REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 17 OF 2016

ALICE ARIKO MAKOKHA.....PLAINTIFF/APPLICANT

VERSUS

BENARD MUSUNGU DISMAS.....DEFENDANT/RESPONDENT

RULING

This application is dated 9th October 2018 and is brought under Article 159 of The Constitution of Kenya 2010, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 45 Rules 1, 2 and 5 of the Civil Procedure Rules 2010 seeking the following orders;

1. That this application be certified urgent and service of the same be dispensed with in the first instance.

2. That pending the hearing of this application inter parties, the respondent, and/or his agents be restrained from sub-dividing and/or evicting the applicant together with her family from parcel No. E. WANGA/ISONGO/174.

3. That on inter parties hearing, the Honourable court be pleased to review, set aside and/or vary its judgment delivered on 20/9/2018 and proceed to determine the case on substantive merits.

4. That costs be provided for.

It is grounded on the following general grounds that by a judgment delivered on 20/9/2018, the suit herein was struck out for being res judicata on the strength of Kakamega Succession Cause No. 372 of 1996. That this was irrespective of the fact that parties had proceeded and subjected the matter herein to a full trial. The point of law in respect of which the suit herein was struck out was never formally presented before this honourable court. The issues for determination in this suit were never heard and finally determined in the said succession cause. That it is in fact under the strength of the said succession cause that the plaintiff/applicant filed this suit. The applicant has sufficient reason in seeking the review orders sought above.

The defendant/respondent opposed the plaintiff's application dated 9th October, 2018 on the following grounds that the application does not meet the conditions for a review. That the application is fatally defective and lacks merit. That the plaintiff is a frivolous and vexatious litigant. That the orders sought amounts to this court sitting on its own appeal and thereby an abuse of the court process. That the plaintiff's suit was based on inheritance a matter which was determined in Kakamega HC Succession Cause No. 372 of 1996 and thereby res-judicata.

This court has considered the application and the submissions therein. 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-*
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> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
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> *(b) by a decree or order from which no appeal is hereby allowed.*
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> *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-*
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> *(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
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> *(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 order as it thinks fit on sufficient reason being given for review of its decision. However this discretion should be exercised judiciously and not capriciously. I see no mistake or error or omission on the part of the court when it found this suit was res judicata. In Court of Appeal, *Civil Appeal No. 2111 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. The application is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 3RD JULY 2019.

N.A. MATHEKA

JUDGE