail for having been filed after unreasonable delay.

14. But even if the application had been made timeously, I would still have dismissed it. If the argument of the plaintiff is based on mistake or error apparent on the face of record, I am afraid that I do not see any mistake or error apparent on the face of the record. As was mentioned in the case of *National Bank of Kenya Limited vs Ndungu Njau (1997)eKLR* (cited with approval by the Court of Appeal in the case of *Otieno Ragot & Company Advocates vs National Bank of Kenya Limited (2020)eKLR*, the error or omission must be self-evident and should not require an elaborate argument, and further, it will not be sufficient ground for review that another judge could have taken a different view of the matter. If it is the position of the applicant that the order to call the Land Registrar *sua sponte* was a mistake or error of the judge, that to me would be a substantive error, which ought to be taken up on appeal and not through a review. A review cannot be the substitute for an appeal. The applicant indeed did seek leave to appeal, which leave was granted, and a Notice of Appeal filed. The applicant ought to have pursued that avenue and not seek a review, for to me, the issue is not one that falls under the category of “error apparent on the face of the record.”

15. The application is certainly not based on any fresh evidence, and neither am I persuaded that there is any other sufficient reason that would warrant a review of the subject order.

16. Given the above, I do not find merit in this application. It is hereby dismissed with costs to the plaintiff.

17. Orders accordingly.

**DATED AND DELIVERED THIS 28TH DAY OF JANUARY 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**