



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. MISC. APPLICATION NO. 32 OF 2019

MBITHI MUTISYA MBITHI.....APPLICANT

VERSUS

NDUNDA THYAKA MUSYOKA.....1ST RESPONDENT

MARY MUTISYA MBITHI.....2ND RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 27th September 2021 filed by the Plaintiff/Applicant and brought under Order 45 Rules 1, 2 and 3, Order 51 Rules 1, 3, 4 and 10 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 (2) (d) of the Constitution. The Application seeks the following orders;

- a. Spent.
- b. The court do review/and or vary its ruling delivered on 13th March 2020.
- c. That the court do allow the application dated 2nd July 2019.
- d. That the costs of this application be provided for.

2. The application is premised on the grounds on its face together with the affidavit of Mbithi Mutisya Mbithi, the Plaintiff in this matter, sworn on 27th September 2021. The Applicant avers that by application dated 2nd July 2019, the Applicant sought for leave to file an appeal out of time against the judgment in Machakos CMCC No. 1187 of 2010 together with an order of stay of execution of the said judgment pending the determination of the appeal; that the said application was dismissed in a ruling delivered on 13th March 2020 without addressing the merits of the application for the sole reason that the Applicant failed to attach the copy of the judgment in Machakos CMCC NO. 1187 of 2010; that at the time of filing the application dated 2nd July 2019, the Applicant had not obtained a typed and certified copy of the aforesaid judgment; that the Applicant has now acquired the certified judgment and proceedings; that this is a clear case for review and that the application has been brought without unreasonable delay.

3. The Respondents did not file any reply to the application despite being duly served. Though the parties were directed to file submissions in respect of the application, on 18th October 2021, none complied with the said directions.

ANALYSIS AND DETERMINATION

4. I have considered the application and the affidavit in support. The issue that emerge for determination is whether the applicant has satisfied the conditions for review of the orders of 13th March 2020.

5. The statutory provisions in respect of review are enshrined in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides 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.”

6. Order 45 Rule 1 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.”

7. From the statutory provisions, a court has discretion to grant review orders where the applicant demonstrates having discovered new and important evidence which he could not have obtained even after exercising due diligence, or where there is an obvious mistake or error on record or where there is a sufficient cause. In all these instances the application for review must be made without unreasonable delay.

8. Principles for grant of review have been settled in a long line of decided judicial pronouncements. In the case of *Francis Njoroge vs. Stephen Maina Kamore [2018] eKLR* the court stated as follows;

“therefore Order 45 of the Civil Procedure Rules 2010 is very explicit that a court can only review its orders if the following grounds exist;

(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

(b) There was a mistake or error apparent on the face of the record; or

(c) There were other sufficient reasons; and

(d) The application must have been made without undue delay.”

9. In the case of *Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] EA 243* the Court of Appeal described an error apparent on the face of the record as follows;

“In *Nyamogo & Nyamogo vs. Kogo [2001] EA 174*, this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could be reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process or reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

10. This essentially means that for a party to plead an error on the face of the record, they must demonstrate that the error, mistake, fault or lapse is so obvious and plainly clear that it does not take any amount of effort to spot it. The mistake should be glaring. But if it takes convoluted arguments to find the error, then that cannot be said to be an error apparent on the face of the record worthy of an order for review.

11. In the case of *Shanzu Investments Limited vs. Commissioner for Lands Civil Appeal No. 100 of 1993* the Court of Appeal stated as follows;

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by Section 80 of the Civil Procedure Actand that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

12. Similarly, in *Registered Trustees of the Archdiocese of Dares Salaam vs. The Chairman Bunju Village Government & Others*, the

court held that;

“It is difficult to attempt to define the meaning of the words sufficient cause; it is generally accepted however, that the words should receive a liberal construction in order to advance substantive justice, when no negligence, or inaction, or want of bonafides is imputed to the appellant.”

13. On the question of discovery of new and important matter or evidence, the applicant must show that he could not obtain the new evidence even upon exercise of due diligence and that the matter was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.

14. In this case the Applicant has argued that at the time of filing the application sought to be reviewed, the judgment in Machakos CMCC No. 1187 of 2010 had not been obtained by the applicant. The issue that this court ought to address is whether, the applicant’s reason has met the threshold of Order 45 Rule 1.

15. In the application dated 2nd July 2019, the applicant sought for leave to appeal against the judgment in Machakos CMCC NO. 1187 of 2010 and an order of stay of execution of the same judgment. Upon hearing the application, this court struck out the said application without considering the merits thereof on ground that the judgment which was sought to be appealed against and which was sought to be stayed, was not annexed to the application and the court could not ascertain the applicants allegations. The finding led to the applicant to file the instant application for review, stating that she had now obtained the judgment, and the court should now be able to review its earlier decision as the applicant could not obtain the judgment earlier.

16. The wording of Order 45 Rule 1 is unambiguous in respect of discovery of new evidence as a ground for review. The applicant must show that at the time of the decision sought to be reviewed, the new matter or evidence was not within his knowledge or could not be produced by him after the exercise of due diligence. The fact that the application sought for leave to appeal out of time against the judgment in Machakos CMCC No. 1187 of 2010 and sought to stay the said judgment clearly demonstrates that the said judgment was at the core of the applicant’s application and therefore the applicant cannot be heard to plead lack of knowledge of the said judgment as such proposition is simply irreconcilable with the facts in this matter.

17. The applicant has attempted to explain that he could not obtain a copy of the judgment at the time of filing his application ostensibly because he was only able to obtain the same on 12th August 2021. He has not shown that he applied for the certified copy of the judgment before filing the application on 2nd July 2019 and has not explained the diligent efforts he applied between 2nd July 2019 and 13th March 2020 when the court’s decision was made. The key date being the date of the decision and not the date of filing the application. In the case of *Kaiza vs. Angelo Mpanju Kaiza [2009] eKLR*, the Court of Appeal held that not every new fact will qualify for interference of the judgment.

18. Similarly, in the case of *Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) vs. Kariuki Marega & Another [2018] eKLR*, the Court of Appeal stated as follows;

“we emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.”

19. I note that in the application dated 2nd July 2019, the court struck out the said application because it did not have the judgment which was sought to be appealed against and whose execution was sought to be stayed. Thus, the application was not decided on merit but on the fact that it was incompetent for lack of very basis upon which the applicant’s allegations were premised. In short, it was a house built on quick sand, and its fate was an order for striking out. The application having been struck out, the applicant could only file a fresh application if he intended to have his day in court. He could not seek to revive a fatally incompetent application through a review application as that would only be compared to attempting to construct a foundation on a house already condemned for having being built on quick sand.

20. In the premises I am not satisfied that the applicant could not obtain a certified copy of the judgment he sought to appeal against before 13th March 2020 when this court made its decision on the application dated 2nd July 2019. My considered view is that the said application having been struck out for being incompetent could not be resuscitated by way of review application.

21. The upshot is that the Plaintiff/Applicant’s application dated 27th September 2021 lacks merit and the same is dismissed with no order as to costs.

RULING DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 7TH DAY OF FEBRUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms Ooro holding brief for Mr. Munyao for Applicant

No appearance for Respondents

