



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 14 OF 2013 (OS)**

**CONSOLIDATED INTO ELC CASE NO. 178 OF 2017**

**MARTIN KAZUNGU KONDE.....PLAINTIFF/APPLICANT**

**VERSUS**

**KARISA KAHINDI KIRAO**

**KAZUNGU KAHINDI KIRAO**

**KAHASO KAHINDI KIRAO.....DEFENDANTS/RESPONDENTS**

**RULING**

1. By this Notice of Motion application dated and filed herein on 29<sup>th</sup> October 2018, the two (2) Defendants urge the Court to review and set aside the Ruling delivered herein dated 11<sup>th</sup> October 2018. The application which is supported by an affidavit sworn by the 1<sup>st</sup> Defendant Karisa Kahindi Kirao is premised on the grounds that:-

***i) There is an error apparent on the record; and***

***ii) That the applicant has obtained new and important documents that will change the nature of the case.***

2. The application is opposed. In a Replying Affidavit sworn and filed herein on 18<sup>th</sup> January 2019, Martin Kazungu Konde (the Plaintiff) avers that he came to Court on 8<sup>th</sup> March 2017 seeking eviction orders against the Defendants.

3. The Plaintiff avers that on the said 11<sup>th</sup> October 2018, this Court issued injunction orders restraining the Defendants from trespassing into the suit property, carrying out any construction thereon or generally dealing with the same.

4. The Plaintiff denies that there is any new evidence produced by the Defendant to warrant a review of the orders issued herein.

5. I have considered the application as well as the response thereto. I have equally considered the written submissions placed before me by the Learned Advocates for the parties.

6. The application before me is expressed to be brought under Order 45 of the Civil Procedure Rules. That order provides at Rule 1 thereof 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;***

***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) .....

7. According to the Applicants, the Ruling of this Court dated 11<sup>th</sup> October 2018 failed to take into consideration the fact that there are two consolidated suits herein and that the same is tantamount to an order for the eviction of the Defendants before the suit can be heard on its merits. It is further the Applicant's case that the Court relied on documents that were mere forgeries and that there is discovery of new and important matter to warrant a review of the earlier decision.

8. Having considered the application before me, I am unable to see any new and important matter raised therein which could not be produced by the Applicant at the time when the Ruling was made. As the Court of Appeal stated in **Stephen Gathua Kimani –vs- Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR:-**

*“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh.”*

9. As it were, an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record.

10. In the matter before me, I am unable to discern the purported error on the face of the record and/or any discovery of an important matter which could not be produced by the Applicants at the time the Ruling dated 11<sup>th</sup> October 2018 was delivered.

11. It follows therefore that I did not find any merit in the application. The same is dismissed with costs.

**Dated, signed and delivered at Malindi this 13<sup>th</sup> day of May, 2020.**

**J.O. OLOLA**

**JUDGE**