



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 91 OF 2015

PAUL NGUI KATILU.....RESPONDENT/PLAINTIFF

VERSUS

JAMES MWANZIA KATILUAPPLICANT/DEFENDANT

RULING

1. Vide the Notice of Motion dated 4th November 2019 and brought under Articles 48 and 159(1) of the Constitution of Kenya 2010, Sections 80, 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Orders 46 and 51 Rule 1 of the Civil Procedure Rules, the Defendant/Applicant sought for the following orders;

- (1) **Spent**
- (2) **THAT this Honourable Court be pleased to review its judgment delivered on 22nd February 2019.**
- (3) **THAT this Honourable Court be pleased to issue an order allowing the Applicant through the District Surveyor Machakos to conduct the survey and mutation of the Parcel of Land known as Machakos/Kitanga/28.**
- (4) **THAT this Honourable Court be pleased to issue an order that the Officer Commanding Station, Machakos do provide security and ensure the maintenance of peace during the survey and mutation of the Parcel of Land known as Machakos/Kitanga/28 by the District Surveyor Machakos.**
- (5) **THAT this Honourable Court be pleased to issue any further orders it deems fit.**

2. The Application is anchored on the grounds particularized on its face as well as the Supporting Affidavit sworn on 4th November 2019 by the Defendant/Applicant. He deposed that on 22nd February 2019, this honourable court delivered its judgment by dismissing Plaintiff's suit; that the Chief Kitanga Sub-Location wrote a letter to the Plaintiff indicating that the Surveyor Machakos County would conduct survey in respect of Land Parcel Number Machakos/Kitanga/28 on 24th July 2019; that on the said date the Plaintiff in the company of other persons stopped the surveyor from doing his work; that the Plaintiff's actions are in contravention of the court's directions; that the Defendant is the bona fide registered proprietor of Land Parcel Number Machakos/Kitanga/28 by virtue of the decision of the Eastern Province Land Disputes Appeal Tribunal, Embu in respect of Appeal Number 19 of 2009; that the Defendant had filed the award in Machakos Chief Magistrate's Court Miscellaneous Civil Application No. 144 of 2008, which decision was confirmed on 5th August 2010; that the Defendant is now desirous of subdividing the land yet the Plaintiff is stopping the surveyor; that this honourable court has the discretionary powers to include an order directing the District Land Surveyor Machakos to proceed and survey the aforesaid land and that the Officer Commanding Station Machakos Police Station to provide security for maintenance of peace and that the orders sought will not prejudice the Plaintiff.

3. The Plaintiff/Respondent did not file any response to the application hence the same proceeded unopposed. The application was canvassed by written submissions. The applicant filed his submissions on 5th March 2020 while no submissions were filed on the part of the Respondent.

APPLICANT'S SUBMISSIONS

4. The Applicant submitted that this court having found that this suit was *res judicata*, did not go into the merits of the case but dismissed the case with costs. He contended that on 17th July 2019, the Chief Kitanga Sublocation informed the Respondent that survey in relation to Land Parcel Number Machakos/Kitanga/28 was to be conducted on 24th July 2019 but the Plaintiff did not allow the survey to proceed. Counsel for the Applicant argued that the Plaintiff's actions were contrary to the Law of Kenya, but the Plaintiffs persists in the same. Counsel contended that the Defendant is the registered proprietor of the said parcel of land having been declared as such by the Eastern Province Appeals Tribunal award which was confirmed on 5th August 2010 vide Miscellaneous Civil Application Number 144 of 2008.

Counsel asserted that the Applicant is desirous of subdividing his land and should not be stopped by the Plaintiff/Respondent.

5. Counsel relied on Article 48 of the Constitution of Kenya and argued that the same protects his right to property. Counsel cited Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya for the proposition that this court has unfettered inherent powers to make such orders as may be necessary for the ends of justice. Further, counsel relied on Section 80 of the Civil Procedure Act for the proposition that he was entitled to orders of review. Counsel placed reliance on the case of *Madalina Wambui Marete & Another vs. Julius Kigutu [2019] eKLR* to argue that Section 24 of the Land Registration Act vests ownership of land in the registered proprietor thereof together with all rights and privileges appurtenant thereto.

