



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 64 OF 2004

GEOFFREY K. IMATHIU.....1ST PLAINTIFF
WILFRED KIRIMA.....2ND PLAINTIFF
STANLEY MBAABU MUKIIRA.....3RD PLAINTIFF
ELIJAH MBAABU MUKIIRA.....4TH PLAINTIFF
JOSEPH GIKUNDI MUGENDI.....5TH PALINTIFF
JASON MUTWIRIA RINTARI.....6TH PLAINTIFF
FRANCIS KIAMBI RINTARI.....7TH PLAINTIFF
MURIITHI MWITHIMBU.....8TH PLAINTIFF
HARRON KOOME RIMBERE.....9TH PLAINTIFF
SHADRACK GIKUNDA KIRIINYA.....10TH PLAINTIFF
JULIUS MBAABU RINTARI (DECEASED)
THROUGH JOYCE MBAABU.....11TH PLAINTIFF

VERSUS

MERU COUNTY GOVERNMENT.....DEFENDANT

RULING

1. This ruling is in respect of two applications, the 1st one dated 14.5.2010 filed by plaintiffs for the review of the judgment of 28.3.2019 and the other one dated 22.5.2019 filed by defendant for stay of execution. On 20.7.2019, the advocates for the parties agreed that the application of 14.5.2019 should be determined first. Directions were also given on the timeliness for filing of further affidavits and submissions.

APPLICATION DATED 14.5.2014

2. This application is brought under the provisions of section 1A, 1B 3, & 3A Civil Procedure Act Article 10 (2) (b) & Article 159 of the constitution of Kenya and under Order 43 of the Civil Procedure Rules CAP 21 Laws of Kenya.

3. The applicants are seeking orders of a review of the judgment of 28.3.2019 so that the court can award damages as set out in the amended plaint of 17.11.2005. It was extended that failure to award the general damages was an error on the face of the record.

4. The application was supported by the affidavit of Geoffrey K. Imathiu who averred that the court did not address the issue of general damages yet the same had been prayed for in their amended plaint as prayer (b).

5. This application was opposed by the respondent via the replying affidavit of one Irah Nkuubi who is the chief legal officer of the defendant. He avers that there are no new important matters which have come to the knowledge of the applicants and that the court addressed the issue of award of damages at paragraph 40-43 of the judgment.

6. The respondents seek the dismissal of the application with costs to them.

7. The applicable law on the issue of review is anchored under section 80 and order 45 of the Civil Procedure Act and Rules.

8. **Section 80 of the Civil Procedure Act** states that:

“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.”

9. **Order 45 Rule 1 of the Civil procedure Rules** goes ahead to stipulate on what grounds such an order may be granted:

“Any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred ; or by a decree or order from which no appeal is 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.” [Emphasis added]

10. However, for an application of review to succeed, an applicant must satisfy any of the three criteria laid down under **Order 45 Rule 1 of the Civil Procedure Rules**, which are:

a) Discovery of new and important matter or evidence that was not within the applicant’s knowledge or could be produced at that time.

b) mistake or error apparent on the face of the record

c) Any other sufficient reason.

Provided the application is filed without unreasonable delay.

11. In the case of **Jeremiah Muku Methodist Church of Kenya Registered Trustees & Another (2009) eKLR**, it was stated that;

“The three conditions for applying for a review of either the decree or order of court may be summarized from the above rule 1(1) of Order XLIV of the Civil Procedure Rules as – Firstly the 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 the decree was passed or the order was made; secondly; on account of some mistake or error apparent on the face of the record, or thirdly; any other sufficient reason”.

12. In the present matter, the applicants allege that their claim for general damages was not considered by the court. However, as rightly pointed out by the respondent, this court in its judgment of 28.3.2019 devoted on entire section from point 40 – 43 to the kind of damages the court was to award.

13. The court specifically stated that the damages were in respect of the demolitions of the plaintiffs buildings noting that “Plaintiffs are still considered as the owners of the suit plots”.

14. In the case of Charles Kimaita Mwithimbu & another vs Edward Mutua M’Mwithiga Meru H.C.C.C No. 108 of 2010 Gikonyo Judge had this to say on matters review based on errors on the face of the record.

15. It is imperative to know that an error or mistake on the face of the record for which a review will be granted must be one which is readily discernible from the record and does not require much probing or copious explanation to ascertain. Again, such error should be one which goes to the integrity of the proceedings or judgment as to impel the court to correct it in order to maintain the integrity of its process.

16. I find that there is no mistake or error apparent on the face of the record and there are no sufficient reasons to warrant a review. I may as well add that even the assessment of the alleged general damages was not tabulated either in the evidence or in the plaintiff’s submissions.

17. All in all, I find that the application dated 14.5.2019 is not merited. The same is hereby dismissed with no orders as to costs.

APPLICATION DATED 22.5.2019

18. This application is brought pursuant to provisions of section 7 of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya and order 42 Rule 6 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

19. The prayers sought by the defendant are as follows:

(a) That this honourable court be pleased to extend the time for giving of a notice of intention to appeal and permit the defendant/applicant herein to file a notice of appeal out of time against the judgment of the Honourable court made and delivered on 28.3.2019.

(b) That upon granting the order in prayer no. 3 above, this honourable court be pleased to issue an order for stay of execution of the judgment and decree herein pending the filing, hearing and determination of the said intended appeal to the court of appeal for Kenya t Nyeri.

(c) That the costs of this application be costs in the cause.

20. The grounds in support of the application are set out on the face of the application and in the affidavit of one Irah Nkuubi.

21. The applicants/defendants contend that they were aggrieved by the judgment of this court delivered on 28.3.2019. They desired to appeal and they intimated their intention to their advocate but the said advocate did not file the requisite notice. They contend that they are ready to offer reasonable security. They also aver that plaintiffs have no known assets or sources of income and will not be able to refund the decretal sums in the event that the appeal is successful.

22. I have considered all the arguments raised herein as well as the submissions of the rival parties.

23. Order 42 rule 6 (2) of the civil procedure rules provide that:

“No order for stay of execution shall be made under sub-rule (1) unless—(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”.

24. To grant or to refuse an application for stay of execution pending appeal is discretionary in that the court when granting a stay, it has to balance the interests of the applicant with those of the respondent. In determining this balance, the court gives due consideration to the three criteria set under order 42 rule 6 (2) of the Civil Procedure Rules, that is to say:

- (1) Whether appellant stands to suffer substantial loss,
- (2) Whether the application has been brought without delay and
- (3) Whether there is security.

25. On the issue of substantial loss, **Gikonyo J in Wangalwa & another vs Agnes Naliaka Cheseto Misc. application no. 42 of 2011 (2012) eKLR** stated that; ***“The appellant must establish other state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal”.***

26. As rightly put by the defendant, the plaintiffs are individuals. The court doesn't know their sources of income. I also note that the plaintiffs did not file any response to this application as directed by the court.

27. The application therefore stands as unopposed. I allow the same in the following terms:

- (1) The defendants are hereby granted leave to file and serve a notice of intention to appeal out of time within a period of 7 days from today.
- (2) An order of stay of execution of the judgment and decree herein is hereby issued for a period of one year.
- (3) Each party to bear their own costs of this application.

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF APRIL, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to 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.

HON. LUCY N. MBUGUA

ELC JUDGE