REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 187 OF 2015

HERENIA AKELLO OBARE

MARY ANYANGO OBARE.....PLAINTIFFS

VERSUS

MARY A. AKUMU

OTIENO AKUMU

MORRIS AKUMU.....DEFENDANTS

RULING

The application is dated 17th December 2020 and is brought under Order 9, rule 9 and rule 12, Sections 1A, 1B, 3, 3A of the Civil Procedure Act (Cap, 21) section 159 of the Constitution of Kenya seeking the following orders;

1. That the application be certified as urgent.

2. That the application be heard ex-parte in the first instance and service be dispensed with.

3. That the applicants be granted leave to have her advocates, Otieno C.O. Ayayo & Company Advocates to come on record on behalf of the defendant in place of M/s Namatsi & Company Advocates.

4. That pending the hearing and determination of this application there be stay of execution of judgment dated 5th November, 2019 and/or decree dated on 20th November, 2019.

5. That the judgment dated 5th November, 2019 and court decree dated 20th November, 2019 in favour of the defendant/respondent in Kakamega ELC No. 187 of 2015 be reviewed and/or set aside.

6. The cost of the application be provided.

It is based on the grounds that judgment delivered on 5th November, 2019 and the respondent is likely to execute the decree dated 20th November, 2019 intended to appeal, but the process of procuring certified copies of proceeding, decree and/or the certificate of delay was delayed by the court registry and the certificate of delay was delivered to us after the mandatory period of filing the appeal had lapsed. That applicant opted for a review of judgment and order of this honourable court, based on the ground that the honourable court failed to grant the defendants natural justice and/or the opportunity to substitute the 3rd, 4th and 5th deceased defendants and to the honourable court made an error to find that the plaintiffs were not holding the suit property in trust as ancestral land in favour of the defendants. That the applicant was not a party to the proceedings at the lower court in PMCC Case No. 498 of 1991 or at all nor were the 3rd 4th and 5th defendants a party to the proceedings referred to by the plaintiffs. That if the execution is not stayed and/or reviewed the applicants will suffer irreparable damage since the defendants, their servants, agents, relatives have been ordered to be evicted from Land Parcel South Wanga/Bukaya/749 within 6 months.

The second application is dated 18th December 2020 and is brought under Section, 1, 1a, 1b, 3, 3a and 63 € of the Civil Procedure Act Cap 21 Laws of Kenya Order 8 Rule 3 of CPR Rule 1, Rule 10 of CPR seeking the following orders;

1. That the defendant/respondents be evicted from the suit property herein L.R. S. Wanga/Buhaya/749 in execution of the decree herein.

2. That the officer in-charge of Mumias Police Station (O.C.S) to provide security.

3. That costs hereof be provided for.

It is grounded on the annexed affidavit of John Okoth Obare and the following grounds that judgment herein was delivered by the court on 5th November, 2019. That the there is no appeal against the judgment herein nor stay of execution of the decree herein. That a decree has been extracted. That execution of the decree herein should now commence. That litigation must come to an end.

This court has considered the application and the submissions therein. The application dated 17th December 2020 is based on the grounds that the court failed to grant the defendants natural justice and/or the opportunity to substitute the 3rd, 4th and 5th deceased defendants and the honourable court made an error to find that the plaintiffs were not holding the suit property in trust as ancestral land in favour of the defendants. 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 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. The 2nd plaintiff, 3rd 4th and 5th defendants all passed on and the plaintiff opted not to substitute hence the suit abated for and/against them. The judgement would only therefore affect the 1st and 2nd defendants. All the litigants are relatives. The applicant's husband Thomas Akumu Agutu lost to the plaintiff/respondent herein in Kakamega PMCC No. 498 of 1991 involving the same subject matter suit property herein L.R. S. Wanga/Buhaya/749. I find this application is not merited and I dismiss it with no orders as to costs. I find that the second application dated 18th December 2020 is merited and I grant the same with no orders as to costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE