



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 99 OF 2019

MAHMOUD ABDALLA MOHAMED& 9 OTHERS.....PLAINTIFFS

-VERSUS-

GABRIEL KATANA KAJOJ.....1ST DEFENDANT/RESPONDENT

NEW CENTURY MARINE TRADING

EAST AFRICA COMPANY.....2ND DEFENDANT/RESPONDENT

CHI FUNG LAM.....3RD DEFENDANT/RESPONDENT

PATRICOAN KAVINYA MULWA.....4TH DEFENDANT/RESPONDENT

KALAMA RIMBA GONA.....5TH DEFENDANT/RESPONDENT

KAJOJI RIMBA GONA.....6TH DEFENDANT/RESPONDENT

CHARO RIMBA GONA.....7TH DEFENDANT/RESPONDENT

KEA RIMBA GONA.....8TH DEFENDANT/RESPONDENT

FLORENCE NINGALA CHIMEGA.....9TH DEFENDANT/RESPONDENT

CONSOLIDATED WITH

MALINDI ELC CASE NO. 139 OF 2015 AT MALINDI

MAHMOUD ABDALLA MOHAMED& 9 OTHERS.....PLAINTIFFS

-VERSUS-

KALAMA RIMBA GONA & 3 OTHERS.....DEFENDANTS

CONSOLIDATED WITH

MALINDI ELC CASE NO. 28 OF 2020 AT MALINDI

(FORMERLY ELC CASE No. 93 OF 2014 AT MOMBASA)

FLORENCE NINGALA CHIMEGA.....PLAINTIFF

-VS-

MAHMOUD ABDALLA MOHAMED& 8 OTHERS.....DEFENDANTS

RULING

This ruling is in respect of an application dated 28th July 2021 by the plaintiff/applicants seeking for the following orders:

a) *Spent.*

b) ***THAT pending the hearing and determination of this application, this Honourable Court do issue a conservatory order that status quo be maintained, to the effect that the Plaintiffs should continue being in possession of the suit property, until the suit is heard and determined.***

c) ***THAT upon hearing and determination of this application, this Honourable Court be pleased to review, discharge, vary and/or set aside the Order issued on the 23rd March, 2021.***

d) ***THAT upon hearing and determination of this application the court be pleased to review, discharge, and/or vary the orders issued on the 23rd March, 2021 and substitute the same with an order that status quo be maintained in the following terms:***

i. *That the Plaintiffs should continue being in possession of the suit property until the suit is heard and determined.*

ii. *No party should conduct or undertake any activities that may be prejudicial to the other parties' claim on the suit property, until the suit is heard and determined.*

e) ***THAT the costs of this application be provided for.***

Counsel agreed to canvas the application vide written submissions which were duly filed.

PLAINTIFFS' SUBMISSIONS

Counsel gave a brief background to the application and stated that the 5th to 9th Defendants moved this Honourable Court Vide a Notice of Motion Application dated 2nd September, 2020 seeking injunctive orders against the Plaintiff/Applicants herein restraining them from entering all that parcel of land known as L.R No. MN/II/783 and that the said application was premised on false grounds to the effect that the Plaintiffs had deliberately not sued the 5th to 9th Defendants yet they were in physical possession of the suit property.

It was counsel's submission that the Plaintiffs then filed their Replying affidavit wherein they indicated that the 5th to 9th Defendant were not in actual and/or physical possession of the suit property. That on 23rd March 2021 this Honourable Court delivered its Ruling in respect of the application where the court observed that *in as much as the 5th to 9th Defendants had moved the Court for injunctive orders against the Plaintiffs; the Court ordered and directed that the status quo be maintained, 'that the actual status quo on the suit property by the time the said ruling was delivered was that the Plaintiffs were in actual physical possession of the suit property wherein the place was vacant and the Plaintiffs had erected a boundary wall around the suit property'*.

Counsel submitted that the Plaintiffs are the bonafide, lawful and registered proprietors of the property **LR.No.MN/III/783, KikambalaMaweni Kilifi County** and that the 1st Defendant is the uncle of the 2nd Defendant in **ELC Case No.139 of 2015, Malindi, Mahmoud Abdalla Mohamed & 9 Others VS Kalama Rimba Gona& 3 Others.**

Further that there were permanent injunction orders issued on 27th June, 2018 restraining the defendants from erecting any structures or entering upon or dealing with the suit premises, **LR.No.MN/III/783, KikambalaMaweni Kilifi County** and that the defendants were compelled to demolish and remove any structures of any nature erected by them on the suit premises and to vacate the suit premises and further ordered to pay the Plaintiffs' cost of the suit.

It was counsel's submission that on the strength of the impugned ruling, the Defendants attacked the caretaker manning the suit property and have further commenced demolition of the boundary wall an act which the Plaintiffs view as a move by the Defendants to demonstrate that they are in occupation of the suit property yet they have not been in possession of the same at all.

Mr. Lakicha submitted that it is evident that there is an error apparent on the face of the ruling of this Court as the Court did not intend to grant injunctive orders against the Plaintiffs but to preserve the substratum of the suit property.

Counsel listed two issues for determination by the court as follows:

a) ***Whether the Plaintiffs are entitled to injunctive reliefs sought?***

b) ***Whether the plaintiffs have presented sufficient grounds for this Honourable Court to review, vary and set aside the Order issued on 23rd March, 2021.***

Counsel relied on the case of **LUCY WANGUI GACHARA V MINUDI OKEMBA LORE [2015] eKLR** on the principles for grant of injunction and further cited the case of **Nguruman Limited V. Jan Bonde Nielsen & 2 Others, Ca No. 77 Of 2012.**

It was counsel's submission that the plaintiff/applicants are the registered owners of the suit land hence the injunction should issue against

the defendants.

