



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 222 OF 2016

IJAIT C. ALUKU.....PLAINTIFF/APPLICANT

VERSUS

SALOME MWANAISHA MADAGA

COUNTY SURVEYOR

COUNTY LAND REGISTRAR, KAKAMEGA

THE HON. ATTORNEY GENERAL

KINGDOM SONS ACADEMY

EVANS MASINDE....DEFENDANTS/RESPONDENTS

RULING

The application is dated 16th December 2019 and is brought under Sections 1A, 1B & 3A of the Civil Procedure Act and Order 8 rule 3, Order 22 rule 22, Order 9 & Order 45 of the Civil Procedure Rules 2010 seeking the following orders;

1. That this application be certified as extremely urgent and be heard ex-parte in the first instance.
2. That leave be granted to the law firm of Osango & Co. Adv. to come on record in place of M. Kiveu Adv. to act for the plaintiff herein in this matter.
3. That this honourable court be pleased to temporary stay execution of the judgment and or orders made 28th November, 2019 pending inter parties hearing of this application.
4. That this honourable court be pleased to review, vacate and or set aside the judgment and or order made on 28th November, 2019.
5. That leave be granted to the plaintiff/applicant to reopen his case and be allowed to introduce new and or additional evidence which was not within his knowledge at the time of filing the suit and thereafter pursuant to Order 45 rule 5 of the Civil Procedure Rules 2010 this honourable court be pleased to re-hear the plaintiff's suit afresh and admit new evidence.
5. That costs of this application be provided for.

It is based on the affidavit of Ijait C. Aluku and on grounds that judgment was delivered on 28th November, 2019 against the plaintiff/applicant. That there is apparently an error on the face of record occasioned due to lack of sufficient evidence which was not within the knowledge of the plaintiff/applicant at the time of hearing the matter. That there is an apparently error on the face of the record whereby this honourable court in its judgment delivered on 28th November, 2019 made reference to the plaintiff/applicant's pleadings including the plaint when indeed there was no suit as the plaintiff/applicant's suit was withdrawn on or about 19th June, 2019. That the plaintiff/applicant did not instruct the firm of M. Kiveu Advocate to withdraw the suit hence condemned unheard. That the title numbers referred to being Kakamega/Lumakanda/2485 and 2130 do not exist as the same were amalgamated to create a new title number Kakamega/Lumakanda/6542. That the matter proceeded without first complying with an order made by this honourable court on 18th December, 2017 and hence there was no report file by the County Land Registrar and County Surveyor – Kakamega to assist the court arrive

at a fair and just determination of the matter which was the subject matter. That the 1st defendant/respondent failed to disclose that there existed another suit in Kakamega CMCC No. 196 of 2012 involving the same parties and subject matter in which judgment was delivered on 23rd February, 2016 thus the counter claim was res judicata. That the orders made on 28th November, 2019 are incapable of being enforceable as there exists no road of access through the plaintiff's land parcels and the same cannot be enforced without affecting other persons who are not parties to the suit herein.

The 1st respondent submitted that the plaintiff withdrew his case and she proceeded with her counterclaim. That the judgement of this court has already been implemented. That her counterclaim was decided on merit.

This court has considered the application and the submissions therein. It is based on the grounds that That there is apparently an error on the face of record occasioned due to lack of sufficient evidence which was not within the knowledge of the plaintiff/applicant at the time of hearing the matter. **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-

- (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.

(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-

- (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”.

I have perused the court record and find that counsel for the plaintiff withdrew the plaintiff's case on the 26th May 2019 and the court proceeded with the counter claim. After the trial the court found that the defence had established its case on a balance of probabilities. 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. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 27TH OCTOBER 2020.

N.A. MATHEKA

JUDGE