



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO. 506 OF 2008

PAUL KARUGA NJUGUNA..... PLAINTIFF

VERSUS

HOUSING FINANCE OF KENYA.....1ST DEFENDANT

HANNAH NJERI HASSAN.....2ND DEFENDANT

RULING

1. What is before Court is the Notice of Motion dated 27th February 2018. By that application, the 2nd Defendant seeks orders for review, variation or setting aside the order, granted on 16th February 2017. The 2nd Defendant additionally seeks an injunction to restrain the Plaintiff from developing, building, construction and letting out any section of the Land Reference Dagoretti/Riruta/S.272 (the subject property) pending the *inter partes* hearing of the application.

2. This Court, as per Justice Ochieng, delivered judgment dismissing the Plaintiff's case and in effect permitting the 2nd Defendant's counterclaim for the eviction of the Plaintiff from the subject property.

3. The Plaintiff being aggrieved by that judgment filed a Notice of Appeal against that judgment and it is now evident that he has also filed the record of appeal.

4. The Plaintiff also, on 6th September 2016, filed an application for stay of execution of the decree, pending appeal. Justice Ochieng by his Ruling dated 16th February 2017 granted the Plaintiff stay of execution of the decree on condition the Plaintiff would, on every 5th day of the month, deposit rent at Kshs. 50,000 in a joint account. Parties subsequently consented to that rental income, by the Plaintiff, be released to the 2nd Defendant.

5. Essentially what the 2nd Defendant seeks is a review and setting aside of the Ruling, by Justice OCHIENG OF 16TH February 2017.

6. Section 80 of the Civil Procedure Act, Cap 21, provides:

“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.

7. Order 45 Rule 1(1) of the Civil Procedure Rules, on review, provides:-

“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.

8. The 2nd Defendant deponed in support of her application, for Review, that the Plaintiff, is seeking stay of execution of the decree, that the subject property was his family home and that he would suffer if he was evicted. The 2nd Defendant deponed that the Plaintiff failed to inform the Court that he had sub-let the subject property.

9. The 2nd Defendant failed to state on when he discovered that the Plaintiff had sub-let the subject property.

10. The 2nd Defendant also deponed that she is suffering, financially, because she ceased being in full time employment and there is a mortgage she is hard-pressed to meet its obligations.

11. The Plaintiff denied, through his replying Affidavit, that he concealed material fact when he obtained stay of execution of the decree. It further stated that he had complied with the conditions of stay. That he had filed Civil Appeal No. 249 of 2018 and the record of appeal, against the judgment of 18th August 2016.

12. I have considered the parties Affidavit evidence, their written submissions and authorities.

13. Having considered the above, it is in my view necessary to start my analysis by quoting a Court from the appeal decision of the case **NATIONAL BANK OF KENYA LIMITED V NDUNGU NJAU [1997] eKLR** as follows:-

“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 evident and should not require an elaborate argument to be established. It will not be a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review”.

14. The 2nd Defendants sole basis of seeking a review is that the Plaintiff has began to sub-let the subject property. The 2nd Defendant attached to her Affidavit some very unclear photographs showing temporary structures and some showing people seated.

15. There is no way of telling which property was photographed by the 2nd Defendant. It could have been photographs of any property within Kenya.

16. The 2nd Defendant also failed to inform the Court when the discovery was made that the Plaintiff was sub-letting.

17. It is important to state that the Plaintiff does not deny that he has sub-let. But he does reiterate that he and his family occupy the subject property.

18. Justice Ochieng by his Ruling of 16th February 2017 bore in mind that the subject property was the family home of the Plaintiff; that the title of the subject property was in the 2nd Defendant’s name; and that if the Plaintiff lost possession of the subject property, it would be a complete disengagement of the Plaintiff and the subject property. The Learned Judge therefore concluded:

“In my considered view, based on the unique factors prevailing in this case, I find that justice demands that the status quo prevailing be maintained until the pending appeal was (sic) determined”.

19. Here above I quoted Section 80 of Cap 21 and Order 45 Rule 1(1) of the Civil Procedure Rules. The basis upon which the Court will grant review is where there has been discovery of new and important matter which, after due diligence, which was not within the knowledge of the Applicant. The 2nd Defendant did not say what prevented her to carry out investigation of the status of the subject property to find out if indeed the Plaintiff had correctly disclosed who was in occupation of the subject property. The 2nd Defendant failed in due diligence to carry out that investigation and also failed to indeed show the Plaintiff had sub-let of the subject property.

20. It is also pertinent to state that the 2nd Defendant’s application for review was made after unreasonable and unexplained delay. The ruling the 2nd Defendant seeks to review was made on 16th February 2017. The application for review was filed on 27th February 2018. That is a delay of one year which remained unexplained.

21. On the whole having considered the application, the Affidavit evidence, the submissions and authorities, I am of the firm view that the application is without merit.

I find it appropriate to refer to the case of **ROSE KAIZA VANGELO MPANJU KAIZA (2009) eKLR** where the Court discussed due diligence and stated:

“Where such a review application is based on fact of the discovery of fresh evidence the Court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will

strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his party in adducing all possible evidence at the hearing.”

22. The costs, in this matter, must follow the event. They shall be awarded to the Plaintiff.

23. The order of the Court is that the application dated 27th February 2018 is dismissed with costs to the Plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of MARCH, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie**COURT ASSISTANT**

..... **COUNSEL FOR THE 1ST DEFENDANT**

.....**COUNSEL FOR THE 2ND DEFENDANT**