REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 138 OF 2013

ISAAK MUTIMBA MACHIO.....PLAINTIFF/APPLICANT

VERSUS

CORNELIUS WABWIRE ZAKARIA.....DEFENDANT/RESPONDENT

RULING

The application is dated 6th July 2020 and is brought under Section 1A, 3 and 3A & 80 of the Civil Procedure Act Cap 21 and order 21, Rule 22, Order 45, Rule 1 and 2 of the Civil Procedure rules 2010 seeking the following orders;

1. That service of this application be dispensed with, the same be certified urgent and head ex-parte in the first instance.

2. That pending the hearing of this application interpartes, there be a stay of execution of the judgment of this court delivered on 28th February, 2019 and the ruling delivered on 30th April, 2020.

3. That there be a stay of execution of the judgment of this court delivered on 28th February, 2019 and the ruling delivered on 30th April, 2020.

4. That the judgment of this honourable court delivered on 28th February, 2019 be reviewed and/or set aside.

5. That the ruling of this honourable court delivered on 30th April, 2020 be reviewed and/or set aside.

6. That the plaintiff/applicant be allowed to re-open his case and adduce further evidence.

7. That costs of this application be provided for.

It is supported by the annexed affidavit of Isaak Mutimba Machio, the applicant and grounds that there is the discovery of new and important matter and evidence which after the exercise of due diligence was not within the applicant's knowledge and could not be produced by him at the time when the decree was passed. That the ground measurement of the defendant's land parcel No. North Wanga/Matungu/1764 is in excess by one acre while the ground measurements of the plaintiff's land parcel No. N/Wanga/Matungu/1763 is less by one acre. That the plaintiff's home from which eviction is to issue sits on the exclusive one acre.

The respondent submitted that the plaintiff/applicant's application herein is defective, frivolous, vexatious, bad in law, academic, an abuse of court process and a waste of court's time. That the said application technically raises issues that should be canvassed in an appeal. That the honourable court is fanctus officio and therefore cannot sit on its own appeal by entertaining and determining the latter application. That there is nothing to review or error apparent on court record as the plaintiff/applicant has raised issues that were already adversely conversed during the main hearing of this matter. That the plaintiff/applicant's main pleadings raised most contentious issue that he occupy more land than the actual area he purchased from him which issue was dealt with during the hearing of this matter.

This court has considered the application and the submissions therein. It is based on the grounds that there is new and important evidence which has come to the plaintiff's knowledge or could not be produced by him during the hearing of the suit. The court is now asked to review and set aside it's judgment. **In the case of Kwame Kariuki & Another Vs. Mohamed Hassan Ali & 4 Others (2014) eKLR,** the Court observed that:-

> *"It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal."*

In the case of *Mwihoko Housing Company Limited vs Equity Building Society (2007) 2 KLR 171* is relevant. It was held, that;

> *"A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;*

> *"An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made…"*

Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

> *"(1). Any person considering himself aggrieved-*
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> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
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> *(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) 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 applies for the review."*

The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states as follows:

> *"Any person who considers himself aggrieved-*
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> *(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."*

Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However this discretion should be exercised judiciously and not capriciously. In Court of Appeal, *Civil Appeal No. 211 of 1996, National Bank of Kenya Vs Ndungu Njau,* 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 evidence and should not require an elaborate argument to be established. It will not be 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 proceed on an incorrect expansion of the law".*

From the above provisions of the law, authorities cited and facts of this case I find that the applicant has failed to show any mistake or error apparent on the face of record and/or any sufficient reason to enable this court set aside its decision. There is no new matter and/or evidence that has come to the knowledge of the plaintiff as his written statement and evidence are all on record. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28TH SEPTEMBER 2020.

N.A. MATHEKA

JUDGE