



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 95 OF 2018 (OS)**

**MICHAEL SAFARI NGARI.....PLAINTIFF**

**VERSUS**

**SHEIKH NUREIN MUHIDIN.....DEFENDANT**

**RULING**

1. This ruling is in respect of the defendant/applicant's notice of motion dated 10<sup>th</sup> May 2019 brought under Sections 1A, 1B, 3A, 63(e), of the Civil Procedure Act, Order 45, Rule 1, 2, 3, 4 and 6, Order 51 Rule 1 of the Civil Procedure Rules and Article 159 of the Constitution of Kenya seeking to review and/or set aside ex debito justitiae and/or discharge orders given on 22/2/19 and all orders/process consequential thereto. The application is premised on the grounds on the face of the motion and supported by the affidavit of Sheikh Nurein Muhidin sworn on 10<sup>th</sup> May, 2019.

2. It is the applicant's contention that there is material information that was not in his possession at the time of the hearing of the application dated 20/4/18 and subsequently the issuing of the orders of 22/2/2019. The applicant has deposed that at all material times, he has been and is still the registered owner of the suit property known as Land Parcel No. 11864 (original No.11703/137) Section 1 Mainland North (CR No. 1704/13) measuring approximately 0.0375 hectares. That he purchased the suit property from one Benson Ogembo Nyakundi vide a Sale Agreement dated 23<sup>rd</sup> December, 2015 witnessed by Mahal Nur whereby he procured vacant possession of the suit property. The applicant avers that prior to the said purchase, he conducted both local and official search and an inspection of the property by visiting the site in the company of the three area chiefs; namely Mr. Omar Abdalla Sanga, Mr. Kitsao Ziro Ngowa and Mr. Bakari Hussesin Siwa and confirmed that the parcel was vacant and free from any encumbrances. That in late 2016, after the land was transferred to his name, the applicant had the plot demarcated and also constructed a temporary fence around it.

3. The applicant states that in February, 2018 he was informed by Mahal Nur that a stranger had invaded the suit property and was constructing a structure therein. That he visited the site and was surprised to find that there was an ongoing construction of Swahili houses in the plot and the fence had been brought down by the developers. The applicant further states that he went to the area chief and reported the incident, and the area chief informed him that they had knowledge of the ongoing construction and had told the respondent the land he was building on belonged to someone else and warned him against constructing any structures thereon, but the plaintiff proceeded with the construction.

4. The applicant states that he went to Bamburi Police Station and reported the matter vide OB No. 37/5/3/10 and was referred to Kisauni CID Section where the plaintiff was summoned. That the plaintiff admitted that he had no title to the property but suggested that the applicant sells him the portion he has developed. The applicant states that they agreed to meet at Kisauni CID Headquarters the following week to settle the matter but the plaintiff failed to turn up as agreed. The applicant states that when he called the plaintiff to inquire why he did not attend, the plaintiff retorted that he would not attend and the applicant was at liberty to do whatever he wanted to do given that he is the owner of the suit property. The applicant deposes that he was later surprised to be served with a copy of the ruling delivered by the court on 22<sup>nd</sup> February 2019 restraining the applicant from accessing the suit property. The applicant contends that the plaintiff is a trespasser and has no right whatsoever in the suit property and as such, his claim has no basis in law as he cannot claim adverse possession over the property that he encroached upon less than two years ago and which came to the applicant's possession three (3) years ago. The applicant avers that during the hearing of the plaintiff's application, he had not been able to procure the witnesses and relevant documents as he did not have their contacts. That he has made extreme efforts and have since procured witnesses and relevant/material documents to enable the court fully appreciate his claim herein. The applicant states that it is in the interests of justice, fairness, equity, constitutionalism, principles of the rule of law and natural justice and protection of fundamental rights and freedoms enshrined in the constitution of Kenya that the plaintiff's claim for adverse possession be dismissed with costs and for the applicant to be declared the rightful owner of the suit property. The applicant has annexed copies of the certificate of title in his name, the agreement for sale, transfer and OB abstract.

