



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 11 OF 2010

BASILO MUNGUTI MUANGE APPELLANT

VERSUS

NGUGI MALINDI RESPONDENT

(Being an appeal from the Ruling and Order of Hon. L.W Mwangi (S.R.M) in Yatta Senior Resident Magistrate Civil Case No. 11 of 1993)

(Before B. Thurania Jaden J)

J U D G M E N T

1. The ruling that is the subject of this appeal was delivered on 3/2/2010. The ruling dismissed the application dated 4/12/2009 which sought a discharge, variation and/or a review of the orders granted on 25/11/2009.
2. The orders dated 25/11/2009 read as follows:-
 - v. **“That an eviction order be re-issued to the OCS Yatta Police Station in order to evict the Respondent from the Applicants plot No. 37 at Mwea Farmers Company Limited.**
 - v. **Costs to the Plaintiff.”**
3. From what can be discerned from the reconstituted record of the lower court following the disappearance of the original file, judgment was entered for the Plaintiff/Respondent on 12/6/95 for *inter alia*, the eviction of the Appellant and Another from the suitland, named as plot **No. 37 Mwea Farmers Company Limited**. The judgment stands to date.
4. The Appeal is premised on the grounds that:-
 - v. **The decree the Respondent sought to execute was over 14 years old.**
 - v. **The trial magistrate relied on the wrong provisions of the law.**
 - v. **The submissions of the Appellant’s counsel were not considered.**
 - v. **The officer commanding a police station (OCS) is not an authorized court officer for purposes of execution of eviction orders.**
 - vi. **There was no proper service before the eviction orders were issued.**
 - v. **The judgment and decree were brought to the attention of the appellant in the year 2008 after the same had lapsed hence not appealable.**
5. The appeal was canvassed by way of written submissions which I have duly considered.
6. Under **Order 45 rule 1** of the **Civil Procedure Rules**:-

“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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

- 7. In the matter at hand, the application dated 4/12/2009 sought orders that the orders dated 25/11/2009 be discharged, varied and/or reviewed. The application was supported by an affidavit in support sworn by the Appellant, **Basilo Munguti Muange** on 4/12/09 and a supplementary affidavit sworn on 18/1/2010.
- 8. According to said affidavit the application dated 18/4/2009 from which the eviction orders complained about emanated was filed without leave being obtained. That the said application was not served on the Appellant’s Co-Defendant. That the judgment upon which the application for eviction as anchored was over 14 days old and that no Notice to Show Cause was issued. The Appellant further averred that the OCS only managed to destroy the crops and a structure that was on the said land. The Appellant’s fear was that OCS may carry out the irregular exercise of evicting him from the land.
- 9. In opposition to the application, the Respondent swore a replying affidavit on 29/12/09. The Respondent’s contention is that the Appellant was evicted with the OCS providing security. That the Appellant was all along aware of the eviction orders but ignored the same and even started constructing a building on the suitland. The Respondent accused the Appellant of having approached the court with unclean hands.
- 10. Having considered the application for review that was before the lower court, I have not seen any discovery of any new and important matter or evidence that was brought before the court. There was also no mistake or error on the face of the record or any other sufficient reason. From the matters raised in the affidavit that supported the application for review, it is apparent that what was complained about was erroneous conclusions on matters of law e.g. **Limitation of Actions Act Cap 22 Laws of Kenya**, execution of decrees, lack of service on the Co-Defendant etc. Those are not good grounds for review but may be good grounds for appeal. It is not clear from the affidavit in support why the application for eviction was not opposed by the Appellant or any attempts made to have it set aside. The complaint regarding lack of service only touched on the Appellant’s Co-Defendant. The error in the ruling of the lower court in referring to the former **Order IXVI** instead of **Order IXIV** is a typographical error which was corrected by the same court. In any event, the then **Order L.r.12** provided as follows:-

“Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”

- 11. With the foregoing, I find no merits in the appeal and I dismiss the same with costs to the Respondent.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **6th** day of **March** 2014.

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B. THURANIRA JADEN

JUDGE