



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC CASE NO 1037 OF 2016**

**(FORMERLY HCCC NO. 489 OF 2012)**

**JUSTINE MAGARE BOSIRE.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**ISAAC OMBOGA.....DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Plaintiff/Applicant filed a Notice of Motion on 25<sup>th</sup> September, 2020 seeking an order that this court be pleased to review its orders issued on 30<sup>th</sup> July, 2019 in relation to an application dated 29<sup>th</sup> July 2019 which was allowed in terms of prayer No. 2 instead of Prayer 1 of the said application. According to the Applicant, Prayer 1 which they would like this court to grant is to the effect that;

(i) *“This honorable court be pleased to order that the Respondent be evicted from the Plaintiff’s/Applicant’s Land parcel LR. NO. KISII WANJARE/BOKEIRE/4414 herein referred to as the suit land”.*

2. Apart from seeking the review order, the Applicant sought an order that the OCS Gesonso Police Station do provide security during the eviction and demolition of the illegal structures on the suit land.

3. In support of his application the Applicant through his Advocate, Anyona A. Mbunde swore a Supporting Affidavit on 25<sup>th</sup> September, 2020. In his Affidavit, learned Counsel deponed that this case was heard and judgment pronounced on 14<sup>th</sup> of December, 2018. He deponed that the Defendant was given 60 days to deliver vacant possession of the suit property failure to which the Applicant would be at liberty to file an application for eviction. The Applicant subsequently filed an application on 29<sup>th</sup> July, 2019 under certificate of urgency. The said application was allowed in terms of prayer 2 instead of prayer 1 of the Notice of Motion. He decried that he had on several occasions attempted to extract the order to proceed with eviction and demolition of the illegal structure but he had been unable to do so since prayer 2 of the Notice of Motion was in respect of the costs. He thus prayed that this application be varied and allowed in terms prayer 1 of the Notice of Motion dated 29<sup>th</sup> July, 2020 an order that the OCS Gesonso Police Station do provide security during the eviction and demolition of illegal structures from the Suitland.

4. In response to the application, the Respondent filed Grounds of Opposition dated on 5<sup>th</sup> February, 2021. The Respondents in the said grounds stated that the application was fatally defective as the order sought to be reviewed was not annexed to the application. He stated that the Applicant was well aware of an Appeal against the whole Decree/Judgment which was Civil Appeal No. 38 of 2019 at Kisumu. He deponed that if this court allowed the application, he would be prejudiced since he would suffer irreparable damage in case his appeal succeeds.

5. The court directed that the application be canvassed by way of written submissions and both parties have filed their submissions.

**ISSUES FOR DETERMINATION**

6. From my analysis of this application, the response thereto by the Respondent and the written submissions filed by the by their respective Advocates, I deduce the following as the issues for determination;

a) Whether the Applicants have met the threshold for review of the court order issued on 30<sup>th</sup> July, 2021.

b) Whether the failure to attach the order sought to be reviewed renders the application fatally defective.

## ANALYSIS AND DETERMINATION

### Whether the Applicant has met the threshold for review of the court order issued on 30<sup>th</sup> July, 2021.

7. Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules provides as follows: -

Section 80 “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.”

Order 45;

“1. (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”

8. From the above provisions, it is clear that while **Section 80 of the Civil Procedure Act** grants the court the power to make orders for review, **Order 45** sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

9. In the instant application the Applicant seeks an order that this court be pleased to review its order issued on 30<sup>th</sup> July, 2019 on the ground that there is an error on the face of the record.

10. According to the Applicant, allowing the application in terms of prayer 2 instead of prayer 1 was an error made by the court. He argued the eviction of the Respondent was necessary given that the Respondent was still in occupation of the suit property at the expense of the Applicant who by law was expected to enjoy the fruits of the judgment issued in his favor.

11. The Respondent on his part does not deny that there was an error on the face of the order dated 29<sup>th</sup> July, 2019 but instead argues that he has filed an Appeal against the Judgment/Decree issued by this court in this case and thus contends that the same shall be rendered nugatory and he shall be exposed to irreparable loss if this application is allowed. In response to this argument by the Respondent, learned counsel for the Applicant submitted that the Appeal that has been filed by the Respondent is yet to be prosecuted and that there is no stay of execution of the judgment of this court by this court or the Court of Appeal. He further submitted that the Respondent had not demonstrated to what extent he will suffer in case the application for review is granted.

