



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

MISC. APPLICATION NO. 8 OF 2020

JOSEPH JUSTIN MUTHEE.....APPLICANT

VERSUS

HENRY KINYUA MBUI.....RESPONDENT

RULING

Introduction

The Applicant vide a Notice of Motion dated 10th December 2020 sought the following orders:-

1. Spent.

2. That pending hearing and determination of this application, this Honourable Court be pleased to issue an order of stay of the Court's judgment dated 24th April 2019.

3. That this Honourable Court be pleased to review the ruling/order issued in Court on the 13th November 2020 by this Court together with the consequential orders arising therefrom.

4. That costs of this application be in cause.

The application is premised on the following grounds:-

1. That the Respondents are in the verge of executing the said judgment and the Applicant may be condemned unheard.
2. That the Applicant is desirous and willing to provide security for costs to secure payment of the decretal sum pending the outcome of the Appeal.
3. The Court should be of the opinion in application for stay of execution give the applicant time to deposit the decretal sum with the Court pending hearing and determination of the appeal.
4. That the said Valuation Report for the land that was brought to the Court was highly exorbitant and exaggerated.
5. That the Applicant intends with the order of the Court to instruct a County Valuer to carry out proper valuation and probably come up with a proper sum to the value of the land.
6. That should the Court give me another chance, I will comply.

The Respondent through the firm of Kiguru Kahigah & Co. Advocates filed grounds of opposition in opposition thereto dated 24th February 2021.

Applicant's summary of Facts

The Applicant in his affidavit in support of the application stated that he is aware of the ruling by this Honourable Court on 13th November 2020. He argued that he was sued by the Respondent in CMCC No. 102 of 2015 and judgment was delivered against him on 24th April 2019. He was aggrieved by the said judgment and instructed his hitherto advocate to prefer an appeal but the advocate for some reason he could not understand, did not lodge the appeal. He instructed another advocate who also did some delay in filing the appeal. According to

the Applicant, his opinion for appeal is to enable the Applicant to engage a Public Valuer to carry out the valuation of the land to enable him pay the respondent.

The Applicant also contends that the Respondent's valuation of the land to a tune of Ksh. 2,995,000/= is much high and that it should be reviewed as he is a man of merger means not in a position to settle the amount but may lead him to languish in abject poverty. He stated that the suit land is a family property which he depends on to feed his family and that it is only fair and just that the Respondent is compensated by way of monetary means.

Respondent's Grounds of Opposition

The Respondent set out the following grounds of opposition to the application:-

1. That the application is frivolous, vexatious and an abuse of Court process.
2. That the application lacks merit and does not lie.
3. That the application does not meet the legal threshold for orders of review under the provisions of **Section 80 and Order 45 of the Civil Procedure Rules Cap. 21 Laws of Kenya** as per the grounds cited and the orders sought for are not available to the Applicant.
4. That stay orders are not available as no proceedings are pending and the orders granted on 12th November 2020 were negative orders for dismissal of the application and hence incapable of any execution or staying.
5. That the only remedy available to the applicant is to appeal against the dismissal orders and not a review as prayed.
6. That the Applicant has not disclosed any discovery of new matters or any sufficient reasons to warrant the granting of the orders sought.

Legal Analysis

I have considered the Notice of Motion dated 10th December 2020 and the supporting affidavit. I have also considered the grounds of opposition in response thereto. The application is brought under **Section 80 CPA and Order 45 of the Civil Procedure Rules, Cap. 21 Laws of Kenya**.

Section 80 CPR 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 CPR also 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 mistakes 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”.

The Applicant has confirmed from his affidavit in support of this application that this Honourable Court rendered itself on an application for stay of judgment by the lower Court on 13th November 2020 by dismissing the same for lacking merit. The applicant has moved this Court for a review of the said orders. The grounds for review as provided under the applicable law are as follows:-

1. *There is a discovery of new and important matter.*
2. *The matter could not be produced by him at the time when the decree was made despite due diligence.*

3. *On account of some mistakes or error apparent on the face of the record or*

4. *Any other sufficient reason and*

5. *The application is made without unreasonable delay.*

The Applicant has not shown any of the five grounds for the grant of the application. He has not given any new and important matter which he could not produce when he made the application for stay of the decree and/or order delivered by this Court on 13th December 2020. He has not identified any mistake or error apparent on the face or record or any other sufficient reasons to warrant this Court to consider in the grant of the orders sought. I also note that the orders issued by this Court on 13th December 2020 is a negative order which is incapable of being executed. This Court had dismissed the Applicant's application for stay of execution of the decree in the lower Court case being CMCC No. 102 of 2015. The order of dismissal is a negative order which cannot be executed as the Court did not order the Applicant to do anything or refrain from doing anything. It was an order incapable of being executed. I agree with counsel for the Respondent that the application dated 10th December 2020 is frivolous, vexatious and an abuse of the Court process. The same is hereby dismissed with costs. It is so ordered.

RULING READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 23RD DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Asimwe holding brief for Mr. Kahiga for Respondent
2. Applicant – absent
3. Kabuta – Court clerk.