5. The plaintiff/respondent opposed the application through a replying affidavit sworn on 15<sup>th</sup> July, 2019. The respondent denied that the applicant acquired vacant possession of the suit premises and deposed that even though the applicant bought the suit property in 2016 he only

came to land on 24/2/18. The respondent avers that he entered onto the suit property in the year 2004. The respondent avers that the matter or issues raised in the application are matters which require evidence through a hearing and cannot form the basis of an application for review. Relying on legal advice, the respondent contends that there is no new issue that has been brought in the matter through the present application and that the ruling of the court delivered on 22<sup>nd</sup> February 2019 dealt extensively on the documentary evidence tendered in the application for injunction dated 20<sup>th</sup> April 2018 and that if the applicant was aggrieved by the decision of the court, the best option was to file an appeal but not an application for review. That failure to procure witness statements before or at the interlocutory application cannot be a ground for review as such statements are only considered and/or adopted at the hearing of the suit. It is the respondent's contention that the application has not met the conditions for review as no new documentary evidence has been tendered in support of the application which was not within the knowledge of the applicant and that there is no mistake or error apparent on the face of the record. The respondent urged the court to dismiss the application with costs.

6. Only the applicant filed written submissions which were also highlighted by Mr. Ngonze, learned counsel for the applicant. Mr. Ngonze submitted that at the hearing of the Notice of Motion dated 20<sup>th</sup> April, 2018, the defendant was not in a position to present documentary evidence on the undisputed issues of ownership of the suit property, but has since managed to get them and the same are now lodged in court. The order of injunction ought not have been issued against the owner of the suit property. He therefore urged the court to allow the application.

7. I have considered the application. The issue to consider is whether the orders issued on 22/2/19 should be set aside. In the ruling delivered on 22<sup>nd</sup> February, 2019 the court (Omollo, J) after considering the notice of motion dated 20<sup>th</sup> April 2018 on merit found the application as merited and confirmed the orders of injunction earlier given by allowing prayer 3 which restrained the defendant from invading and/or trespassing and/or demolishing and/or selling and/or constructing structures or dealing with the suit premises in any manner whatsoever detrimental to the rights and interest of the plaintiff pending hearing and determination of the suit. The court considered in particular, the supporting affidavit and the grounds of opposition filed. The court stated at paragraphs 3 and 4 of the ruling as follows:

***“ 3. The principles to be proved under injunction applications are well settled in Giella –v- Cassman Brown case. The applicant annexed in his affidavit in support of the motion photos of a house which he says is on the plot. He also annexed a demand letter dated 19<sup>th</sup> March 2018 written to him by the defendant’s advocate seeking for vacant possession. Although the defendant states in his grounds that the photos do not indicate the date on which they were taken, his own demand letter confirms that the applicant was in possession at the time of filing of the suit.***

***4. The applicant also states that he has been in possession for some time. To demonstrate this, he annexed utility bills issued to him sometime in 2009. The defendant did not rebut this evidence as the grounds of opposition cannot answer to these facts. The applicant has thus demonstrated that he has a prima facie case with a probability of succeeding. Secondly, the balance of convenience tilts in his favour as the interest of justice favour maintenance of the prevailing status quo i.e. the applicant retaining possession until the suit is heard and determined.”***

8. Order 45 of the Civil Procedure Rules provides as follows:

***“ 1. (1) Any person considering himself aggrieved –***

***(a) By 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 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 applied for review.***

***2 (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.***

***(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.***

***(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.***

***3. (1) Where it appears to the court that there is not sufficient ground for review, it shall dismiss the application.***

***(2) where the court is of the opinion that the application for review should be granted, it shall grant the same:***

**Provided that no such application shall be granted on the grounds of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.”**

9. In the instant application, the application for review is founded on the discovery of new and important evidence that was not in the applicant's possession at the time of hearing of the earlier application. These include witnesses as well as documents such as copies of the title, agreement for sale, transfer and OB abstract. The alleged new and important evidence cannot, in my view, be said to be one which after the exercise of due diligence, was not within the knowledge of the applicant, or could not be produced by him at the hearing of the application dated 20<sup>th</sup> April 2018. In my view, the alleged new evidence was within the knowledge of the applicant and he could have produced the same during the hearing of that application. Moreover, in the ruling sought be reviewed, the court considered the issue of the prevailing status quo at the time, i.e. that the applicant was in possession. So that, even if the court was to hold that there was new and important evidence, which of course is not true, in the circumstances of this matter the court could highly not have arrived at a different decision. I am however, not satisfied that the material relied on by the applicant herein are new and important matter or evidence which was not within the applicant's knowledge or which the applicant could not have produced with the exercise of due diligence, when the application dated 20/4/18 was heard. I am of the view that the applicant has not satisfied the conditions for grant of the orders sought under Section 80 of the Civil Procedure Act as read with Order 45 of the Civil Procedure Rules.

10. In the upshot I find that the Notice of Motion dated 10<sup>th</sup> May 2019 is devoid of merit and the same is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 7<sup>TH</sup> day of July 2020.**

**C.K. YANO**

**JUDGE**

**In the presence**

Yumna Hassan Court Assistant