



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT BUSIA**

**ELC CASE NO. 76 OF 2015**

**FLORENCIO OKITUK OPILIO.....PLAINTIFF/APPLICANT**

**= VERSUS =**

**KARULI PANYAKO OMULEPU.....DEFENDANT/RESPONDENT**

**RULING**

1. The Applicant moved this Court under sections 1, 1A, 1B, 3A, 3B and section 63 (e) of the Civil Procedure Act, Order 51 Rules 1, 4, 10(1), (2) of the Civil Procedure Rules on the 15<sup>th</sup> of Dec, 2020 for orders THAT:

**a. Spent;**

**b. This Honourable Court do issue a temporary order of stay of judgement, proceedings and order of the Court pending hearing and determination of this application interpartes;**

**c. This Honourable Court set aside and review the orders of this Court made on the 15.7.2020 allowing the Plaintiff's/Respondent's application dated 11.05.2020;**

**d. Spent;**

**e. The costs of this application be in the cause.**

2. The Application was supported by the affidavit of **KAROLI PANYAKO OMULEFU** dated 15<sup>th</sup> Dec, 2020 and on the following grounds;

***a. That, the Plaintiff/Respondent never paid to the Defendant/Applicant the full agreed purchase price;***

***b. That, in view of the nonpayment of the agreed purchase price the contract between the parties is hence untenable in view of breach on the part of the Plaintiff/Respondent;***

***c. That, in any event the Plaintiff/Respondent does not reside on part of LR NO. SOUTH TESO/APOKOR/552 and as such does not qualify to acquire any part of thereof by virtue of adverse possession and also the fact that there have been several complaints against the Plaintiff's use of LR NO. SOUTH TESO/APOKOR/552;***

***d. That, it is in the interest of justice that the application be allowed.***

3. The Respondent opposed the application by filing his Replying Affidavit dated 17<sup>th</sup> of February, 2021 which pleaded that:

***a) That he entered into an agreement with the Appellant herein on 25.6.99 for the purposes of purchasing a portion measuring 1 acre out L. R NO SOUTH TESO/APOKOR/552 for a consideration of K.Shs.25,000/=;***

***b) That he cleared and paid all the monies required as per the Sale Land Agreement and the same is evident on the said agreement as the Applicant acknowledged by signing each and every time, he received money on account of the purchase of the land;***

***c) That all attempts to make the Applicant transfer the portion have been futile;***

***d) That he stayed on the land until the year 2005 when he was advised that I can obtain the 1 acre through adverse possession since***

*he stayed peacefully for over 12 years and judgement was entered in his favour.*

*e) That this case has already been determined and a court order issued to that effect;*

*f) That the application is an abuse of the court process and the same ought to be dismissed with costs.*

4. Parties agreed to canvass the application by way of written submissions. However only the Respondent filed his submissions on 12<sup>th</sup> of April, 2021 submitting that the Applicant deliberately sought to evade the wheels of justice by ignoring the court process and later seeking to delay the execution process by bringing the present application. He submitted

further that the Applicant has not met the standards for setting aside as set out in the case of **Pithon Waweru Maina vs. Thuku Mugira Civil Appeal No. 27 of 1982.**

5. For an application for review to be successful, this Court is called upon to consider the principles set out in order 45 of the Civil Procedure Rules that:

- a. There is discovery if new and important matter of evidence, which after the exercise of due diligence was not within the Applicant's knowledge or could not be produced at the time the decree was passed or the order made;
- b. On account of some mistake or error apparent on the face of the record;
- c. Or for any other sufficient reason; and
- d. The application should be brought without unreasonable delay.

6. For the present application to be successful, the Applicant ought to ensure that he meets the threshold laid down by Order 45 rule 1 of the Civil Procedure Rules specifically that he has discovered new evidence that was not within her knowledge when the judgement and order was passed and that he brought this application without unreasonable delay.

7. The Applicant seeks a review on the basis that the Respondent did not complete payment of the purchase price in respect of the suit property. This in my opinion is not new evidence as the matter was already canvassed during trial. The Applicant has not challenged the finding on the matter nor appealed against the entire judgement entered in favour of the Respondent. Secondly, the order complained of was executory of the judgement, it did not change the decree as passed by the court.

8. In the case of **TOKESI MAMBILI & OTHERS VS. SIMION LITSANGA CIVIL APPEAL NO. 9 OF 2001 AT KISUMU**, the Court held that,

**“In order to obtain a review an applicant has to show to the satisfaction of the Court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made...Where the application is based on sufficient reason, it is for the Court to exercise its discretion.”**

9. In a similar case of **EVAN BWIRE VS. ANDREW NGINDA KISUMU Civil Appeal No. 103 of 2000**, the Court held that:

**“an application for review will only be allowed on very strong grounds, particularly if its effect will amount to re-opening the application or case a fresh.”**

10. Finally in the case **RACHEL WAMBUI & 2 OTHERS VS. LOUIS KAMBO (2019)** Muchelule J. and Ali-Aroni (LJ) while quoting the case of Tokesi (supra)unanimously held that,

**“it is trite law that in order to obtain a review the applicant has to show to the satisfaction of the Court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not have been produced at the time when the order to be reviewed was made...”**

11. In view of the above conclusion, I find that the Applicant has failed to meet the threshold set for review and setting aside of the judgment and as such the application fails.

12. The costs of the Application is awarded to the Respondent.

**DATED, SIGNED & DELIVERED AT BUSIA THIS 28TH DAY OF JULY, 2021.**

**A. OMOLLO**

**JUDGE**