



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 90 OF 2016**

**ERNEST SIFUNA SIMWERO.....PLAINTIFF**

**VERSUS**

**JARED MWIMALI MUKWANDALA (deceased).....DEFENDANT**

**AND**

**PAUL MUCHUMA MWIMALI.....APPLICANT**

**RULING**

The application is dated 30<sup>th</sup> June 2020 and is brought under order 45 rule 1 & 2 of the Civil Procedure Rules 2010, order 9 rule 9 of the Civil Procedure Rules 2010, Section 3A & Section 80 of Civil Procedure Act Cap 21 Laws of Kenya seeking the following orders:-

1. That this application be certified urgent and heard ex-parte in the first instance.
2. That the firm of M/s. Gabriel Fwaya Advocates be allowed to come on record in the place of M/s. Momanyi, Manyoni & Co. Advocates on behalf of the applicant.
3. The applicant be allowed to substitute the defendant herein.
4. That pending the hearing and determination of this application this honourable court does issue an order staying the execution of the decree issued on the 17<sup>th</sup> December, 2019
5. That this honourable court be pleased to review, vary and or set aside the judgment of this honourable court issued 17<sup>th</sup> December, 2019.
6. That the order of this honourable court made on 16<sup>th</sup> October, 2019 be set aside and or reviewed.
7. That the defendant's case be re-opened, be heard and determined on merit.
8. The costs of this application be provided for.

The application is grounded on the affidavit of Paul Muchuma Mwimali and the general grounds that the initial defendant died on the 14<sup>th</sup> day of October, 2019. That the proceedings of 16<sup>th</sup> October, 2019 proceeded against a deceased defendant and they were therefore null and void. That the court's attention was not drawn to the fact that the initial defendant had died at the time the order for closing the defence case was made on 16<sup>th</sup> October, 2019 and judgment delivered on 17<sup>th</sup> December, 2019 because the counsel then on record was not aware that the defendant was dead. That the fact of the initial defendant passing on forms new matters that were not within the knowledge of the court and or counsel on record. This application has been written without undue delay. The reliefs sought meets the ends of justice.

The plaintiff/respondent in his response raised a preliminary objection that this application is res judicata, meaning the dispute the applicant wants re-opened, heard and determined and a decree issued in his prayer 7 has already been heard and determined on 17<sup>th</sup> December, 2019 decree by court. That this court lacks the jurisdiction to reopen this case afresh as prayed for by the applicant herein to a matter it has already heard and made a determination on. That there is no evidence that the applicant herein has sought the permission of this honourable court to explain why he is seeking the reliefs in his prayers six months after the decree was issued yet the law is that such reliefs be sought within 30 days after decree. That this honourable court lacks the jurisdiction to stay the execution of its own decree as prayed for in its fourth prayer in the absence of an appeal on the same decree filed in a court with competent appellate jurisdiction. That the decree the applicant seeks to have its execution stayed has already been executed in full as the Land Registrar has already reinstated LP East Wanga/Malaha 189 which

was hitherto in the name of the defendant herein in the name of Esteri Oteche as directed by this honourable court as evidence by the official land search herein.

**This court has considered the application and the submissions therein.** The plaintiff/respondent raised a preliminary objection that this application is res judicata, meaning the dispute the applicant wants re-opened, heard and determined and a decree issued. I find that the matter is not res judicata and the objection is over ruled. The application is based on the grounds that the initial defendant died on the 14<sup>th</sup> day of October, 2019. That the proceedings of 16<sup>th</sup> October, 2019 proceeded against a deceased defendant and they were therefore null and void. This court is now asked to review and set aside the judgement. **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 order as it thinks fit on sufficient reason being given for review of its decision. However this discretion should be exercised judiciously and not capriciously. I see no mistake or error or omission on the part of the court when it proceeded with the matter after satisfying itself that the applicant was represented by counsel at all material times. In Court of Appeal, *Civil Appeal No. 2111 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. I have perused the court record and find that on 15<sup>th</sup> January, 2018 the defendant and his advocate Mr. Momanyi were both in court. He gave evidence and was cross-examined. On the 16<sup>th</sup> October 2019 the defence case was closed in the presence of the defendants advocate Miss Omar who was holding brief for Mr. Momanyi. The case came up for submissions on the 13<sup>th</sup> November 2019 and Mr. Momanyi for the defendant was again present and filed his final submissions. Judgement was then delivered on the 17<sup>th</sup> December 2019. The applicant cannot now come to court and state that those proceedings were null and void. His recourse is now to file an appeal against the said decision and the defendant was ably represented by a senior advocate who even filed a notice of appeal after the said judgement. I find this application is not merited and I dismissed it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 26<sup>TH</sup> OCTOBER 2020.**

**N.A. MATHEKA**

**JUDGE**