



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 282 OF 2010**

**1. WILLIAM T.ABIRA**

**2. WILLIS M. MURIGU**

**3. PAUL NGAO MAKALU**

**4. KENNETH MUKHAYA**

**5. PETER N. MWANGELA**

**6. NYAPINDA DAVID**

**7. JEFF GUANTAI**

**8. LAZARUS OBUNGU**

**9. MATHENDU KAVITA**

**10. MUHANGANI JOEL**

**11. RICHARD M. NJUGUNA**

**12. WILSON KARANJA**

**13. MARTIN K'OBONYO.....PLAINTIFFS**

**-VERSUS-**

**KENYA CIVIL AVIATION AUTHORITY.....DEFENDANT**

**RULING**

**1. This Ruling determines the Applicant's application dated 27.6.2016 which seeks for the following Orders:**

**a. Spent.**

**b. That this Honourable Court be pleased to review its orders and ruling of Hon. M. J.Anyara Emukule, MBS dated and delivered on 8.6.2016.**

**c. that pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to grant stay of execution pending hearing and determination of this Application, the ruling and orders of the High Court of Kenya Mombasa Civil suit No. 282 of 2010 (Hon. M.J. Emukule dated and delivered on the 8.6.2016.**

**d. That cost of this Application be provided for.**

2. The application is supported on the grounds on its face which are further elucidated in the affidavit sworn on the 27.6.2016 by **Mr. Paul Ngao Makali**, on his behalf and his fellow Plaintiffs.

3. The Plaintiffs' case is that in the Judgment of the Court delivered on 8.6.2016, the learned Judge erred in failing to give a valid interpretation of the effect of Plaintiffs' eviction from the suit property. It is deponed that the Plaintiffs are successful decree holders in the Court of Appeal Civil Application No. 67 of 2010. According to the Plaintiffs, the Judge failed to consider that they were yet to receive their severance pay or terminal benefits from the Defendant/Respondent as found in Court of Appeal Civil Application No. 67 of 2010. It is the Plaintiffs/Applicants' averment that they will be unable to seek alternative accommodation before the amounts are forwarded to them and any execution of the orders made on the 8.6.2016 will lead to an injustice since the Plaintiffs/Applicants have no current employment and only await the dues owed to them as decree holders in HCCA 67 of 2010.

4. The Defendant/Respondent opposed the Application vide its Grounds of Opposition dated 22.8.2016 and filed in court on the even date as reproduced hereunder;

**a. That the Plaintiffs' application is incompetent, misconceived, fatally defective and an abuse of the Court process.**

**b. That this Honourable court lacks jurisdiction to hear the application since a similar application over the same issues has been made by the Plaintiffs and declined by the Honourable Court.**

**c. That the suit herein having been summarily dismissed on the 12<sup>th</sup> October, 2010, the same is now res judicata thus no further proceedings ought to be entertained herein.**

**d. That the Plaintiffs/Applicants are re-litigating issues already determined by the Honourable court hence an abuse of the Court process.**

**e. That the application ought to be dismissed with costs accordingly.**

5. The instant application was disposed of by way of written submissions. The Plaintiffs/Applicants submissions are dated 17/9/2018 and filed in court on even date.

#### **PLAINTIFF'S SUBMISSIONS**

6. The Plaintiffs/Applicants identified four(4) issues to submit on; that is,

- a. Whether this Honourable Court has jurisdiction to hear the Applicants' notice of motion dated 27.6.2016;
- b. Whether the Applicants are entitled to an order of review under Order 45 of the Civil Procedure Rules 2010;
- c. Whether the Applicants are entitled to stay of execution of orders and;
- d. Whether there was a contract between the applicants and Respondents.

7. On whether this court has Jurisdiction to hear the instant application, it is the Plaintiffs/Applicants case that the Orders of Hon. Emukule made on 8<sup>th</sup> June, 2018 were drastic as the mandatory injunction to vacate suit premises within 30 days was not pleaded by the defendant. According to the Applicants, the law cannot aid a party who has not pleaded what he wants. It is further submitted that the orders will have the effect of the Plaintiffs being evicted from their current residences. It is averred that the Applicants are not opposed to vacating the suit premises save that they are awaiting settlement of the court's decree in the Court of Appeal Civil Application No. 67 of 2010. The Plaintiffs/Applicants are of the view that Order 45 Rule 2(2) of the Civil Procedure Rules 2010 clothes this court with jurisdiction to determine the present application.

