



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 86 OF 2016

SHEIKHA MOHAMED ALI & 4 OTHERS.....PLAINTIFFS

VERSUS

HAMID MOHAMED ABDULKADIR.....DEFENDANT

RULING

1. By a Notice of Motion dated 25th February, 2020, the Defendant/Applicant seeks the following orders:

1. Spent

2. Spent

3. That this honourable court be pleased to issue an order for stay of the execution of the ruling of this honourable court delivered on the 19th February, 2020 and all the consequential orders pending the hearing and determination of this application inter-partes and ostensibly issues an order for status quo pending the determination of the application herein.

4. That this honourable court be pleased to set aside, review and or/vary the judgment and decree of this honourable court delivered on the 11th of May, 2017.

5. That costs of this application be provided for.

2. The application is premised on the following grounds:

1. That judgment was entered in respect of PLOT SUBDIVISION NO.619 SECTION 1 MAINLAND NORTH (ORIGINAL NUMBER 50/2) when the defendant was ordered to give vacant possession or be evicted therefrom, to pay rent arrears of Kshs.1,209,500.00 mesne profits at the rate of Kshs.6500/- per month from 1st June, 2015 until vacant possession.

2. That PLOT SUBDIVISION NO.619 SECTION 1 MAINLAND NORTH (ORIGINAL NUMBER 50/2) does not exist as the said property was subdivided into 3 plots namely PLOT NO.12102/I/MN, PLOT NO.12103/I/MN and PLOT NO.12104/I/MN which plots have also been further subdivided with the 1st plot having been subdivided into 26 plots, the 2nd plot into 29 subplots and the 3rd plot subdivided into 58 subplots.

3. That the defendant only owns 3 plots in the 2nd subdivision being plot No. 12103/I/MN which plot has been further subdivided into 29 subplots.

4. That the defendant duly conducted a search with the Registrar of Titles and established that indeed the property known as PLOT SUBDIVISION NO.619 SECTION 1 MAINLAND NORTH (ORIGINAL NUMBER 50/2) does not exist and has further discovered new and important matter or evidence after due diligence to the effect that the three plots as subdivided are further subdivided cumulatively into 113 subdivisions out of which the defendant only occupies 5 subplots.

5. That the defendant stands to suffer prejudice if the judgment and decree of this Honourable court and its consequent order made on the 11th May, 2017 are not set aside, reviewed and/or varied; and

6. That it is therefore prudent that the judgment and decree issued on the 11th May, 2017 be set aside, reviewed and/or

varied to allow parties to properly ventilate on the dispute between them.

3. The application is supported by the affidavit of Hamid Mohamed Abdukadir the defendant sworn on 25th February, 2020 and a further affidavit sworn on 19th October, 2020. The defendant reiterates that the PLOT SUBDIVISION NO. 619 SECTION 1 MAINLAND NORTH (ORIGINAL NUMBER 50/2) does not exist since the said property was subdivided into 3 plots which have also been further subdivided into several plots. The defendant has annexed copies of TITLE NO.629/I/MN and searches showing the subdivision for the three respective properties. The defendant avers that the cumulative subdivisions of 113 plots the defendant only owns 5 plots in the 2nd subdivision being plot no.12103 namely PLOT NO. MN/I/17312, 17313, 17314, 17315 and 17316. He has also annexed copies of the Topocadastral Survey Report and the survey plan. The defendant contends that the plaintiffs have by untoward means moved with haste to execute the judgment and decree as against the defendant notwithstanding the fact that the SUBDIVISION NUMBER 619 SECTION 1 MAINLAND NORTH (ORIGINAL NUMBER 50/2) measuring approximately 12.92 acres ceased to exist when it was subdivided into various plots and as such the decree and warrants directing vacant possession or eviction from PLOT NUMBER 619 SECTION 1 MAINLAND NORTH was and is accordingly unenforceable against the defendant. The defendant avers that he has duly conducted a search with the Registrar of titles and established that indeed the property known AS PLOT SUBDIVISION NO.619 SECTION 1 MAINLAND NORTH (ORIGINAL NUMBER 50/2) does not exist and has further discovered new and important matter or evidence to the effect that the three plots as subdivided are further subdivided cumulatively into 113 subdivisions out of which the defendant only occupies 5 subplots. It is the defendant's contention that in the circumstances there is sufficient reason for an order of review to be issued as against the judgment of this court. That this application has been brought without any undue delay. The defendant further contends that the replying affidavit sworn by Natasha Ali on behalf of the plaintiffs herein is incompetent and should be struck out.