On the second issue whether the applicant has met the threshold for review of the ruling dated 23rd March 2021, counsel relied on the case of **KHALIF SHEIKH ADAN V ATTORNEY GENERAL [2019] eKLR** where the Learned Judge cited the Case of **Republic –Vs- Public Procurement Administrative Review Board & 2 Others (2018) eKLR** and held: -

“That the rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds:

- a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made;***
- b) On account of some mistake or error apparent on the face of the record, or***
- c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.***

Mr. Lakicha also cited the case of **STEPHEN GATHUA KIMANI –VS- NANCY WANJIRA WARUINGI / PROVIDENCE AUCTIONEERS (2016) eKLR** where it was held that Section 80 gives the power of review and Order 45 sets out the rules and also relied on the case of **NYAMOGO & NYAMOGO ADVOCATES –VS- KOGO (2001) 1EA 173** it was held that: -

“An error on the face of the record can only be determined on the facts of each case. For an error of law on the face of the record to form a ground for review, it must be of a kind that states one in the face and on which there could be reasonably be no two options. If a courts original view was a possible one, it cannot be a ground for a review even though it may be one for appeal...”

Counsel urged the court to find that the applicants have met the threshold for review and grant the orders as prayed in the application.

9TH DEFENDANT’S SUBMISSIONS

Counsel for the 9th defendant submitted that the ruling dated 23rd March 2021 delivered by Justice J. O. Olola and in particular at paragraph 19 and 24, the court was clear that the plaintiffs acted in a dishonorable manner. That the plaintiffs deliberately misled the court therefore the eventual eviction of the 9th Defendant and the other Defendants from the suit property.

Mr. Gikandi relied on the case of ***Mistry Amar Singh vs Serwano Wofunira Kulubya UCA No. 74 of 1960*** where the court stated thus

“Ex turpi causa non oritur action. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.”

It was counsel’s further submission that the status quo that prevailed prior to the orders of 9th December 2019 was restored by the court which was that the Defendant remains in occupation of the suit property.

Counsel submitted that the Plaintiff should not be allowed to use the review process as though it was an appeal process and that the plaintiff has not met the threshold for review provided for under Order 45 of the Civil Procedure Rules.

On the application for injunction counsel submitted that the same is res judicata as provided under section 7 of the Civil Procedure Act by reason of the determination of the injunction application dated 2nd September 2020 which was decided on the ruling delivered by Justice Olola on 23rd March 2021.

Counsel urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The issues for determination are whether the plaintiff/applicants have met the threshold for review of the ruling dated 23rd March 2021 and whether they are entitled to an order of injunction.

Order 45(1) of the Civil Procedure Rules sets out the requirements that have to be met before a review is granted as follows:

“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 review of judgment to the court which passed the decree or made the order without unreasonable delay”.

In the case of *Evan Bwire V Andrew Aginda Civil Appeal No. 147 of 2006* cited in the case of *Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers (2016)* eKLR the Court of Appeal held as follows:

“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”

From the plaintiff’s elaborate submissions which dealt with the merits of the entire suit, counsel stated that the Court did not intend to grant injunctive orders against the Plaintiffs but to preserve the substratum of the suit property. This submission, with due respect to counsel is a bit worrisome as how can we imagine what orders the Judge intended to grant if they were not granted or specifically stated by the Judge?

The question to address is whether there is any mistake or error on the face of record. In the ruling delivered on 23rd March 2021 by this court at paragraph 24 of the ruling, the court stated that he considers that the orders obtained by the plaintiff on 9th December 2019, had been obtained without making full disclosure to the existence of the defendants and another pending dispute in respect of the suit property.

The court then made an order for maintenance of status quo prevailing ante the orders of 9th December 2019 to be restored and be maintained pending the hearing and determination of the consolidated suits.

This ruling was clear on what status quo was and not as the applicant states that the court did not intend to grant injunctive orders hence I do not see any error apparent on the face of the record.

To my mind it seems the plaintiff is asking the court to sit as an appeal on the ruling which the applicants are aggrieved with. This application with due respect to counsel is a backdoor to change the orders that were not favourable to the applicants in the guise of a review. It is trite law and procedure that if a party is aggrieved by a ruling, decree or judgment of a court, then such party has a right of appeal. This court therefore has no jurisdiction to grant the orders of review sought as they have not met the threshold as provided for under Order 45 of the Civil Procedure Rules.

In the case of *Origo & Another V Mungala (2005) 2KLR cited in Jameny Mudaki Asava V Brown Otengo Asava & Another (2015)* eKLR the court held as follows:

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction. They have now come to a dead end.”

This is a case where the applicants are faulting the conclusion of the court which they think might have been erroneous. An erroneous appreciation of the law or evidence on record is not a ground for review. If such were allowed, then there would be no reason for the hierarchy of courts. If that was the case, then courts on application or *suo moto* would recall files and change their decisions against laid down principles of natural justice. This would result into anarchy and disorder.

On the issue whether the applicants are entitled to an order for injunction, having found that the application for review lacks merit, I find that the application dated 2nd September 2020 for injunction was determined vide a ruling dated 23rd March 2021 hence it also fails on account of being *res judicata*.

The upshot is that the application is hereby dismissed with costs in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF DECEMBER, 2021.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.