



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. 40 OF 2017

DAVID MWIYEI.....APPLICANT

VERSUS

JULIUS MUSYOKA KILYA.....RESPONDENT

RULING

Introduction

1. This Court vide a judgment dated 27th June, 2018 entered judgment in favor of the applicant as prayed in his plaint with orders that each party bears his own costs. Subsequently, on 20th February, 2019 the applicant filed the instant application dated 19th February, 2019 seeking the following prayers: -

- 1) THAT this application be certified as urgent and service thereof be dispensed with in the first instance.**
- 2) THAT the court be pleased to review, quash and or vary the judgment on costs delivered on 27th June, 2018.**
- 3) THAT costs be in the cause.**

2. The grounds upon which the application is based is that the applicant alleges that he incurred costs for the trial and execution and therefore urges the court to award him costs for the suit.

3. The matter came up for directions on 17th June, 2019 when there was no appearance by the respondent despite being served. The applicant sought to have the application heard by way of written submissions, and they filed their written submissions dated 21st June, 2019.

Background

Applicants Case

4. The applicant averred that he was the owner of Land Parcel No. Mwingi/Mwingi/4114 in Kitui County whereas the Respondent is the owner of Land Parcel Mwingi/Mwingi/339 and allege that in the year 2015 or thereabout the Respondent made developments literally blocking access to his land. He alleges that he approached County offices in Mwingi town where the Respondent was issued with statutory notices on 12th February, 2016 but failed to comply. In addition, he states he visited the Land Registrar and later the Land Surveyor Mwingi established that the Respondent action was illegal and ordered him to demolish the development and allow access, but all was in vain. In all this he alleges he incurred costs for hearing of the suit herein for travelling of witnesses.

5. Further, he alleges that after this court delivered judgment in his favour, the Respondent failed to comply with the same occasioning him more costs as he hired auctioneers and attached a receipt for Kshs. 50,000/=. And therefore, in the interest of Justice he urged this court to review its judgment and award him costs.

6. In their filed submissions, they submitted that costs follow events, and that although costs are a discretion of the court, they submitted that since they incurred further costs after judgment as the respondent failed to comply with the court judgment, which would have mitigated costs, it is their submissions that the Respondent attitude herein warrants this court to award them costs.

7. In this regard they relied in the cases of **Cecilia Karuru Ngaya vs Barclay, Bank & Another (2016) eklr** and **Jasbir Singh & Others vs Tarlochan Rai & Others**.

Analysis and Determination

8. I have carefully considered the grounds in support of and against the application together with the submissions by the applicant and the relevant law and authorities cited. The only issues for determination are as to whether the applicant has made out a good case to justify the grant of orders for review.

9. In this regard **Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules** provides as follows:-

Section 80. Review

“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.”

Order 45, rule 1. Provides for Application for review of decree or order. It states: -

“1. (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”

10. It is apparent that **Section 80 of the Civil Procedure Act above** grants this court the power to make orders for review, **Order 45** sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and **any other sufficient reason**.

11. Consequently, for a review to be undertaken, the statutory grounds are; firstly, there ought to exist an error or mistake apparent on the face of the record. Secondly, that the applicant has discovered a new and important matter in 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. Thirdly, that there is sufficient reason to occasion the review.

12. The applicant in this case is not alleging that there is an error or mistake apparent on the face of the record nor that there is discovery of a new and important matter to warrant this court to review its decision. The only remaining guess is that the applicant seems to be basing his application on the third limb of ‘sufficient reason’.

13. In this regard the Court of Appeal in case of **Sadar Mohamed vs Charan Signh and Another {1963}EA 557** held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter.

14. In my view the issue of awarding costs is a matter of the court exercising its discretion and cannot be the subject of review by the same court in view of the above Order 45 rule 1 of the Civil Procedure Rules.

Decision

15. In conclusion, it is my finding that the applicant’s ground in support of the instant application does not meet the threshold set in law above to warrant this court to exercise its discretion to review its Judgment in favour of the applicant. Accordingly, the applicant’s application dated 19th February, 2019 is dismissed with no orders as costs.

Read, delivered and signed in the Open Court this 28th day of January, 2020.

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E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Langat holding brief Nzili for Applicant
2. Fardowsa: Court Assistant present