



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

PETITION NO. 18 OF 2012

JOSEPH MUTEGI KIRUGI.....RESPONDENT

VERSUS

HON. ATTORNEY GENERAL.....APPLICANT

RULING

1. Before me is a notice of motion dated 30th November 2018 brought under provisions of Article 50 of the Constitution, Section 1A, 2A, 3A and 80 of the Civil Procedure Act and Order 45 Rule 1, 2, 3 and 5, Order 51 rule 1 of the Civil Procedure Rules, whereby applicant is seeking the review or setting aside of the judgement delivered on the 18th July 2018 together with all consequential orders/decree.

2. The applicant contends that the judgement delivered manifested an error as the affected portion of the property, as per the report was 0.50 ha. This was a mistake since the gazette notice captured the acreage of 0.0050ha, and the price per acre was not considered by the court. Further, the copies of the photographs did not show the nature of the developments. Finally, applicant avers that their preliminary objection filed on 5th October 2017 was not considered in the final analysis.

3. The applicants in their submissions have argued that there exists sufficient reasons to review the judgement as the final judgement was procured illegally/fraudulently and that the said judgment is not executable as it relates to a parcel of land which has already been de-gazetted and it is trite law that courts do not issue orders in vain but with a view to settling specific disputes.

4. On the other hand, the respondent argued that the applicant is trying to revisit a proper judgement, and that the preliminary Objection was never prosecuted by the applicant hence the court had no business considering the same.

5. I have considered all the arguments raised herein. The Applicant is seeking review/setting aside of the judgment and decree of this court issued on 18th July 2018.

6. Section 80 of the Civil Procedure Act (Cap.21) Laws of Kenya 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.”

7. Order 45 of the Civil Procedure Rules sets out the grounds for review of a judgment. The same 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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”

8. In the instant case, the Applicant has based their grounds for review of the orders made on 18th July 2018 under the second condition,

“mistake or error apparent on the face of the record” –see Ground (j) in the applicant’s application.

9. In the case of Jeremiah Muku Methodist Church of Kenya Registered Trustees & Another (2009) eKLR, it was stated that;

“The three conditions for applying for a review of either the decree or order of court may be summarized from the above rule 1(1) of Order XLIV of the Civil Procedure Rules as – Firstly the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time the decree was passed or the order was made; secondly; on account of some mistake or error apparent on the face of the record, or thirdly; any other sufficient reason”.

10. Further, the Court of Appeal in the case of; National Bank of Kenya Ltd vs Ndungu Njau Nairobi CA No. 211 of 1996 held that;

“A review may be granted whenever the courts consider 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 a deliberate 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 proceeded on an incorrect expression of the law.”

11. Similarly, the Court stated in the case of Draft and Develop Engineers Ltd vs National Water Conservation and Pipeline Corporation, Civil Case No. 11 of 2011 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 factors 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 stares 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 along drawn process of 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 (emphasize). Again, if a view 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 also possible.”

12. On perusal of the judgement entered on 18th July 2018, it was noted by this court that the applicant did not show up for trial and the case proceeded ex-parte. The applicant alleges that there was an error as the report indicated 0.050 hectares while the gazetted land was 0.0050 hectares. This issue was however addressed in the judgement buy this court at paragraph 12. The applicant has submitted that plaintiff seeks to benefit from an illegality as the property was situated on a road reserve. I find that in essence applicant is trying to adduce evidence after judgment.

13. On the issue of the Preliminary Objection, I find that the same was brought forth by the present applicant way back in October 2017. It was the duty of the applicant to have the same prosecuted. They failed to do so before the Judgment. This court cannot therefore revisit the matter.

14. In conclusion, I find that the application filed on 30.11.2018 is not merited, the same is hereby dismissed with costs to respondent /plaintiff.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 10TH DAY OF JULY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Kiongo for respondent

Ngugi holding brief for Kimathi for petitioners

HON. LUCY. N. MBUGUA

ELC JUDGE