REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 317 OF 2017

STANLEY KIMANYANO KIKUYU.... PLAINTIFF

VERSUS

ZEBEON MAKONGE..... DEFENDANT

RULING

This application is dated 19th December 2019 and is brought under order 45 rules 1 and 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Articles 159 of the Constitution of Kenya 2010 seeking the following orders:-

1. That the application before court be certified as extremely urgent and it be heard exparte in the 1st instance.

2. That pending the interparties hearing of the application, there be a temporary stay order of execution of the judgment and or decree o this court issued on the 20th day of September, 2018.

3. That the honourable court be pleased to review and or set aside its judgment of 20th day of September, 2018 in its entirety and order a fresh trial of this case.

4. That the court do order the withdrawal and eventual transfer of Hamisi Principal Magistrate's court ELC No. 16 of 2018 for purposes of consolidation with Kakamega High Court ELC Case No. 317 of 2017 for hearing and final determination of the issues therein.

5. That costs of this application be provided for.

It is premised on the grounds that this matter proceeded exparte in the absence of the applicant. The applicant has never been notified of this matter. The matter proceeded on the basis of a false affidavit sworn by a process server who never served the applicant at all. The suit amount to duplicity as a similar suit was filed in Hamisi Principal Magistrate's Court and is still pending todate. The applicant had obtained restraining orders in the Hamisi cause and the institution of another suit in the High Court by the respondent was intended to purposely evade the orders issued in Hamisi. The respondent has now engaged on wanton spree of destruction of the applicant's property on the suit property. It is only in the interest of justice that the respondent be gagged by an order of court from furtherance of his illegal activities. Land issues are emotive and there can only be justice based on evidence from both sides. It is only fair that the applicant be afforded an opportunity to defend his proprietary rights in the suit property.

This court has considered the application and the submissions therein. The applicant submitted that the matter proceeded on the basis of a false affidavit sworn by a process server who never served the applicant at all. The suit amount to duplicity as a similar suit was filed in Hamisi Principal Magistrate's Court and is still pending todate. This court is now asked to review and set aside it's 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 applicant 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".

I have perused the court record and find that judgement was entered in this matter on the 20th September 2018. This application was filed on the 20th December 2019 over one year later! This is indeed inordinate delay. 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 find this application is not merited and I is dismissed it with no orders as to costs as it was undefended.

It is so ordered.

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

N.A. MATHEKA

JUDGE