



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 256 OF 2017

JOHN A. KAROLI

JANE MMBONE AMALEMBA

JOSEPH MMEYWA AMALEMBA

THOMAS MBOYA AMALEMBA.....PLAINTIFFS /APPLICANTS

VERSUS

JOSEPH C. MAKAMU.....DEFENDANT/RESPONDENT

RULING

The application is dated 19th April 2021 and seeks the following orders;

1. That the application herein be treated urgent in the first instance.
2. That pending hearing and determination of this application, there be a review of court proceedings and judgment of this court delivered on 9th April, 2019.
3. That pending hearing and determination of this application there be a refraining orders against the defendant, his agents, servants, employees or whosoever from entering, digging, ploughing, constructing and or doing any transaction or anything until this application is heard and finalized.
4. That pending hearing and determination of this application there be a refraining orders against the defendant, his agents, servants, employees or whosoever from entering, digging, ploughing, constructing and or doing any transaction or anything until this application is heard and finalized.

It is based on the grounds that the 1st applicant is the son of the late Amalemba Karoli who died way back in 1979. That in the premises no succession proceedings were preferred and they are intending to file the same soon. That the respondent fraudulently obtained title deed No. Isukha/Lukose/1027 and transferred the whole land to himself. That he sold him a portion of his father's land which was half acre and not two acres as fraudulently obtained and he paid him Ksh. 15,000/= leaving a balance of Ksh. 2,000/= unpaid to date. That the respondent used false claims to defeat justice in Kakamega HCCC case No. 256 of 2017. That he could not capture the claim for fraud in an originating summons matter hence the need for review of this proceedings and judgment. That indeed the respondent has gained access to the subject land and was thrown out via an eviction order arising from the alleged Originating Summons.

The respondent submitted that a prayer for review of court proceedings and judgment of this court delivered on 9th April, 2019 as prayed for pending the hearing and determination of this application is not available in law. That the applicants have filed an application in the Court of Appeal Kisumu being ELC Application No. 2F of 2021 seeking for leave to file a fresh notice of appeal as per the annexure marked J.C.M. 1. And this is where the applicants ought to have sought for the orders similar to what is sought in this application.

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 applicants submitted that no succession proceedings were preferred and they are intending to file the same soon. That the respondent fraudulently obtained title deed No. Isukha/Lukose/1027 and transferred the whole land to himself. That he sold him a portion of his father's land which was half acre and not two acres as fraudulently obtained and he paid him Ksh. 15,000/= leaving a balance of Ksh. 2,000/= unpaid to date. I see no mistake or error or omission on the part of the court. 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. There is no new evidence that has come to light. The principles for granting an injunction have also not been met as the applicants have failed to show a prima facie case. Their recourse if dissatisfied was to file an appeal. I find the application dated 19th April 2021 is not merited and I dismissed it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 21ST JULY 2021.

N.A. MATHEKA

JUDGE