4. In opposing the application the plaintiffs filed a replying affidavit sworn on 24th September, 2020 by Natasha Ali, Advocate for the plaintiffs and grounds of opposition dated 24th September, 2020. She deposes inter alia, that the subdivision of the PLOT SUBDIVISION NO. 619 SECTION 1 MAINLAND NORTH (ORIGINAL NUMBER 50/2) into 3 plots and further subdivided into 113 subplots was within the applicant's knowledge even prior to the judgment being delivered, and was even pleaded in the defence filed herein. The plaintiffs contend that the defendant has ensured that the plaintiffs are unable to proceed with haste in executing the decree by filing various applications from the date of delivery of judgment, including an application dated 28th April 2017 to set aside judgment, application dated 15th February 2018 for stay pending appeal, application dated 16th July, 2019 for stay of execution and an order for restoration, all of which have been dismissed, and the instant application. The plaintiffs aver that the application herein has not met the threshold to enable this court to review the judgment.

5. Both parties filed written submission through their respective advocates in support of the opposing positions. The submissions were also ably highlighted by Mr. Asige learned counsel for the applicant and Mr. Hassan, learned counsel for the plaintiffs.

6. Mr. Asige submitted that the application herein is not limited to just a review application, but one which also seeks setting aside and/or variation of the judgment. It was also the applicant's submission that the court did not have jurisdiction to entertain the plaintiffs' claim as filed in 2015 because the suit land had ceased to exist when the plot was subdivided in 2003 into 3 subplots. Mr. Asige submitted that the suit was a nullity because it was claiming reliefs on a non-existent plot. He submitted that orders obtained in respect of plot no.619 cannot be enforced against the plots the applicant currently is in occupation and possession. It was his submission that the suit was null and void *ab initio* and therefore a nullity. He submitted that the court cannot entertain a nullity and cannot make orders in vain in a nullity. Mr. Asige referred to the overriding objective under Section 1A and 1B of the Civil Procedure Act and submitted that the court had inherent power and jurisdiction to set aside the judgment even *suo moto*. He relied on the case of **Benjamin Leonard Macfoy –v- United Africa Company Limited (Privy Council Appeal No. 67 of 1960)**. He further submitted that jurisdiction can be raised at any time in proceedings. Counsel for the defendant relied on the case of **Adero & Another –v- Ulinzi Sacco Society Limited, Nairobi Civil Suit No. 1879 of 1999**. He submitted that order 45 of the Civil Procedure Rules deals with three aspects when considering review namely, whether there is an error on the face of the record, when there is new evidence which was not discoverable when the proceedings were made, and that there was sufficient reason to occasion review. Counsel also relied on the case of **Zablon Mokua –v- Solomon M. Choti & Others (2016) eKLR** and urged the court to allow the application in terms of prayers 3 and 4 thereof.

7. On his part, Mr. Hassan for the plaintiffs submitted that the application herein basically seeks an order for review on the ground that there is discovery of new evidence. He submitted that in this case, the issue of jurisdiction is being raised 3 years after the court delivered its judgment in 2017 adding that in the defence, the defendant admitted that the court had jurisdiction. That the defendant is bound by his pleadings and cannot now state that the court had no jurisdiction. The plaintiff's counsel submitted that the applicant ought to prove three matters; discovery of new and important evidence; the discovery of the new evidence would be one that after the exercise of due diligence was not within the applicant's knowledge and the application ought to be made without unreasonable delay. He relied on the case of **Rose Kaiza –v- Angelo MPanju Kaiza (2009)eKLR** in which the Court of Appeal held that not every new fact will qualify for interference of the judgment. He submitted that in this case, there is no new evidence that the applicant has discovered as the issues raised were pleaded by the defendant in his defence in 2015. Counsel further submitted that the registered proprietors of the subdivisions are the plaintiffs and that the subdivision are over the same land. It was further submitted that the application has been brought after unreasonable delay and after three previous applications by the defendant were all dismissed. He pointed out that the court had in its ruling of 19.2.2020 pronounced itself as being *functus officio*.