12. It is in common ground that there exists a judgment against the Defendant whose execution has not been stayed. It is also clear from the record that the application dated 29<sup>th</sup> July, 2019 was seeking an order of eviction in execution of the said judgment.

13. The court granted the said application save that there was a mix-up with regard to the prayer that was granted thus necessitating an application for review.

14. Order 45 rule 1 (2) is very clear that 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. This therefore means that the Applicant who had not preferred any appeal against the judgment of this court has right to apply for review notwithstanding the pendency of the Appeal filed by the Respondent. I equally agree with Applicant that the respondent has not demonstrated the extent of loss he will suffer that cannot be remedied by costs if his Appeal succeeds after this Application has been allowed.

15. In the circumstances, it is my finding that the Applicant has met the requirements for grant of an order of review set out under Order 45 Rule 1.

**Whether the failure to attach the order sought to be reviewed renders the application fatally defective.**

16. Learned counsel for the Respondent argued that the application was fatally defective since the Applicant failed to attach a copy of the order he wants this court to review as required under Order 45 of the Civil Procedure Rules.

17. However, my reading of Order 45 reveals that there is no express provision that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review.

18. I am guided by the Court of Appeal decision in the case of **Sheikh Ali Taib v George Ellam Wekesa & another [2017] eKLR** where it was held that:

*“A reading of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules which confer the review jurisdiction of the High Court does not have any requirement that in an application for review, an applicant must attach to the application an order that he or she seeks the court to review. In saying this, we are not stating anything new. In **Sadrudin Kurji & Another v. Shalimar Ltd & 2 Others, CA No 64** of 2006 this Court noted that there was no legal provision requiring inclusion of the order in an application for review. With great respect, the ruling of the High Court in **Stephen Munga Maingi v. The Government of the United States of America & Another (supra)**, does not stand for the proposition the learned judge assigned it. The application for review in that case was dismissed because the court was not satisfied that there was any new and important matter which had come to light which was not within the knowledge of the applicant or which he could not have produced after the exercise of due diligence at the time the order was made; that there was no mistake or error apparent on the face of the record, and that there was no other sufficient reason.*

*That is not to dispute that the High Court has severally held that failure to attach a copy of the order is fatal to an application for review. See for example, **William Saina v. Joshua Cherutich, HCCC No 259 of 2001 (OS)** and **Suleiman Murunga v. Nilestar Holdings Ltd & Another, ELCC No. 1549 of 2013**. However, recently in **Peter Kirika Githaiga & Another v Betty Rashid, CA No. 210 of 2014**, this Court emphasized the fact that the law does not require attachment of a decree or order to an application for review and concluded:*

*“As already stated Order 45 (1) does not expressly provide that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the court’s attention to that part of the ruling or judgment which he complains of, since such decision would be on the court file anyway, the application for review cannot be rendered fatally defective.”*

*We reiterate that view and add that it is most consistent with the requirement in Article 159 that courts should not pay undue regard to technicalities, particularly in a case like the present one where there was no dispute at all regarding what the court held in the first ruling, which the appellant wanted reviewed.”*

19. Therefore, I find that the failure of the Applicant to attach the copy of the order dated 30<sup>th</sup> July, 2019 does not render this application for the review defective.

**CONCLUSION**

20. In conclusion, I find the application for review of the order issued by this court on 30<sup>th</sup> July, 2019 with respect to an application filed by the Applicant on 29<sup>th</sup> July, 2019 is merited and I therefore proceed to review the orders issued in respect of the said application and make the following orders:-

- i. That the Respondent be evicted from the Applicant’s land parcel LR. No. KISII WANJARE/BOKEIRE/4414 with immediate effect.
- ii. The OCS Gesonso Police Station is hereby directed to provide security during the eviction and demolition of illegal structures on the Applicant’s land parcel LR No. KISII WANJARE/BOKEIRE/4414.
- iii. That costs of this application to be borne by the Respondent.

**DATED, SIGNED AND DELIVERED AT KISII THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2022.**

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**J.M ONYANGO**

**JUDGE**