6. It was further submitted for the Applicant that where a party needs police presence for security and enforcement of a court order, the same should be granted. In that regard counsel relied on the cases of *Josephine Mueni vs. Patrick Ihachi [2019] eKLR* and *Namu Wachira & 2 Others vs. Njeru Wachira [2015] eKLR*, which this court has considered. Counsel concluded by arguing that this court has the discretion to grant the prayers sought.

ANALYSIS AND DETERMINATION

7. I have carefully considered the application, the affidavit in support as well as the submissions filed and authorities relied upon. The issue that arise for determination is whether the applicant has met the threshold for grant of orders for review.

8. The law in respect of review of judgment is provided for in Section 80 of the Civil Procedure Act and Order 45(1) 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.**

Order 45 Rule 1 for the Civil Procedure Rules 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.**

9. Essentially therefore under Order 45 Rule 1, for an applicant to succeed in seeking orders of review, he/she must demonstrate; that;

- (a) That there is discovery of new and important matter or evidence, which was not in his knowledge or could not be produced by him after exercise of due diligence; or**
- (b) That there is a mistake or error apparent on the face of the record; or**
- (c) That there is a sufficient reason;**
- (d) And an application for review must be made without unreasonable delay.**

10. In the case of *Evan Bwire vs. Andrew Aginda Civil Appeal No. 147 of 2006* the Court of Appeal stated as follows;

“An application for review will only be allowed on strong grounds particularly if its effect will amount to reopening the application or case afresh.”

11. On the issue of an error apparent on the face of the record, the court had the following to say, in the case of *Nyamogo & Nyamogo vs. Kogo [2001] EA 170*;

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a 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 spares one in the face and there could 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 a long drawn process of reasoning 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 new adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.

12. In considering an application for review the court is also obligated to consider if there is sufficient reason to review its earlier decision. In the case of *Sadar Mohamed vs. Charan Singh & Another*, it was stated as follows;

“Any other sufficient reason for the purposes of review refers to the grounds analogous to the other two (for example error apparent on the face of the record and discovery of new and important matter).”

13. In the judgment of this suit, the court made a finding as follows;

“Having found that this suit is res judicata, I need not go into the merits of the case. Consequently, the plaintiff’s suit is dismissed with costs.”

The defendant/applicant has sought to have two more orders beyond the dismissal. He seeks that there be an order allowing the applicant through the District Surveyor Machakos to conduct survey on Land Parcel Number Machakos/Kitanga/28 and an order that the Officer Commanding Station Machakos to provide security to maintain peace during the survey process.

14. It appears the defendant has no complaint about the dismissal order, he seeks for the two additional orders. He does not argue that he had a counterclaim which sought for the two orders. His arguments are that those orders would enable him implement Machakos Chief Magistrates Court Civil Miscellaneous Application Number 144 of 2008. He has not told this court why he has chosen to make the application in this matter instead of the said Miscellaneous Application Number 144 of 2008. In my view the reasons given by the applicant do not meet the threshold of Order 45 Rule 1 of the Civil Procedure Rules. The prayers sought are substantive prayers which did not arise in this matter, and which can only be determined by a fresh suit, and not through this matter as this court is now *fuctus officio*. In fact, the applicant did not attempt to make any submissions on whether this matter fell under the ambit of Order 45 Rule 1.

15. The upshot of the above is that the Notice of Motion dated 4th November 2019 lacks merit and it is dismissed with no order as to costs.

16. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 9TH DAY OF FEBRUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

IN THE PRESENCE OF:

MR. KELI FOR THE APPLICANT

NO APPEARANCE FOR THE RESPONDENT

MS. JOSEPHINE MISIGO – COURT ASSISTANT