



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO 172 OF 2017

DOUGLAS KARIUKI.....PLAINTIFF/RESPONDENT

VS

FRANCIS IREGI MWANGI.....DEFENDANT/APPLICANT

RULING

1. The ruling relates to the application dated the 12/11/2020 in which Applicant sought for orders that; -

a. Spent

b. Spent

c. Spent

d. The Court to issue stay of execution of its earlier orders issued on the 14/5/2020 and judgement delivered on the 17/5/2018 pending the hearing and determination of the application and the suit.

e. The Court to review vacate and or set aside the judgement delivered on the 17/5/2020.

f. The Applicant be allowed to defend the suit and the matter be heard de novo.

2. The application is supported by the affidavit sworn on the 10/11/2020 where the Applicant deponed that this suit was filed against him on the 27/6/13 and the law firm of H K Ngugi Advocates entered appearance and filed a defence on his behalf albeit he did not instruct them at all. That thereafter all the communications were served through the said law firm and that he learnt of the suit on the 22nd and 23rd September when he was evicted from the property. That his right to be heard has been denied and urged the Court to review its decisions to accord him the opportunity to be heard.

3. The application is opposed by the Respondent vide his replying affidavit sworn on the 15/1/2021. That the Applicant was served with the suit on the 21/5/13 at 8.40 am and he declined to sign and thereafter the Applicant entered appearance and filed statement of defence, list of documents and all along was represented by the firm of HK Ngugi for which service of all Court documents were channeled through. That he stands to be prejudiced because he has executed the judgement fully in his favour and the Applicant was evicted in September 2020.

4. I have read and considered the written submissions of the parties.

5. Review is governed by Section 80 of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules. The applicable law for grant of review is Section 80 of the Civil Procedure Act which provides *inter alia*: -

“Any person who considers himself aggrieved—

a. by a decree or order from which an Appeal is allowed by this Act, but from which no Appeal has been preferred; or

b. by a decree or order from which no Appeal is allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”

6. Order 45 Rule 1 of the Civil Procedure Rules is couched in the following terms:

“(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

(c.) on account of some mistake or error apparent on the face of the record, or

(d) 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.”

7. The Applicant has urged the Court to review the orders on grounds that he was not aware of the existence of the suit and further that he did not instruct the law firm of H K Ngugi and co advocates to act for him. The Respondent has challenged the above assertions and hold that the Applicants simply ignored the summons served upon him and for the full duration of the suit was represented by a law firm on record to whom Court documents were duly served upon as seen on the affidavit of service on record.

8. The he only learned of the suit on the 22nd and 23rd when he was being evicted.

9. It is common ground that when clients instruct their Advocates, the contract is personal and the Court is never a party. Once a party enters appearance through a law firm the legal assumption is that the lawyer is possessed with proper legal instructions for the client they claim to represent.

10. Having said that I have reviewed the file and note that a demand letter was served upon the Applicant on the 21/5/2013 which he declined to sign. Further I have perused a document dated the 16/3/2000 in which the signature of the Applicant appears and which signature when viewed with a casual eye resembles the signature on the Applicants witness statement filed on the 22/8/13. The Applicant has not claimed that he did not sign this statement or denied the signature on the two documents. Further a careful reading of the said statement marries with the statement of defence filed on the 22/8/13.

11. A close perusal of the record shows that the Applicant was served personally on the 6/11/19 at 7 am as seen on the affidavit of service dated the 7/11/2019. The Court is therefore not persuaded that the Applicant learned of the suit on the 22nd and 23rd of September. In any event he does not indicate the year in his averment. Even for argument sake he meant September of 2020, it is evidence that the orders of the Court were brought to his attention much earlier in 2019.

12. I have perused the record and it is evident that the law firm of H K Ngugi & Co Advocates are on record for the Applicant upto and including 24/2/2020 when he sought an adjournment on grounds of indisposition. Earlier on the 20/2/18 it was recorded that the said advocate had lost contact with his client and had expressed his desire to withdraw from acting. He nevertheless never actualized his request and continued acting for the Applicant including during the hearing on the 20/2/18.

13. That said the Applicant has not demonstrated or proved that he indeed did not instruct the counsel on record. He who alleges must proof. The picture depicted from the record is that of a frustrated advocate with an uncooperative client and not one who was totally in the dark about the existence of the suit.

14. The Court is not persuaded that the Applicant neither knew of the existence of the case nor did not instruct the counsel. I am cognizant to the fact that should it turn out that indeed the advocate acted for the Applicant without proper instructions, the law is clear on the remedies available to such client, the Applicant included. That said I have no doubt. In other words, the Applicant is not left without a remedy for his woes with his legal representative.

15. It is commonly agreed by the parties that the Applicant has been evicted and the judgement has been fully executed and there may not be anything to say in the circumstances. Court orders cannot therefore be issued in a vacuum or in vain.

16. In terms of delay, the Court has found that the judgement was delivered on the 17/5/18 and the Applicant is being made over 3 years and 9 months. There are no reasons that have been advanced by the Applicant for the delay which in the opinion of the Court is inordinate and unexplained.

17. I have also noted that the Applicant has not filed any draft statement of defence to enable the Court know if he has a defence with triable issues.

18. Having considered the circumstances of this case, the pleadings and the conduct of the parties I find that the grounds of review that is to say new and important matter, error on the face of the record and or for any sufficient cause have not been proved to warrant the grant of the orders.

19. In the end the application is unmerited and is dismissed with costs to the Respondent.

DATED, SIGNED & DELIVERED ONLINE THIS 11TH DAY OF MARCH 2021.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Kariuki HB for Kimwere for the Plaintiff/Respondent

Ms Muiruri for the Defendant/Applicant

Njeri, Court Assistant