



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 253 OF 2016

RONALD ONYANGO OBONGO.....PLAINTIFF

VERSUS

JACKTONE OWINO.....DEFENDANT

RULING

The first application is dated 2nd March 2021 and is brought under section 1 (a), 1 (b) and 3A of the Civil Procedure Act and order 51 of the Civil Procedure Rules seeking the following orders:-

1. That this application be certified as urgent and the service of the same be dispensed with in the first instance.
2. That the officer commanding Luanda Police Station to be ordered to provide security during the execution of the decree issued on 16th April, 2020.
3. That the costs of this application be provided for.

It is based on the annexed affidavit of Ronald Onyango Obongo and on the following general grounds that judgment was entered in favour of the plaintiff/applicant on the 18th day of April, 2020. That the plaintiff/applicant obtained a decree for eviction order against the defendant/respondent, his agents, servants and employed at the expiry of six (6) months from the date of the said judgment. That defendant/respondent was duly served with the said decree and to date there is no appeal and/or stay of execution preferred. That the time frame which the defendant was given to vacate L.R. No. West/Bunyore/Ekwanda/627 has lapsed. That the defendant/respondent has become arrogant, violent and unfriendly thus he is not keen of moving out of the suit land voluntarily. That the security by the police officers is needed during the execution of the said decree so as to avoid the breach of peace. That the court's decree cannot be issues in vain.

The second application is dated 16th March 2021 and is brought under Order 45 Rule 1 (b) of the Civil Procedure Rules and Section 80 of the Civil Procedure Act and the Constitution of Kenya 2010 seeking the following orders:-

1. That the honourable court be pleased to review its judgment of 16th day of April, 2020 and or its decree or order emanating from the said judgment issued on 16th July, 2020 and all other consequential orders arising therefrom.
2. That there be an order staying or suspending the execution of the court's decree issued on 16th July, 2020.
3. That upon the said review and or setting aside of the judgment/decreed/consequential orders thereof, the honourable court be pleased to grant the applicant leave to defend the proceedings herein.
4. That in the alternative and without prejudice to the prayer in 2 above, the honourable court be pleased to order a stay of the proceedings herein pending the hearing and determination of Vihiga PMC Succession Cause No. 99 of 2019 (formerly Kisumu High Court Succession Cause No. 730 of 2013.)
5. That costs of this application be borne by the plaintiff/respondent.
6. That the court be pleased to issue any other order or relief if deems just and fit to grant.

It is premised on the following grounds that there is sufficient reasons to be explained herein below for the court to review its judgment/decreed and any other order emanating from the proceedings herein. The title in respect of the suit land to wit West Bunyore/Ekwanda/627 was registered in the name of the plaintiff by transmission vide Kisumu High Court Succession Cause No. 730 of 2013 and which proceedings the defendant has instituted revocation proceedings which are presently ongoing and awaiting determination. The

applicant was never notified of the proceedings or judgment herein until when he was confronted with an eviction order to vacate the suit property and the application for the police to forcefully evict him. It will only be just and fair that the orders sought in the application be considered as the applicant stands to suffer irreparable loss should the revocation proceedings be ruled in his favour. Whereas the plaintiff herein filed fraudulent succession proceedings in Kisumu High Court, there is sufficient reason to believe that he filed the instant proceedings in Kakamega High Court to conceal the proceedings in Kisumu while using different advocates. The suit parcel is the only ancestral land known to the applicant herein and hence if execution is allowed to proceed, the applicant will suffer irreparable loss.

The respondent submitted that the defendant/applicant herein was aware of this matter and he appointed M/s. Ken Omollo & Associates and later on he replaced them with the firm of the current advocates on record D.C. Chitwa & Co. Advocates (Annexed and marked "ROO1" is a copy of Notice of Change of Advocates.). That the succession matter is totally unrelated to his initial claim. That the judgment-debtor is merely out to deny him enforcement of the fruits of the judgment herein. That that all proceedings and notices pertaining to this matter were duly served upon the judgment-debtor and/or his representatives. That this application is misconceived and unmerited and ought to be dismissed with costs.

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. That the title in

respect of the suit land to wit West Bunyore/Ekwanda/627 was registered in the name of the plaintiff by transmission vide Kisumu High Court Succession Case No. 730 of 2013 and which proceedings the defendant has instituted renovation proceedings which are presently ongoing and awaiting determination. The applicant was never notified of the proceedings or judgment herein until when he was confronted with an eviction order to vacate the suit property and the application for the police to forcefully evict him. I have carefully perused the court file and I find that the defendant was personally present in court during the mention of this matter from as far back as 2018. He first appointed M/s. Ken Omollo & Associates and later on he replaced them with the firm of the current advocates on record D.C. Chitwa & Co. Advocates as per the record. On the 22nd May 2019 a hearing date was taken by consent and Chitwa Advocate was represented by Willy Advocate and a date set for 27th November 2019 and marked as the final adjournment for the plaintiff. On the hearing date the defendant and his advocate failed to show up and the matter proceeded ex parte. Judgement was delivered on the 16th April 2020 and the defendant was given six months to vacate the suit land. It is only after the plaintiff filed an application to enforce the judgement that the defendant brought the application for review and or stay. 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”.

This court has perused the court file and finds that the defendant was at all times represented by counsel. In fact the hearing date for the main trial was taken by consent of both counsels.

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. The succession matter was well within their knowledge during the trial in this matter and the defendant offered no defence. Their recourse if dissatisfied was to file an appeal. I find the second application is dated 16th March 2021 is not merited and I dismissed it with costs. Having found so I find that the first application is dated 2nd March 2021 is merited and I grant the same as prayed.

It is so ordered.

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

N.A. MATHEKA

JUDGE