



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT BUSIA

CASE NO. 177 OF 2016

MONICAH NAFULA ADUI.....1ST APPLICANT

JUDITH NERIMA OGOMBE.....2ND APPLICANT

= VERSUS =

LEORNARD OTUBA SANYA.....RESPONDENT

R U L I N G

1. Before the Court for determination is the application dated 5th February 2020 filed under sections 1A, 1B and 3A of the Civil Procedure Act, Orders 45 Rule 1 and Order 51 of the Civil Procedure Rules. The applicants seek the following orders:

- (i) That the Court be pleased to set aside its order issued on 11th December 2019.**
- (ii) That the Court be pleased to review its orders issued on 1st December 2018 and instead find that the Respondent was and still is in contempt of the order of this court issued on 4th October 2017.**
- (iii) That the court be pleased to order that the Respondent bears the costs of this application and that of the application dated 30th November 2017.**
- (iv) Any other relief the court deems fit to meet the ends of justice.**

2. The application is supported by the affidavit jointly sworn by the applicants, Monica Nafula Adui and Judith Nerima Ogombe on 19th February 2020. It is pleaded that vide its ruling delivered on 11th December 2019, this Court dismissed their application for contempt of court dated 30th November 2017 for the following reasons:

- (i) That they did not demonstrate any act constituting a breach of the former order after its issuance*
- (ii) That the Court found that the applicants had annexed undated photographs in support of the application*
- (iii) That the applicants did not demonstrate their relationship to the respondents referred to in annexure No. 3 in their supporting affidavit sworn on 25th June 2019*

3. The applicants contend that the court did not refer to their aforementioned further affidavit which in their opinion sufficiently demonstrates acts committed by the Respondent constituting contempt of the court order dated 4th October 2017. That the photographs taken on 27th February and 4th June 2019 being annexures to the further affidavit and referred to therein show a building under construction nearing completion and a complete house both owned by the Respondent. The applicants aver that the said affidavit was not considered by the court resulting in an apparent error and mistake on the court record. If considered, the court would have arrived at a different conclusion upholding the application for contempt. On the issue of relationship between themselves and the respondent, the applicants deponed that they are siblings as explained in their submissions dated 24th October 2019.

4. The application was heard on 12th March 2020. Counsel for the applicant reiterated the applicants' stance that the further affidavit dated 26th June 2019 and the photographs annexed thereto demonstrated the acts of contempt complained of in the application. That the resultant ruling of 11th December 2019 was in error warranting review. Counsel submitted further that the respondent is still in contempt to date and urged the Court to allow the application.

5. Counsel for the Respondent on the other hand submitted that there are guiding principles which the Court ought to adhere to in reviewing its orders. That the applicants have not demonstrated the error nor have they presented anything in court to the effect that there has been discovery of new evidence. He cited the case of **Abasi Belinda vs Fredrick Kangawa (1963) EA 557** where the Court held that grounds of appeal are not grounds of review. That the title of land in this case was pursuant to a grant issued in Succession Cause No. 92 of 2015 which grant has since been revoked. Consequently, the applicants have no locus stand to move the court. Counsel concluded by urging the Court to dismiss the application.

6. I have considered the application, the parties' submissions and the applicable law. The Court in exercising its power to review its own decisions can only do so within the framework stipulated in section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil procedure rules which state as follows:

“80. 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1

(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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

7. The jurisdiction and scope of review is therefore limited to the following:

(a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

(b) On account of some mistake or error apparent on the face of the record, or

(c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.

8. The applicant has chosen to base his application on the ground of mistake or error apparent on the face of the record. In their affidavit as well as submissions, the applicants stated that the Court arrived at a finding that was unfavorable to them by failing to consider their further affidavit dated 25th June 2019 and the annexures thereat which they deemed was conclusive proof of the contempt complained of. Failure to consider evidence is in itself a ground for appeal. It does not fit within the definition of “error apparent”. Moreover, a reading of the impugned ruling reveals that the application failed because the applicants' evidence fell short of the threshold of proof of contempt to warrant the orders sought.

9. In **Nyamogo & Nyamogo v Kogo (2001) EA 170**, while discussing what constitutes an error on the face of the record, the court rendered itself as follows:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.” (Emphasis mine).

10. After considering the further affidavit, I am still not convinced that the applicants have proved the contempt complained of to its requisite standards. A party is bound by its pleadings and at paragraph 4 of the supporting affidavit to the said application, it is stated thus:

“THAT the defendant herein has ignored the court order and went on to continue constructing on and cultivating on the suit land. Herein annexed are copies of the photographs.”

The two undated photographs annexed has one iron roofed house with a mud wall and the second one is a small wall made of bricks.

11. In the applicants' further affidavit which is said was not taken into consideration has also annexed two photographs. The first photo which is dated 27th Feb 2018 is a brick-walled house with roofing timber already placed on it. The second photograph also undated is complete permanent house. A comparison of the photos annexed to the supporting affidavit and those annexed to the further affidavit clearly represent different structures. The Respondent in his replying affidavit sworn on 16th January 2018 at paragraph 5 stated thus, "*that L.R No Samia/Budongo/2577 & 2578 are inhabited by 7 families who are not parties to this suit.*"

12. Further in the respondent's supplementary affidavit dated 11th Nov 2019 at paragraph 2 & 3 he stated thus, "*That I am not the person putting up a permanent building on the L.R Samia Budongo/2577 & 2578 depicted in the annexures. The person constructing the houses is not my agent, servant or employee. That the Applicant ought to include the owner of the house to the suit.*" The respondent thus denied the allegations of disobedience imputed on him and put the Applicants to strict proof.

13. Although the Applicants want the orders reviewed on account of the photographs annexed to their further affidavit, I do not see how they would add value to the evidence given that the respondent denied that he was the one putting up the permanent building. Given that there are four photos of structures which the respondent referred to and without any evidence to corroborate that what belongs to the defendant after taking into consideration the averments in the affidavit of Mr. Kalori (annexed to the affidavit in support of this application) that there are other families living on the land who have been left out in this case. In fact, those averments corroborated the respondent's assertions in his denial of breach of the restraining order that over 7 families live on the property who could be responsible for the construction.

14. In light of the foregoing analysis I find no error or mistake in my earlier finding/ruling as it is still my belief that the contempt complained of has not been proved as against the respondent herein. Consequently, the application dated 5th February 2020 is hereby dismissed with costs to the Respondent.

Dated, signed and delivered at BUSIA this 4th day of June 2020.

A.OMOLLO

JUDGE