



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.58 OF 2013

RODGERS MUNDU MUNGA.....PLAINTIFF

VERSUS

1. PATRICK CHISHENGA MUNGA

2. EDISON KASHINDO MUNGA

3. BENSON RUNYA MUNGA.....DEFENDANTS

RULING

1. By this Notice of Motion application dated and filed herein on 27th January 2020, the three Defendants pray for an Order:-

ii) That this Court's Order of 27-11-2019 expunging the 1st Defendant's Statement dated 26th and filed on 27th November 2019 be reviewed to re-open the defence case for hearing before the matter can be fixed for Judgment.

2. The application which is supported by an affidavit sworn by the 1st Defendant Patrick Chisenga Munga is based on the grounds stated on the body thereof as follows:-

i) This is a plea for justice.

ii) It is the law that every party seeking justice be accorded the opportunity to (be) heard.

iii) The order to exclude the defence evidence is draconian and the source of extreme difficulty to the Defendant.

iv) It is in the interest of justice.

3. The Plaintiff is opposed to the application. In a Replying Affidavit sworn and filed herein on 10th March 2020, Rodgers Mundu Munga accuses the Defendants of choosing to ignore the orders issued by the Court even after they were served with a pre-trial notice dated 11th July 2019.

4. The Plaintiff avers that both parties herein were represented in Court on 16th September 2019 when the Deputy Registrar of this Court granted the Defendants 14 days to comply or else they would not be granted an opportunity to call any witnesses during the hearing which was fixed for 27th November 2019.

5. The Plaintiff further asserts that despite those directives, the Defendant never filed anything leading to the striking out of their statements and aver that the present application is but an excuse for their failure to comply with the directives given.

6. I have perused the application and the response thereto. I have also perused the oral submissions made before me by Mr. Angima, Learned Counsel for the Defendant/Applicant and Mr. Fondo, Learned Counsel for the Plaintiff.

7. The Defendants have urged this Court to review its orders of 27th November 2019 expunging the 1st Defendant's Statements from the record and to instead re-open the defence case for hearing before the matter can be fixed for Judgment.

8. On the said date when the matter had come up for hearing, and at the close of the Plaintiff's case, the Defendants had sought an adjournment on the basis that they were not ready for hearing and that they would require time to serve their statements which they had filed in Court that morning upon the Plaintiff before they could proceed with the hearing of the Defence case.

9. Having considered the record herein and noting that Defendants had failed to comply with the orders issued by the Deputy Registrar of this Court during pre-trial on 16th September 2019 requiring them to file any statements they wished to rely on within 14 days, failure to which they would not be allowed to call any witnesses, this Court declined the request for adjournment and proceeded to expunge the Defendants Statements filed that morning from the record. It is those orders that the Defendant now terms draconian and urges this Court to review.

10. As it were Order 45 Rule 1(b) of the Civil Procedure Rules prescribes the conditions that must be met in an application for review of a decree or order as follows:-

i) There must be discovery of a new and important matter or evidence which after the exercise of due diligence, was not within the applicants' knowledge or could not be produced by him at the time when the decree was passed or the order made;

ii) There must be a mistake or error on the face of the record;

iii) The application may be made for any other sufficient reason; and

iv) The application must be made without undue delay.

11. When this Court posed the question whether there was any new or important matter or evidence that the Applicants have since discovered which was not within their knowledge at the time the order was made, Mr. Angima Advocate for the Applicants submitted that their application was made in the interest of justice and that expunging the documents from the record is to deny them a chance to ventilate their case.

12. I did not think that those issues amounted to any new or important matter or any other sufficient reason, as the Defendant's counsel submitted. In the 1st Defendant's Supporting Affidavit to the Application, he avers that this is a land dispute involving brothers and that it is only fair that it be decided fairly by their being given the opportunity to put in their evidence. Indeed he blames his Advocates on record for the failure to comply with the directions given by the Deputy Registrar.

13. It was however not lost on this Court that this suit was filed some seven (7) years ago and that the Defendant's filed their Joint Statement of Defence on 22nd April 2013. No sufficient reason has been given why they did not file the said evidence all that time. As Justice G.V. Odunga observed quoting an earlier Judgment in Republic –vs- Registrar of Societies & Another Ex Parte Joseph Nderu Wanjiri & Others (2016) eKLR:-

“Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their cost that the consequences of careless and leisurely approach to work by their Advocates must fall on their shoulders....Whenever a Solicitor by his inexcusable delay deprives a Client of his cause of action, his client can claim damages against him. Whereas it is true that the Court has unfettered discretion, like all Judicial discretions, it must be exercised upon reason not capriciously or on sympathy alone.. Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent.”

14. In my considered view, this Court having expunged the Defendant's documents from the record, and in the absence of any new and important matter for consideration by the Court, all that was open for the Applicants being aggrieved with the decision, was to appeal the same and not to come to this Court seeking a review as sought herein.

15. In the premises, I did not find any iota of merit in the application before me. The same is dismissed with costs to the Plaintiff/Respondent.

Dated, signed and delivered at Malindi this 29th day of April, 2020.

J.O. OLOLA

JUDGE