



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 376 OF 2017

ALBERT SORE MANG'ULA.....PLAINTIFF/RESPONDENT

VERSUS

JOSEPHAT N. WANANGWE

LIVINGSTONE ODENYI WANANGWE

LABAN J. WANANGWE.....DEFENDANTS/APPLICANTS

RULING

The application is dated 16th December 2020 and is brought under Order 45 Rules 1, 2, 3, 4 and 5 and Order 22 Rule 25 and Section 3A of The Civil Procedure Rules seeking the following orders:-

1. That this application be certified urgent and be heard exparte in the 1st instance.
2. That the honourable court be pleased to order for a stay of execution of the orders issued on the 27th day of September, 2019 and 29th day of September, 2010 pending the hearing and determination of this application inter-parties.
3. That the honourable court be pleased to review its judgment made on the 24th day of September, 2019 since there is an error apparent on the records.
4. That the costs of this application be provided for.

It is based on the annexed affidavit of Josephat N. Wanangwe and the following grounds that the defendants/applicants may be evicted from their portion of land on the strength of the eviction orders issued by the court and yet the defendants/applicants do not reside within the 2.6 acres of land parcel number Marama/Lunza/54. That the defendants/applicants stay away from the 2.6 acres that the court has ordered them to be evicted from. That the defendants/applicants are entitled to occupy the portion from which the court has ordered them to be evicted since the same does not form part of the 2.6 acres belonging to the plaintiff/respondent. That it is in the interest of justice that the above orders be granted to stop the unjust suffering of the defendants/applicants with eviction.

The respondent submitted that the defendants'/applicants' application lack merit as it is on the basis of an illegality them having unequivocally disobeyed the eviction orders of the honourable court issued on the 27th day of September, 2019. That the defendants/applicants herein are staying illegally on the disputed land which measures 2.6 hectares which was surveyed and a title deed issued and not 2.6 acres as declared by the applicants herein, a fact which rightly guided the issuance of the eviction orders. That the fact that the respondent herein was issued with a title deed which is hereto attached is proof that the land was surveyed.

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 Mwhoko 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-

(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.”

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-

(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.

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. The defendant/applicants submitted that they may be evicted from their portion of land on the strength of the eviction orders issued by the court and yet the defendant/applicants do not reside within the 2.6 acres of land parcel number Marama/Lunza/54. That the defendant/applicant's stays away from the 2.6 acres that the court has ordered them to be evicted from. The respondent submitted that the defendants have disobeyed the eviction orders of the honourable court issued on the 27th day of September, 2019. That the defendants/applicants herein are staying illegally on the disputed land which measures 2.6 hectares which was surveyed and a title deed issued. I see no mistake or error or omission on the part of the court as the court order is clear. 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. If the applicants do not live on the suit land then they has no cause to worry as the court orders is clear on who is to be evicted and from where. Their recourse if dissatisfied is now to file an appeal. I find this application is not merited and I dismissed it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 22ND JUNE 2021.

N.A. MATHEKA

JUDGE