



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. 280 OF 2017

LAKEVIEW INVESTMENTS LIMITED..... PLAINTIFF

VERSUS

PROF. JOHN PAUL ODERO [SUED AS THE CHAIRMAN NAIROBI KENYA

SECONDARY SCHOOLS HEADS ASSOCIATION].....DEFENDANT

RULING

1. In the Application dated 14th July, 2020, the Plaintiff has sought for the following orders:

- a. That the Honourable Court be pleased to review, vary and/or set aside its Order given on 15th May, 2020 which found the Plaintiff's Director, Joseph Oduor Okwaro in contempt of the orders of this Honourable Court of 25th January, 2019.**
- b. That the Honourable Court be pleased to issue summons to one Shilla Ishiundu, the owner of the one-storey building erected on the suit property to appear personally in court to confirm ownership of the said property.**
- c. That the Honourable Court be pleased to order the Officer Commanding Mavoko Police Station to enforce the orders in 3 above and ensure compliance thereof.**

2. The Application is supported by the Affidavit of the Plaintiff's Director who has deponed that vide a Notice of Motion dated 1st March, 2019, the Defendant/Respondent sought to have him committed to prison for disobeying the Court Order issued herein on 25th January, 2019 that had directed the maintenance of status-quo in respect of the suit properties pending the hearing and determination of the substantive suit.

3. The Plaintiff's Director deponed that the order of status-quo meant that neither of the parties in this suit, their respective agents, servants or employees could transfer, alienate, develop or adversely interfere with the suit properties and that in his Replying Affidavit and Further Replying Affidavit filed in court on 21st May, 2019 and 17th October, 2019 respectively, he denied having disobeyed the said court order and stated that the said development which was then on-going on the suit property was being carried out by a third party, who also claimed ownership of a portion of the suit property having allegedly purchased the same.

4. According to the Plaintiff's Director, as at the time of swearing his said affidavits in response to the Respondent's application for contempt, he did not have the particulars of the person who was responsible for the subject development on the suit property despite having made efforts to establish his/her identity and that he has since been able to establish the particulars of the person responsible for the said construction, which information was not before the Court when the contempt application was being litigated upon.

5. It was deponed by the Plaintiff's Director that he has since established that one Shilla Ishiundu of Mobile Tel No. 0721 445 965 is the owner of the one-storey building erected on the suit property; that he never gave his consent to the said Shilla Ishiundu to construct a house thereon since she is a stranger to him and that it is only fair and in the interest of justice that the said Shilla Ishiundu be summoned to personally appear before this Honourable Court to enable the Court ascertain the facts adduced herein by himself that neither the Plaintiff nor himself had anything to do with the development of the suit property.

6. According to the Plaintiff's Director, the aforesaid new evidence as to the identity of the person responsible for the subject development on the suit property warrants this Court to review its orders given on 15th May, 2020 that found that he was in contempt of the orders of this Court issued on 25th January, 2019 and that it is only fair that the aforesaid new evidence that he could not previously place before the Court be considered to enable the Court arrive at a just decision.

7. The Plaintiff's Director finally deponed that he will suffer great prejudice if he is committed to civil jail yet it is very clear that the

property in question was not erected by the Plaintiff or himself but by a third party whose identity has now been established.

8. In response, the Defendant filed a Notice of Preliminary objection and Grounds of Opposition in which he deponed that the Plaintiff's Director lacks audience to argue any further Application before this court because he is un-discharged contemnor; that the Application does not raise any ground to overturn the contempt conviction and that the Application is res judicata in view of the decision of this court of 15th May, 2020.

9. In his submissions, the Plaintiff's advocate submitted that it is very likely that the Court would have arrived at a different decision if the fact of the real owner of the building erected on the suit property had been brought to its attention and that the Civil Procedure Rules gives latitude to a party aggrieved by an order of a Court to either appeal against such an order or apply for its review and setting aside.

10. Counsel submitted that the Plaintiff seeks to bring on board one Shilla Ishiundu to answer to issues of ownership of the building erected on the suit property; that the said Shilla Ishiundi, who is the owner of the said building, has not filed any pleadings in this matter and that because the contempt proceedings were premised on a building owned by her, it is only fair and in the interest of justice that she be called upon to clarify as to whether she had any association with the Plaintiff herein.

11. It was submitted by counsel that the issue as to the ownership of the building erected on the suit property was not conclusively determined on merit since the Plaintiff had denied in its pleadings of being the owner of the same and that the operation of the principle of *res judicata* is therefore ousted.

12. The Plaintiff's counsel submitted that there is need to have the Court orders issued on 15th May, 2020 set aside and/or reviewed because there is sufficient evidence available that was not previously placed before the Honourable Court that vindicates the Plaintiff's director from blame and that no prejudice would be occasioned to the Respondent since the court, and more so the parties herein, would be able to identify any trespassers and/or third parties who may be illegally or legally in occupation of the suit property and who are not parties to these proceedings.

13. The Plaintiff's counsel placed reliance on the case of *Nairobi HCCC No. 96 of 2005 Dhiraj D Popao & Another Vs Charles Mwangi Kogonia*, where the court allowed an application for review on account of discovery of new evidence as follows:

“There is no strict proof of the allegations about discovery of the new evidence or any other sufficient ground for review. For an application for review to succeed the evidence must not only be new but the Applicant must prove that he did not have them in his possession at the time and could not have obtained it despite due diligence.”

