



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 329 OF 2017

ADRIANO I. AMBANI.....PLAINTIFF

VERSUS

CHRISTOPHER A. MUSATSIDEFENDANT

RULING

The first application by the defendant is dated 25th November 2020 and is brought under Section 80 of Civil Procedure of Civil Procedure Act, Order 45 and 51 of the Civil Procedure Rules, 2010 seeking the following orders;

1. This application be certified as urgent and be heard as soon as possible.
2. The execution of the judgment and ruling from this honourable court dated 2nd July, 2019 and 28th September, 2020 respectively be stayed pending the hearing and determination of this application.
3. The judgment by this honourable court on 2nd July, 2019 be reviewed on the grounds that the court was misinformed as to the facts of the case.
4. Costs of this application be provided for.

It is made on the grounds that the trial court did not take into account certain facts surrounding the suit property South Kabras/Shamberere/1735 and the same was not represented during the hearing of the suit. That South Kabras/Shamberere/1735 was subject of a suit in Civil Suit No. 126 of 1976 (Lower Courts) and Kakamega HCCA No. 35 of 1980 (withdrawn) between Christopher Ambani vs Elikana Lichungu Ambani in which the courts entered judgment for Elikana Lichungu Ambani. That both parties entered into an agreement to which Elikana Lichungu Ambani agreed to subdivide the suit property and gifted South Kabras/Shamberere/2674 as the same is subject to succession proceedings. That the plaintiff/respondent has rightful claim to his share in S/Kabras/Shamberere/2674 as the same is subject to succession proceedings. That the defendant/applicant has learnt that the plaintiff/respondent is intent on extracting orders from the judgment of this honourable court. That due to this information, the plaintiff/respondent misinformed the court as to the status of the suit property hence the filing of this application.

The second application by the defendant is dated 9th December 2020 and is brought under section 3A and 95 of the Civil Procedure Act and Article 159(2) of the Constitution of Kenya seeking the following orders;

1. This application be certified as urgent.
2. That this honourable court do extend time to file and serve the Notice of Appeal dated 23rd November 2020 and the same be deemed as duly served and filed.
3. Costs of the suit be in the cause.

It is based on the grounds that, the applicant is not certified with the judgement of the court and intends to appeal. That the delay was occasioned by the plaintiff's application dated 28th August 2017 which was determined on the 28th September 2020.

The third application by the plaintiff is dated 1st February 2012 and is brought under Order 40 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking the following orders;

1. That service of the application hereto be dispensed with in the first instance.

2. That the honourable court order the Land Registrar Kakamega and Land Surveyor Kakamega to visit land parcel S/Kabras/Shamberere/1735 and subdivided the said parcel equally between the parties herein.

3. That the costs of this application be provided for.

It is based on the grounds that the applicants have a prima facie case. That the applicant herein is the owner of a portion of land parcel S/Kabras/Shamberere/1735. That this honourable did direct that the respondent's title be cancelled to enable the applicant get a title of his portion from land parcel S/Kabras/Shamberere/1735. That the said title was cancelled by the Land Registrar and the said land reverted to the name of the original owner Elkana Lichungu Ambani. That the Elkana Lichungu Ambani did appear before the Land Control Board and consented on transferring half of the portion of L.P. S/Kabras/Shamberere/1735 to the applicant's name. That they later invited the District Surveyor to visit, divide and demarcate the said land parcel but the defendant objected and instead blocked the surveyor from doing his work. That it is in this regard that the District Surveyor advised as to obtain a court order directing him to visit, subdivide and demarcate land parcel S/Kabras/Shamberere/1735.

The plaintiff submitted that at all material times, the suit property South Kabras/Shamberere/168 was originally registered in the name of Elikana Lichungu Ambani a step brother to both the respondent and applicant to hold the said parcel in trust for the parties herein. That Elikana Lichungu Ambani later transferred the said suit land to the applicant herein hoping he will transfer half of the said portion to the respondent. That in any event the said title has reverted back to the name of Elikana Lichungu Ambani who appeared before the Malave Land Control Board on 18th December, and consented to transfer half of the said portion to the respondent herein Adriano I. Ambani. That the defendant does not have an arguable case with high chances of success as the registration of the suit property has already reverred back to the name of Elkana Lichungu Ambani who was the first registered owner who was holding the said title in trust for the parties herein.

The defendant submitted that this honourable court did deliver a judgment on the 2nd of July, 2019 in favour of the plaintiff/applicant seeking for cancellation of his name from the land title number South/Kabras/Shamberere/1735. That after cancellation by the Land Registrar the land to be revert back to the original owner Elkana Lichungu Ambani. That he did file an application for review and stay of the said judgment before this honourable court through an application dated 25th November, 2020. That the said application is yet to be determined by this honourable court. That he has an arguable case with high chances of success and the same will become nugatory if the application by the plaintiff is allowed.

This court has considered the application dated 25th November, 2020 and the submissions therein. It is based on the grounds that there is new and important evidence was not produced during the hearing of the suit. The court is now asked to review and set aside it's judgment. **In the case of Kwame Kariuki & Another vs. Mohamed Hassan Ali & 4 Others (2014) eKLR**, the Court observed that;

"It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal."

In the case of *Mwihoko Housing Company Limited vs Equity Building Society (2007) 2 KLR 171* is relevant. It was held, that;

*"A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of *Rose Kaiza Vs Angelo Mpanju Kaiza 2009*, the Court was categorical that;*

"An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made..."

Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states as follows:

“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.”

Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However this discretion should be exercised judiciously and not capriciously. In Court of Appeal, *Civil Appeal No. 211 of 1996, National Bank of Kenya vs Ndungu Njau*, the Court of Appeal held that;

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law”.

From the above provisions of the law, authorities cited and facts of this case I find that the defendant/applicant has failed to show any mistake or error apparent on the face of record and/or any sufficient reason to enable this court set aside its decision. There is no new matter and/or evidence that has come to the knowledge of the plaintiff as his written statement and evidence are all on record. This application is dismissed with no orders as to costs. On the second application by the defendant dated 9th December, 2020 *Section 79G of the Civil Procedure Act* deals with the time for filing appeals from subordinate courts and states:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

In the case of *Paul Musili Wambua v Attorney General & 2 others (2015) eKLR*, the court held that;

“...it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

I have perused the court record and find that judgement in this matter was delivered on the 2nd July 2019. The same was amended on the 28th September 2020. This application was filed in December 2020 after an application for review was filed. The defendant applicant seems to be confused as to what orders they require and I find this application was an afterthought. I find that the reason for the delay is not acceptable and a *good and sufficient cause for not filing the appeal in time has not been demonstrated. I find this application is not merited and I dismiss it with no orders as to costs.*

The third application by the plaintiff seeks for orders that the Land Registrar Kakamega and Land Surveyor Kakamega to visit land parcel S/Kabras/Shamberere/1735 and subdivided the said parcel equally between the parties herein. I have perused the judgement of this court where the court ordered that the said title land parcel S/Kabras/Shamberere/1735 be cancelled by the Land Registrar and the said land reverted to the name of the original owner Elkana Lichungu Ambani. The plaintiff can now not come back to court and ask for a visit by the surveyor. I find that this application is not merited and the same is dismissed with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 20TH APRIL 2021.

N.A. MATHEKA

JUDGE