REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO 184 OF 2020

LUCY NYAGUTHI MUGO.....PLAINTIFF/APPLICANT

VERSUS

ZUMZUM INVESTMENT LTD.....DEFENDANT/RESPONDENT

RULING

The application is dated 21st May 2021 and is brought under Order 43 Rule 1 and 2, Order 51 Rule 1, 15 of the Civil Procedure Rules, 2010 and Section 3A, 63 (e) of the Civil Procedure Act seeking the following orders;

1. That the Honourable Court be pleased to stay execution of its orders issued on 19th May, 2021 pending the hearing and determination of this application.

2. That this Honourable court be pleased to review its orders issued on 19th May 2021.

3. That the costs of this application be provided for.

It is based on the grounds that on 19th May 2021, the Court in Mombasa ELC Case No. 184 of 2020 Lucy Nyaguthii Mugo –v- Zumzum Investment Limited dismissed the applicant's application dated 9th October, 2020 seeking a temporary injunction pending the hearing and determination of the suit against the defendants. The applicant has learned of the existence of a matter before this very court, Mombasa ELC Case No. 139 of 2020 Fondo Karisa Mtangi & 431 Others-v- Zumzum Investment which matter flows from similar material facts as that of the applicant's suit and in the said matter, this court has granted the plaintiffs/applicants therein orders of temporary injunction pending the determination of their suit which orders were issued on 14th October, 202 restraining the respondent from evicting and or disrupting quiet possession and enjoyment bye the applicants. That during the reading of the ruling and in course of the proceedings, the applicant's advocate faced technical hitches with audio and video conferencing, and the court was not able to hear the applicant's immediate oral application for stay of execution of the orders pending the applicants appeal and the session abruptly terminated. That it was whilst preparing the applicants formal application for stay of execution, the applicant's advocates on perusal of the court file and court's cause list came across this new material fact which has guided this application and which ought to guide this honourable court in its decision. The facts in Mombasa ELC No. 139 of 2020 directly flow from the respondents notice of eviction issued to the plaintiff's including the applicant herein and the orders of a temporary injunction pending the hearing and determination of the suit granted by this honourable court on 14th October, 2020 therein preserves the parties' proprietorship interests and the same should apply to the applicant herein. That clearly there are two different rulings on matters grounded on the same set of facts thereby manifestly erroneous and should be corrected by the honourable court. That court orders should be certain and uniform and the current status clearly shows there are two different rulings by this court touching on the same set of material facts thereby craving correction by this honourable court. That failure to review the ruling issued on 19th May 2021, the applicant shall suffer irreparable harm and in view of the nature of urgency, this matter ought to be expeditiously dealt with by this honourable court to preserve and protect the rights of the applicant. That the result of the ruling and the finality of its nature, and without any orders staying execution, the applicant is heavily prejudiced and exposed to eviction action by the respondent rendering the applicant's entire case trivial. That the ruling as delivered by this honourable court has for all intents and purposes has rendered the applicant's substantive case against the respondent nugatory as the same relates to proprietary interests in the suit property. That this application has been made expeditiously and bonafide and they pray that the honourable court finds in its discretion and in the interests of justice and allows the application as prayed. That it is in the interest of justice and fair play that this honourable court reviews its ruling delivered on 19th May 2021 on the foretasted grounds so as to preserve and protect the rights of the plaintiff/applicant herein. That the plaintiff/applicant stands to suffer irreparable harm and great prejudice if this application is not allowed. That the respondent will suffer no prejudice whatsoever if at all the orders herein are granted and the application heard on merit.

The respondent submitted that the application dated 21st May 2021 is bad in law and abuse of the court process deceitfully veiled as an application for review when the same seeks to have this court sit as an appellate court on its own decisions for which this court lacks jurisdiction. That there is no fresh and new evidence for which this court should exercise the review powers considering that the purported Order in ELC No. 139 of 2020 is not an evidence whatsoever in support of the plaintiff's case and the said case is materially different with this suit and order therein was entered under totally different circumstances which was ex-parte. That the application does not in any manner

whatsoever meet the threshold for review and the application 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 Mwihoko 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*
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> *(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-*
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> *(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 on 19th May 2021, the Honourable Court Judge of Environment and Land Court Mombasa in ELC Case No. 184 of 2020 Lucy Nyaguthii Mugo –v- Zumzum Investment Limited dismissed the applicant's application dated 9th October, 2020 seeking a temporary injunction pending the hearing and determination of the suit against the defendants. The applicant has learned of the existence of a matter before this very court, Mombasa ELC Case No. 139 of 2020 Fondo Karisa Mtangi & 431 Others-v- Zumzum Investment which matter flows from similar material facts as that of the applicant's suit and in the said matter, this court has granted the plaintiffs/applicants therein orders of temporary injunction pending the determination of their suit which orders were issued on 14th October, 202 restraining the respondent from evicting and or disrupting quiet possession and enjoyment by the applicants. 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 said case Mombasa ELC Case No. 139 of 2020 Fondo Karisa and 421 Others vs ZumZum Investment Limited, existed all along and there is no evidence that the circumstances are the same. 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 21st May 2021 is not merited and I dismissed it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH OCTOBER 2021.

N.A. MATHEKA

JUDGE