8. On whether there was an employment contract between the Plaintiffs/Applicants and the Defendant/Respondent, it is submitted that the same is not disputed after the court had found as such and concluded that the Applicants were unlawfully terminated from their contracts of employment. It is the Applicant's case that it would be unconstitutional to evict them without having settled the decretal amount they are entitled to.

9. The Plaintiffs/Applicants further contend that in the event that their continued occupation amounts to trespass then the same can be remedied by an award of damages which would be set off from the decretal amount owed to the Applicants by the Respondents. According to the Applicants, the orders for mandatory injunction are erroneous, inhumane and an assault to human rights especially where the parties sought to be evicted are unemployed senior citizens with families living there. On that basis the Plaintiffs/Applicants pleads with the court to review the orders made on **8.6.2016**. To buttress this line of argument, the Plaintiff/Applicants rely on the case of **Mohamed Yakub Athman & 29 others –vs- Kenya Ports Authorities**.

#### **DEFENDANT'S SUBMISSIONS**

10. The Defendant/Respondent submissions are dated 14<sup>th</sup> August, 2018 and filed in court on 24<sup>th</sup> August, 2018. It is submitted that the application is incompetent, misconceived, fatally defective and an abuse of the court process. It is averred that the Plaintiffs have abused the court process by filing a series of applications in an effort to continue occupying the Defendant's premises. Further that the Plaintiffs had filed an application for injunction which was dismissed vide a ruling dated 31.10.2012. Thereafter the Plaintiffs filed an application for

stay which was again dismissed vide the ruling dated 8<sup>th</sup> June, 2016. It is further submitted that the Plaintiffs/Applicants have not preferred any appeal against the said rulings even after the suit was summarily dismissed.

11. It is the Respondent's case that there are no special circumstances to grant a stay of execution herein since the Plaintiffs had been granted enough time to prepare and vacate the suit premises. It argued that since the Applicants are no longer in employment with Defendant, their continued occupation of the suit premises is contrary to their terms of employment or the policy of the Defendant.

12. The Respondent further argued that the instant application is res Judicata since the Plaintiffs have made several applications seeking stay orders. The case of **James Gitonga Thigunku & 4 others-vs- Elizaphan Njoki Thinguku & Another [2016] eKLR** and **Uhuru Highway Development Limited –vs-Central Bank of Kenya & 2 others [1996]eKLR** are relied on to canvass the argument that there must be an end to litigation and what the Plaintiff are doing amounts to re-litigating issues already determined.

13. The Respondent asserts that the Plaintiffs have not brought forth or discovered any new matter or evidence to warrant review of the order made on 8.6.2016 thus the application does not meet the threshold of review as contemplated under Order 45 Rule 1 of the Civil Procedure Rules. This argument was supported by excerpts from the case of **Stephen Gathura Kimani –vs-Nancy Wanjira Waruingi v/a providence Auctioneers [2016]eKLR**.

14. Lastly, the Respondent submitted that the Plaintiffs are now trespassers on the Defendant's premises since their employment contract with Defendant was terminated. On this line of argument, the Respondent called to its aid a plethora of judicial precedents including; **Eric V.J. Makokha & 4 others –vs-Lawrence Safari & 2 other [1994]eKLR**, and **Abdi Mohamed Daib –vs- Kenya Ports Authority (2015) eKLR**.

#### **Analysis and Determination.**

15. I have considered this application, affidavits in support and in opposition of the application, the submissions for both parties, as well as the authorities relied on. I have also considered the law applicable. Two issues arise for determination in this matter, namely:

(i) Whether this Court has jurisdiction to determine this review application; and if yes

(ii) Whether a case has been made to warrant that review

#### **Whether this Court has jurisdiction to determine this review application**

16. The Respondent's contention is that this court lacks Jurisdiction to review the decision delivered on 8.6.2016, on the basis that a similar application was made by the Plaintiffs before this court and the same was dismissed. The Respondent's case is that the plaintiff sought to have issues which have been heard and concluded by a court of competent jurisdiction, re-litigated. It expressed the view that the Application is res Judicata.

17. I have had the chance to consider the flow of this suit. It was initiated by way of plaint The Plaintiff seeking to set aside eviction notice dated 3/8/10 which sought to evict the plaintiffs from the houses they had occupied by virtue of their contract of service with the Defendant, terminated in March, 2003. I have considered Judge Mureithi's ruling delivered on 31.10.2012. The Plaintiff's were granted 60 days stay and directed to look for alternative residences after their application was declined.

18. Being aggrieved by the aforesaid decision, the Plaintiffs filed an Application dated 6.12.2012 seeking a stay of execution of the said ruling. A notice of Appeal was filed to the Court.

19. Hon. M.J. Emukule vide a ruling delivered on the 8.6.2016 dismissed the plaintiffs Applications on grounds that a house allowance can never be part of the salary. The Plaintiffs were granted 30 days stay to vacate the defendant's premises. The Plaintiffs now seek to have the orders issued by Hon. M.J. Anyara Emukule issued on the 8.6. 2016 reviewed.

20. I also note that the suit was summarily dismissed by the Honourable Court on 31.10.2012. The Plaintiffs/Applicants have never appealed on any of the orders. The only reason advanced by the Plaintiffs/Applicants is that they are currently not employed and if the review is not granted they will be prejudiced because they cannot get an alternative accommodation.

20. In this regard, I agree with Hon. M.J. Emukule that a house allowance can never be part of the salary. It does not include any of the benefits that the Plaintiffs are to be paid by the Respondent. In my view, there is therefore no ample reason that has been advanced to excuse the Plaintiffs from eviction if the Respondent intends to. This Court does not agree with the Plaintiffs excuse that if their continued stay amounts to trespass, then the same can be cured by damages set off from their benefits. I wish to state that a court of equity cannot allow a party to retain the benefit of a transaction which he or she unfairly acquired.

21. This court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. As was stated by the Authors of **Halbury's Laws of England, 4<sup>th</sup> Edition Volume 37**

**Para 14** under the heading "***Inherent Jurisdiction of the Court***" at Page 23;

"The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked

not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise (i) control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

22. In the instant case, it is clearly evident that the Plaintiffs did not file this suit with the object of seeking justice from this court. The plaintiff filed this suit purposely to secure the interim orders of stay so that they would continue residing in the Defendant’s premises.

23. Nonetheless, Order 45(1) of the Civil Procedure Rules sets out the requirements for an application for review 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”.**

24. Order 45 is very explicit that a court can only review its orders if the following grounds exist;

(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

(b) There was a mistake or error apparent on the face of the record; or

(c) There were other sufficient reasons; and

(d) The application must have been made without undue delay.

25. From the applicants’ application, there is no new and important matter that could not be produced by the applicants at the time when the Ruling was made. Indeed, all the issues raised in the present application were the same ones raised when the application was canvassed and upon which the court arrived at its ruling.

26. 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.”**

27. The second question that this court ought to consider is if there is any mistake or error apparent on the face of the record. The Plaintiffs/Applicants maintain that the order made on 8.6.2016 was drastic such that close interpretation would have the effect that the plaintiffs will be evicted. My considered view is that the best recourse for the Plaintiffs/Applicants would lie in filing an appeal from the said ruling. Changing the decision would amount to this court sitting on appeal against a Ruling of a judge of concurrent jurisdiction. Therefore ,this cannot be a basis of a review. In the case of **Origo & Another V Mungala (2005)** 2KLR cited in **Jameny Mudaki Asav – 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.”**

28. Lastly the court has to consider if there is sufficient reason to review the court’s earlier ruling. The applicants have not elaborated any sufficient reasons to warrant a review of the court’s ruling. In the case of **Sadar Mohamed –V- Charan Singh and Another** it was held that

**“Any other sufficient reason for the purposes of review refers to the grounds analogous to the other two (for example error apparent on the face of the record and discovery of new and important matter”)**

29. The circumstances that led to by Hon. Justice Muriithi’s order issued on the 31.10.2012 and Hon M.J. Emukule’s ruling delivered on 8.6.2016 have not changed. The Defendant herein remains heavily prejudiced notwithstanding that the Plaintiffs herein are no longer in employment yet they still occupy staff quarters.

30. In conclusion I find that this is not a proper case for this court to exercise its discretion in favour of the Plaintiff/Applicant. The upshot of the foregoing is that the application lacks merit and is dismissed with costs.

It is so ordered.

**Dated, Delivered and Signed at Nairobi this 20<sup>th</sup> day of May,2020.**

**D.O. CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15<sup>th</sup> March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes