



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 266 OF 2014

MARY VANDE

LABAN AMUNGA WILLIAM

ALICE NALIAKA ATILA.....PLAINTIFFS/APPLICANTS

VERSUS

JANE ANYANGA.....DEFENDANT/RESPONDENTS

RULING

The application is dated 25th October 2019 and is brought under section 3 and 3A of the Civil Procedure Act and order 45 rule 1 of the Civil Procedure Rules seeking the following orders:-

1. That the judgment herein entered against the plaintiff striking out the plaintiff/applicant suit on 9th May, 2019 be set aside reviewed and or varied together with all the consequential orders enabling there from.
2. That the costs of this application be in the cause.

It is based on the grounds that there is now information and documentary evidence that was not available at the time of hearing of the case which includes; Letter by the social Development Officer Kakamega Central, letter by the chairman Eshihongo Market and letter by the Senior Assistant chief Esumeiya sub-location. That the new information available from the concerned official and government agencies point out as to who has trespassed on the plaintiff's suit plots. That it's clear that from the evidence now availed Eshihongo Maji Maji Women Group indeed does not exist hence incapable of trespassing the plaintiff's plot. That it is therefore in the interest of justice that the order should be granted.

This court has considered the application and the submissions therein. It is based on the grounds that there is now information and documentary evidence that was not available at the time of hearing of the case. 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 Mwhoko 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. 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 find this application is not merited and I dismissed it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 16TH DAY OF APRIL 2020

N.A. MATHEKA

JUDGE