14. Counsel submitted that since the development on the suit property is clearly identifiable, it would not be difficult to enforce any orders that may be issued herein for purposes of ensuring that the said Shilla Ishiundu attends Court.

15. The Defendant's advocate submitted that the Application is res judicata because the court has already considered and rejected the Plaintiff's plea that another person was responsible for building on the suit property contrary to the orders of the court and that in any event, the Plaintiff should be denied audience by this court.

16. It was submitted that no material was placed before the court to explain why the Plaintiff concealed the identity of the person doing the construction on the suit property; that the issue raised by the Plaintiff is res judicata and that the Plaintiff exhausted its opportunity to be heard in opposition to the contempt Application.

17. The Plaintiff is seeking to review the orders of this court of 15th May, 2020 in which the court found the Plaintiff's Director, Joseph Oduor Okwaro, in contempt of the orders of this court of 25th January, 2019. The Plaintiff is seeking to review the orders of the court on the basis that he has since discovered new evidence which was not within his knowledge as at the time the Application for contempt was been argued.

18. Under **Order 45 of the Civil Procedure Rules**, a party considering himself aggrieved by a decree or an order from which an appeal is allowed, but from which no appeal has been preferred, 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 order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, may apply for a review of the order to the court which made the order.

19. Although the Defendant's advocate submitted that the Plaintiff has no right of audience because he is an adjudged contemnor, the perusal of the record shows that this court dealt with that issue vide the Ruling of 25th September, 2020. In the said Ruling, this court held as follows:

“25. Considering that the law allows the Plaintiff to file an Application for review of the Ruling of the court, it is the constitutional and statutory duty of this court to hear the Plaintiff on his Application for review. Indeed, the issue of whether the Application for review meets the requirements of Order 45 of the Civil Procedure Rules can only be ascertained after the court has heard both parties.”

20. This court has therefore made an order allowing the Plaintiff to argue its Application for the review of the Ruling of this court of 15th May, 2020.

21. The Plaintiff's case is that it is very likely that this Court would have arrived at a different decision if the fact of the real owner of the building erected on the suit property had been brought to its attention and that the Civil Procedure Rules gives latitude to a party aggrieved

by an order of the Court to either appeal against such an order or apply for its review and setting aside.

22. According to the Plaintiff, it seeks to bring on board one Shilla Ishiundu to answer to issues of ownership of the building erected on the suit property; that the said Shilla Ishiundu, who is the owner of the said building, has not filed any pleadings in this matter and that because the contempt proceedings were premised on a building owned by her, it is only fair and in the interest of justice that she be called upon to clarify as to whether she had any association with the Plaintiff herein.

23. It was submitted by counsel for the Plaintiff that the issue as to the ownership of the building erected on the suit property was not conclusively determined on merit since the Plaintiff had denied in its pleadings of being the owner of the same.

24. In its Ruling of 15th May, 2020, this court made the following finding:

“26. Although the Plaintiff’s Director has denied that the building was done by the Plaintiff, he has not offered any explanation as to the person who continued with the construction of the one storey building and the perimeter wall despite the court restraining the parties and any people acting under them not to put up any further developments on the suit land.

27. The evidence before me shows that despite the orders of 25th January, 2019 restraining the parties herein from developing the suit property, the Plaintiff, or its agents, put up and completed constructing a one storey building together with the perimeter wall on the suit property”.

25. According to the Plaintiff’s Director, as at the time of swearing his affidavits in response to the Defendant’s/Respondent’s application for contempt, he did not have the particulars of the person who was responsible for the subject development on the suit property despite having made efforts to establish his/her identity and that he has since been able to establish the particulars of the person responsible for the said construction, which information was not before the Court when the contempt application was being litigated upon.

26. It was deponed by the Plaintiff’s Director that he has since established that one Shilla Ishiundu of Mobile Tel No. 0721 445 965 is the owner of the one-storey building erected on the suit property; that he never gave his consent to the said Shilla Ishiundu to construct thereon since she is a stranger to him and that it is only fair and in the interest of justice that the said Shilla Ishiundu be summoned to personally appear before this Court to enable the Court ascertain the facts adduced herein by herself that neither the Plaintiff nor himself had anything to do with the construction of the said property.

27. Although it is the Plaintiff’s case that it has now obtained evidence to show that indeed it is one Shilla Ishiundu who has put up a storey building on the suit property, there is no such evidence before this court. Indeed, the Plaintiff’s director has not explained to this court how he ascertained that it is Shilla Ishiundu who put up the building on the suit property during the pendency of the suit, and the circumstances under which she did so.

28. Having not adduced documents to prove that the suit property was constructed by Shilla Ishiundu, and that the said Shilla Ishiundu was not acting under the Plaintiff’s instructions, it is my finding that there is no evidence of discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the Plaintiff or could not be produced by the Plaintiff at the time when the order of 15th May, 2020 was made.

29. For those reasons, I dismiss the Application dated 14th July, 2020 with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 22ND OCTOBER, 2021

O. A. ANGOTE

JUDGE

In the presence of:

N/A for the Plaintiff

Evans Ochieng for the Defendant

Court Assistant – John Okumu