



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 35 OF 2016**

**PHILIP MWASI KASAVO.....PLAINTIFF**

**VERSUS**

**CHOKWE MUTUNGA.....1<sup>ST</sup> DEFENDANT**

**DENNIS MALOBA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before court is the amended notice of motion dated 28th May 2019 brought by the 1st defendant/applicant under Order 51 Rule 1, Order 11 Rule 3 (g), Order 45, Order 10 Rule 11, Order 40 Rule 1 and 2, Order 22 Rule 25 of the Civil Procedure Rules and Section 3A and 80 of the Civil Procedure Act and other enabling provisions of the law.

The applicant is asking the court for the following orders:

**1. Spent**

**2. That the Honourable court be pleased to review, vary and set aside the judgment delivered on 2<sup>nd</sup> day of May, 2019 and at the same time consolidate this suit with CMCC 4349 of 2003 upon terms and conditions it deems fit.**

**3. That the Honourable Court be pleased to order that this suit unlawfully existed when there was a similar suit against the plaintiff in CMCC No.4349 of 2003 and opted to sue the wrong persons in this case who were to testify in CMCC 4349 of 2003.**

**4. The court be pleased to give an order for a temporary injunction restraining the respondent by himself, his agents and/or servants from further demolishing, evicting and building any structures to the suit property, fencing and/or interfering, trespassing into the applicant's land pending hearing and determination of this application.**

**5. The court be pleased to give an order for stay of execution of the judgment and any other consequential orders issued following the judgment dated 4.4.19.**

**6. Costs of the application be provided for.**

2. The application is premised on the following grounds:

**i. That the advocate on record in CMCC No.4349 has acted unprofessionally and failed to carry out his legal duty to litigate CMCC No.4349 and ELC No. 35 of 2016 and did so in collusion with the plaintiff in this case and the defendant in CMCC No.4349 of**

**2003 to deny justice for the applicant's family.**

**ii. That the advocate on record in both cases summoned the applicant and the 2<sup>nd</sup> defendant to come to court to testify without disclosing the case number and the parties involved using the advantage of their laymanship.**

**iii. That this case was filed before CMCC No.4349 having been determined where the plaintiff was a defendant and the matter is touching on the same property in dispute which the plaintiff has unlawfully acquired.**

**iv. That no one will suffer any prejudice if this judgment is reviewed and set aside and be consolidated with CMCC No. 4349 of 2003.**

**v. That this court will uphold the rule of the law by granting the orders being sought herein.**

3. The application is supported by the affidavit of Chokwe Mutunga, the applicant sworn on 28th May, 2019.

4. The application is opposed. There are grounds of opposition dated 24th October, 2019 and filed on 25th October 2019 by the Respondent on the following grounds:

**1. That the application is overtaken by events as this Honourable Court's judgment has been fully implemented.**

**2. That the application is non-starter as there is nothing to review, injunction or stay and no appeal has been filed in the appellate court.**

**3. That the application is for dismissal.**

5. On 29th October, 2019, the court directed that the application be canvassed by way of written submissions.

The applicant filed his submissions on 13th November 2019 while the respondent filed his on 4th February 2020.

6. I have considered the application and the submissions filed. The issues for determination is whether the court should review and set aside the judgment delivered on 2nd day of May, 2019, and thereafter grant the orders for consolidation, temporary injunction and stay of execution.

7. The rules for review are clear. Section 80 of the Civil Procedure Act give power of review while Order 45 sets out the rules. The rules restrict the grounds for review and lays down the jurisdiction and scope of review limiting it to the following grounds:

**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. In the case of **National Bank of Kenya Ltd-v- Ndungu Njau (1997) eKLR**, 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-evident and should not require an elaborate argument to be established. It will not be a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of law cannot be a ground for review.”**

9. In the instant case, the applicant alleges that his advocate on record in CMCC No.4349 of 2003 acted

unprofessionally as he failed to carry out his duty to litigate that case and this suit and that he colluded with the plaintiff in this case whose is the defendant in CMCC No. 4349 of 2003 to deny justice to the applicant’s family. I have perused the court record herein. The judgment delivered on 2nd May, 2019 was made by the court after hearing both the plaintiff and the defendants. Indeed the applicant herein testified as DW1 while the 2nd defendant testified as DW2. It was after considering the evidence adduced by the plaintiff and the defendants that the court (Komingoi, J) entered judgment in favour of the plaintiff as against the defendants jointly and severally. The court further dismissed the defendant’s counter-claim. It is clear therefore that the court considered the case in totality, including the evidence of the applicant and made a conscious decision. The judgment delivered by the court, in my view, cannot be subject of review in the manner the applicant has urged the court to do. I would be sitting on appeal against a judgment of this court if I was to decide otherwise, which is contrary to the law. In my view, the applicant has not advanced valid grounds as stated hereinabove to warrant the grant of the orders sought.

10. By reason of the foregoing, it is my finding that the amended notice of motion dated 28th May 2019 is devoid of merit and the same is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 9<sup>TH</sup> day of July 2020.**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C. K. Yano, J**