



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO.98 OF 2016

ADRIANA KAUMI MWARABU.....1ST PLAINTIFF

MWARABU KIRIMI NICHOLAS.....2ND PLAINTIFF

VERSUS

PASTOR DENNIS MWENDA.....DEFENDANT

RULING

1. Vide the notice of motion dated 26.7.2018, the plaintiffs/applicants are seeking orders of review of this court's judgment dated 18.7.2018 so as to admit documentary evidence which was not available at the time of the trial. The applicants have now availed receipts to show that the respondent was a tenant of the deceased.

2. It was submitted for the applicants that the respondent was a tenant in plot no.57B Kianjai market where he used to pay rent of Kshs.4,500 per month for three rooms, each room costing Kshs.1,500. The applicants came to find the rent receipts only after judgment was delivered amongst the deceased personal items in an old abandoned store.

3. It is further averred that the forensic document examiners report indicates that the said receipts were prepared by the late Robert Mwarabu.

4. In support of their arguments, the applicants have cited the case of **Turker L.J in Russel vs Duke of Norforl (1940) 1ALL ER, 109** where it was stated that:

“The requirements of natural justice must depend on the circumstances of the case, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth..... One essential is that the person concerned should have a reasonable opportunity of presenting his case”.

5. The respondent has averred that he is a son of Robert Mwarabu. He contends that the rent receipt were fraudulently procured. The respondent had sought for a forensic document examiner to ascertain the authenticity of the same of which a report was duly availed to this court.

6. It was submitted for the respondents that the receipts purported to be new evidence was within the knowledge of the plaintiffs and their advocate and that this had come to light during cross examination.

7. It was also submitted that the receipts are marred with several inconsistencies as they don't identify the respondent as a tenant, don't indicate the property being rented and further the amount in the receipts is very different from the amount pleaded in their affidavit evidence.

8. In light of this, no new evidence has been presented before this honourable court and the application is an afterthought meant at stealing a judicial match. The respondent has cited the case of **Francis Njoroge vs Stephen Maina Kamore (2018) eKLR**, where the court quoted **Francis Orige and another versus Jacob Kamau Mungai (C.A 149 of 2001)** in which the high court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they had intended to call was known to them all along. The respondent further cited the case of **Stephen Githua Kimani vs Nancy Wanjira Wariungi T/A providence Auctioneers (2016) eKLR** where it was stated that;

“an application for review will only be allowed on strong grounds particularly if its effects will amount to re-opening of a case a fresh. In other words I found out that the applicant has not demonstrated existence of any new evidence”, hence the court dismissed the application for review.

9. I find that both parties have correctly cited the relevant applicable law when it comes to the question of review.

10. **Section 80 of the Civil Procedure Act** provides 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”.

11. **Order 45 rule 1 of the Civil Procedure Rules** provides that:

“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”.

12. In the present case, applicants have based their grounds for review of the judgment under the first condition, that is discovery of new and important matter or evidence which was not within their knowledge at the time. ***See Jeremiah Muku Methodist Church of Kenya registered trustee and another (2009) eKLR.***

13. The court has to exercise its discretion judiciously based on the presented facts. The plaintiffs case when the suit was being filed was that the respondent ought to be evicted from the suit premises as he was just a tenant of deceased while on the other hand the respondent claimed he is a son of deceased.

14. The court dismissed the case of the plaintiff on account of failure to establish any tenancy relationship between respondent and deceased (Robert Mwarabu).

15. The applicants have now availed receipts to show that respondent was a tenant of which it was submitted for the applicants that the documents were found in an abandoned house. The question is, what prompted the applicants to file the case if they did not have evidence at the time of filing the suit? In light of this question, it was incumbent upon the applicants to give finer details on how they came across the discovery of the new evidence. The supporting affidavit of Mwarabu Kirimi (2nd applicant) doesn't explain anything about the discovery. All he says is that ***“I and my co-plaintiff had tried our best to look for the receipts before the filing of the suit and during the hearing but they were not available”.***

16. I find that it was not proper for the applicants to try and adduce evidence of discovery in their submissions.

17. It is emerging that the applicants are attempting to build a case post judgment. This is a situation where the 1st plaintiff had testified that she had receipts and tenancy agreement which she had given out (ostensibly to her advocates).

18. Further, it is noted that the claim the applicants are now advancing is not in tandem with their pleadings. The applicants had pleaded that the rent was Kshs.13,800 per month for four rooms. They are now advancing a claim on rent of Kshs.4,500 per month for 3 rooms.

19. I am in agreement with the submissions of the respondent that applicants claim is geared to steal a match.

20. I note that in this court's judgment of 18.7.2018, the court had set out one of the issues to be determined as whether defendant was a son of Robert Mwarabu, since the defence of the respondent was that he was a son of Robert. The question is did the applicants pursue this issue in the relevant court? There is no evidence that applicants have pursued this route of litigation.

21. Looking at the entire record of this case, I am not satisfied that the applicants deserve the discretionary orders of review. It is not lost to this court that even during the trial, the applicants were still trying to introduce documents midstream the trial and now they wanted to have the case re-argued all over again after judgment.

22. I find that this application is not merited. The same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF MAY, 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