8. I have considered the application, the submissions made as well as the authorities cited. I have also considered the relevant law. The application basically seeks to set aside, review and/or vary the judgment and decree delivered by this court on 11th May, 2017. The application is stated to be brought under Section 1A, 3, 3A and 80 of Civil Procedure Act, Order 22 Rule 22, Order 45 Rules 1 and Order 51 Rule of the Civil Procedure Rules.

9. Section 80 of the Civil Procedure Act gives power of review while Order 45 of the Civil Procedure Rules sets out the rules. In my considered opinion, the key issue that emerges for determination is whether the applicant has satisfied the grounds for review.

10. Section 80 provides as follows:

“80. 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.”

11. Order 45 Rule 1 states as follow: -

1 (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 an 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.”

12. From the above provisions of the law, the rules in my view restrict the grounds for review and lays down the jurisdiction and scope of review limiting it to the following grounds:

i. Discovery of new and important matter or evidence which after the exercise of the 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 unreasonable delay.

13. In this application, the defendant stated that he conducted a search with the Registrar of Titles and established that the property known as plot subdivisions no.619 section 1 mainland north (original number 50/2) does not exist since it was subdivided into 3 subplots and has further discovered new and important matter or evidence after due diligence to the effect that the 3 subplots have been further subdivided cumulatively into 113 subdivisions out of which the defendant only occupies five subplots. It is therefore clear that the application herein is based on the discovery of new facts.

14. In the case of **Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) –v- Kariuki Marega & Another (2018)eKLR** stated categorically that where an applicant in an application for review sought to rely on the ground that there was discovery of new and important evidence, one had to strictly prove the same. the court of Appeal stated as follows:

“We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.”

15. In the plaint dated 4th June, 2015 the plaintiffs sued the defendants for vacant possession of the property known as SUBDIVISION NUMBER 619 SECTION 1 MAINLAND NORTH (ORIGINAL NUMBER 50/2). The plaintiffs also sought rent arrears and mesne profits until vacant possession of the suit property is obtained. In their defence dated 20th July, 2015 and filed on 22nd July, 2015, the defendant, while admitting that the plaintiffs were the registered proprietors of the suit property, averred in paragraphs 3 thereof that upon the subdivision of the ORIGINAL PLOT NUMBER 619 SECTION 1 MAINLAND NORTH since about October, 2005 the original plot ceased to exist. In the annexures marked “HMA 1a, 1b, and 1c” in the defendant’s affidavit sworn on 25th February, 2020 in support of the application herein, the copy of the Title No.619 shows that the subdivision of the Suit Plot No.619 into three subplots was carried out on 14.11.2003.

16. In my view, the matters that the applicant now seeks to raise are not new and important evidence. Going by the averments in the defence filed by the applicant and the documents now relied on, it is quite clear that the defendant was well aware of the subdivision way back in 2015 before the judgment was delivered herein on 11th May 2017. I am not satisfied therefore of the allegations by the defendant that he discovered new and important matter or evidence. The allegations clearly have no basis and have not met the requirements of Order 45. In the judgment dated 11th May, 2017, the considered all the facts that had been placed before it by the parties and came to a conclusion that in its view, was fair and just in the circumstance. I find no sufficient cause that has been presented to justify a review of the judgment herein.

17. The other consideration in an application for review is whether the application was brought without an unreasonable delay.

18. The judgment in this case was delivered on 11th May, 2017, while the application for review as filed on 26th February, 2020, a period of about three years later. In my view, the delay is not only inordinate, but the delay has also not been explained.

19. The defendant has also raised the issue of jurisdiction. It has been submitted that this court did not have jurisdiction to entertain the suit allegedly because it is a nullity. In the case of **Samuel Kamau Macharia & Another –v- Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011**, the Supreme Court held as follows:

“68. A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.... Where the constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

20. The dispute in this case was over vacant possession of the suit property and rent arrears as well as mesne profits. It is my view that the court had the requisite jurisdiction to entertain the matter. I am also not persuaded that the suit was null and void and therefore a nullity. Moreover, the issue of jurisdiction was not raised previously. In the defence filed on 22nd July, 2015, and throughout the proceedings, herein, the applicant submitted to the jurisdiction of this court. It is not clear then what has suddenly changed. Nonetheless I am still persuaded that the suit is not a nullity and the court had and still have jurisdiction to entertain the same.

21. By reason of the foregoing, it is my finding that the Notice of Motion dated 25th February, 2020 is devoid of merit and the same is dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 16th day of December 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE