REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 183 OF 2013

JOHN OMAMO NDUNDE.....PLAINTIFF

VERSUS

JULIUS EMITATI OMUSULA.....DEFENDANT

RULING

The first application by the 2nd defendant is dated 23rd July 2019 and is brought under order 12 rule 7, order 22 rule 22, order 19 rule 2 and order 51 rule 1 of the Civil Procedure Rules and sections 1A, 1B & 3A of the Civil Procedure Act, Cap 21 Laws of Kenya seeking the following orders;

(a) That the honourable court be pleased to set aside, review and or vacate the exparte proceedings of 6/11/2017 and the resultant judgment delivered on 6/3/2018, the taxation of 2/8/2018 and all other consequential proceedings and orders made against the 2nd defendant/applicant.

(b) That the honourable court be pleased to order that hearing of this case do start de novo and the 2nd defendant be granted an opportunity to be heard for the case to be determined on merit.

(c) That the process servers Robert O. Mbeja and Anthony Masyongo be summoned to attend court for cross-examination on the contents of their affidavits of service sworn on 4/11/2017 and 28/7/2018 respectively.

(d) That costs of this application be provided for.

It is based on the annexed affidavit of Julius Emitati Omusula, the 2nd defendant/applicant herein and on the following principal grounds that, the 2nd defendant/applicant was never served with the hearing notice for 6/11/2017 or the taxation notice or any other document in this case on 18/10/2017 or 9/7/2018 or any other date or at all. The 2nd defendant/applicant was condemned unheard for an error or default not of his making in utter violation of the Constitution of Kenya and the tenets of natural justice and as such the exparte proceedings and the resultant judgment delivered on 6/3/2018, the decree, taxation proceedings and all other consequential orders made against the 2nd defendant/applicant are unconstitutional, indefensible, irregular, unprocedural, improper and unlawful and should not be allowed to stand. The 2nd defendant/applicant has a formidable defence against the plaintiff's claim which raises triable issues and it is only proper and just that he be given an opportunity to ventilate the same. That the affidavits of service sworn by Robert Mbeja and Anthony Masyongo on 4/11/2017 and 28/7/2018 alleging that the 2nd defendant was served with a hearing notice for 6/11/2017 and a taxation notice are false and the same were sworn and filed to hoodwink and they indeed misled this honourable court into proceeding exparte and delivering an exparte judgment and decree improperly, irregularly and wrongfully thus defeating the ends of justice and it is fair and just the orders sought be granted. The plaintiff will not suffer any prejudice that cannot be compensated by way of damages.

The plaintiff submitted that the applicant entered appearance, filed a defence dated 21/2/2014 through the firm of M/s. Akwala & Company Advocates, annexed marked JO – 1 is a copy. That the applicant was not keen on his case as evidenced from the affidavit by Daniel Akwala Advocate sworn on 21/10/2014 leading the said advocate filing the application to cease acting, annexed marked JO-2 is a copy of the application and the said affidavit. That on 18/2/2015 the firm of Akwala & Company Advocates were granted leave to cease acting for the defendants/applicants. The directions were given and the main suit set for hearing. That the applicant was duly served with notice to attend court severally including notice for taxation as evidenced from the affidavits of service on record.

This court has considered the application and the submissions therein. It is based on the grounds that the applicants was never served to attend court hence the matter proceeded exparte. This court is now asked to review and set aside the judgement. **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

(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-

(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. I see no mistake or error or omission on the part of the court when it proceeded with the matter after satisfying itself that the appellant had been properly served. 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. I have perused the court record and find that on 5/9/2017 in the registry the case was set for hearing for 6/11/2017. That the applicant was served to attend court on 6/11/2017 as per the affidavit of service of Robert O. Mbeja filed, marked JO-3 and 4 are copies of the hearing notice dated 12/9/2017 and affidavit of service sworn on 4/11/2017. That there were several adjournments earlier at the instance of the applicant. That judgment was delivered on 6/3/2018 and this application was filed on 23rd July 2019. There has been inordinate delay as well. I am satisfied that the applicant was properly served with the hearing notices. I find this application is not merited and I dismissed it with no orders as to costs. Any application concerning the taxation should be made before the Deputy Registrar and not before this court.

The second application by the plaintiff is dated 30th July 2019 and is brought under Sections 1A, 3A and 63e of the Civil Procedure Act and

Order 40 rule 3 and order 51 rule 1 of the Civil Procedure Rules seeking the following orders.

1. That the respondent be punished accordingly for disobedience of court order.

2. That costs be provided for;

It is grounded on the affidavit of John Omamo Ndunde, and grounds that judgment of 6/3/2018 and the subsequent decree, the respondent was ordered to give vacant possession of LR No. Marama/Buchenya/1486 in default he be evicted. The order with a penal notice endorsed thereon was on 8/7/2018 duly served on the respondent. The respondent did give vacant possession but in March/April, 2019 returned on the subject matter and planted maize. The respondent has no respect for court orders. Court orders are not given in vain. The reliefs sought shall meet ends of justice.

The respondent submitted that he has never been served with any orders to vacate. This court has considered the second application and the submissions therein. The application is vague and is not requesting for any specific orders. The plaintiff should follow the proper procedure in executing court decrees. I find this application is frivolous and an abuse of the court process and I dismiss it. No orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH FEBRUARY 2020.

N.A. MATHEKA

JUDGE