



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 4 OF 2012

(Formerly Nyeri HCCC 48 OF 2009)

(Formerly Nairobi HCCC 528 OF 2001)

MOSES MWANGI KARANJA.....PLAINTIFF/JUDGMENT CREDITOR

-VERSUS-

DAVID MACHARIA GAKUYU.....DEFENDANT/JUDGMENT DEBTOR

RULING

1. The application dated the 5th March, 2020 seeks for orders of stay of execution of the judgement dated the 26th February 2018 and/or the setting aside, review or varying of the said Judgement.
2. The Application is supported by the grounds set on its face as well as on the supporting affidavit of David Macharia Gakuyu the Applicant/judgment debtor herein.
3. The application was opposed by the respondent/ judgment creditor via their replying Affidavit dated the 9th July 2020 wherein vide the orders of the Court of 8th July 2020 parties took directions to have the same disposed of by way of written submissions to which only the Respondent complied.
4. I have considered the said application where the Applicant seeks for orders of stay of execution of the judgement dated the 26th February 2018 and/or its review and/or setting aside and/or varying of the same.
5. From the Applicant's sworn affidavit and the grounds giving rise to the said application, the Applicant's assertion is that the court failed to peruse and/or read and/or consider the Applicants submissions dated 1st November 2016 to which it would have noted that there had been an error on the face of the record.
6. That the Court had awarded judgment based on prayers that had been abandoned by the Plaintiff in his further amended Plaint of the 22nd July 2005. That the judgment of the court was based on a prayer for adverse possession which would not have been the case had the court been aware of the further amended Plaint filed before it.
7. In opposing the application, the Plaintiff's written submissions were to the effect that the matter had been pending in court since the year 2001 wherein on 26th February 2018 Judgment had been entered in favour of the Plaintiff/judgment creditor.
8. That being dissatisfied with the judgment the Applicant herein had filed his Notice of Appeal dated 9th March 2018 and an Application for stay of execution pending the hearing and determination of the appeal, dated 12th March 2018.
9. That the application was heard and dismissed for want of merit wherein after the Plaintiff executed the Decree on the land parcel No. Loc 3/Gichagiini/283 which land was subsequently registered in his name and a title deed (herein annexed) issued.
10. That thereafter the Plaintiff had also commenced execution proceedings against the Applicant in respect of costs, wherein the Applicant disappeared upon a notice to Show Cause having being served upon him only for him to resurface with the present application without an explanation as to what became of his intended Appeal.

11. That the matter before court was res judicata the court having already rendered itself on the same and secondly that the conditions that were set out for one to be granted stay of execution as was held in the case of **Elena Doudoladova Korir vs Kenyatta University [2014] eKLR** had not been met by the judgment debtor. It was their submission that the Applicant sought to prevent that which had already happened.

12. That the Applicant/judgment debtor had also failed to show the kind of substantial loss he was likely to suffer if stay of execution was not granted.

13. That in seeking to review the judgment, the provisions of Order 45 of the Civil Procedure Rules had set out the requirements for such an application to which the judgment debtor had not discharged. That he had not demonstrated that there was any apparent error on the face of the record and what new evidence he had discovered after exercise of due diligence and which evidence was not within his knowledge at the time the Decree was passed.

Determination

14. I have considered the Application for stay of execution of the judgement dated the 26th February 2018, its review and/or setting aside and/or varying the same. I have also considered the reasons given for and against the said application.

15. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

16. The Court of Appeal in the case of **James Njuguna Chui vs John Njogu Kimani [2017] eKLR** held that

The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the courts and had his dispute decided must learn to live with it. It is not open to him to litigate or reargue the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other party from the spectre of endlessly repetitive litigation hanging over their heads like the sword of Damocles. It also protects the court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated courts but, worse, by having contradictory decisions emanating from the court or courts over the same issue, courtesy of the repeat litigation.

17. I have also considered the fact that the Applicant filed an application dated 12th March 2018 brought by Notice of Motion of an even date wherein he had sought for stay of execution of the judgment delivered on 26th February 2018 pending hearing and determination of his intended Appeal. I also note that via a ruling delivered on the 2nd July 2018, the said application was dismissed. The Applicant did not Appeal against that dismissal. This marked the matter as finalized thus making the subsequent application res judicata the ruling of 2nd July 2018 in as far as the application for stay of execution of the judgment delivered on 26th February 2018 was concerned.

18. The Applicant has also sought for the judgement dated the 26th February 2018 to be reviewed. Order 45 of the Civil Procedure Rules which provides the procedure and the conditions that an Applicant must satisfy in an application for review states as follows:

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.

19. Section 80 of the Civil Procedure Act provides 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.

20. From the above provisions, it is clear that whereas Section 80 of the Civil Procedure Act gives the Court the power to review its orders, Order 45 Rule 1 of the Civil Procedure Rules sets out the rules which restrict the grounds upon which an application for review may be made. These grounds include;

- i. *discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made or;*
- ii. *on account of some mistake or error apparent on the face of the record, or*
- iii. *for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

21. In the **Serephen Nyasani Menge v Rispah Onsase [2018] eKLR** the court had held that;

Order 45 rule 1(a) and (b) in addition to setting out the conditions that an Applicant in an application for review must satisfy in order to get the application granted, reiterates the proviso of Section 80(a) and (b) which in my view makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party. Once a party has opted for a review the option of an appeal cannot at the same time be available to the party.....

In my view a proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order.

22. In the present case, I find that the Applicant having filed his Notice of Appeal dated the 9th March 2018, had exhausted the process of review but now wishes to review the judgment to try his luck. The Applicant cannot be permitted to have a second bite of the cherry and his instant application constitutes an abuse of the process of the court and the same must surely fail.

23. Litigation somehow must come to an end and for the Applicant, the end came when he filed his Notice of Appeal and somewhere along the line he abandoned the Appeal only to resurface with the present Application seeking to review the Judgment of 26th February 2018. Litigation cannot be conducted on the basis of trial and error and that is why there are provisions of the law and the procedure to be adhered to.

24. The Applicant deposes that there is an error apparent on the face of the record in that the Court had awarded judgment on prayers that had been abandoned by the Plaintiff in his further amended Plaintiff on the 22nd July 2005 which was sufficient reason to review the judgment. That had the court been aware of the further amended Plaintiff filed before it, the judgment of the court would not have been based on a prayer for adverse possession.

25. I beg to differ with the Applicant's disposition in that a look at the impugned Judgment, the opening statement is to the effect that;

'By a Plaintiff dated 29th March 2001 and amended on 5th June 2001 and further amended on 22nd July 2005 the Plaintiff herein.....

26. By the said opening remarks I find that this was evidence that had been placed before the court as it was in existence and for which the Court relied upon to reach its verdict and therefore it cannot be said to be new evidence.

27. In the decided case of **Ajit Kumar Rath -vs- The State of Orisa & Others, 9 Supreme Court Case 596:** the Supreme Court of India had this to say:-

'the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule"

28. Having looked at the reason herein advanced by the Plaintiff/Applicant seeking that this Court reviews its judgment of 26th February 2018, the same does not constitute the discovery of new evidence which was not within his knowledge or could not be produced by him at the time of hearing of the suit. I find that this limb of the Application did not meet the threshold set out under Order 45 Rule 1 of the Civil Procedure Rules and thus this is not a proper case for the court to exercise its discretion in favour of the Applicant. Accordingly, I proceed to dismiss the application dated 5th March, 2020 in its entirety with costs.

Dated and delivered at Nakuru this 17th day of December 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE