



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 40 OF 2013

RAMADHAN SALIM BAKA.....PLAINTIFF/APPLICANT

VERSUS

JITENDRA POPATILAH NARANJI.....DEFENDANT/RESPONDENT

RULING

1. The application before court is the notice of motion dated 6th April, 2018 brought by the plaintiff under Section 1A, 1B and 3A of the Civil Procedure Act, Order 10 Rule 11, Order 22 Rule 22, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules. The applicant is seeking the following orders:

1. Spent.

2. That pending the hearing of this application inter-partes, this Honourable court be pleased to grant stay of execution of the orders granted by the Honourable court on 19th March, 2018 directing the OCS Rabai Police Station to provide security to the Defendant/Respondent while evicting the plaintiff from the suit property MGUMOPATSA/MAZERAS/1452.

3. That this Honourable court be pleased to review with a view to varying and/or setting aside the orders granted by this Honourable court on 19th March, 2018.

4. That this Honourable court be pleased to set aside the orders granted on 21st September, 2017 dismissing the suit for want of prosecution and all consequential orders and reinstate the suit for hearing.

5. That costs of this application be provided for.

2. The application is premised on the grounds:

a. An ex parte order has been granted directing the officer commanding Rabai Police Station to provide security to the defendant while evicting the plaintiff and his extended family from the suit property.

b. That the defendant/respondent has commenced eviction process and is putting a perimeter wall so as to prevent the plaintiff from accessing or leaving the property.

c. That the orders granted on 19th March, 2018 were granted in error as no decree capable of being executed has been issued.

d. That unless the orders sought are granted, the plaintiff/applicant and his entire family may be displaced and disinherited.

3. The application is also supported by the affidavit of Ramadhan Salim Baka, the applicant sworn on 6th April, 2018. The applicant deposes that with the help of Kituo cha sheria, he instituted proceedings against the defendant/respondent claiming ownership of the suit property. He avers that he later instructed his advocates on record who advised him that the most appropriate relief would be to apply for revocation of title which, according to him, was fraudulently obtained by the respondent. He further deposes that in the meantime, he was informed by his advocates on record that the suit was on 21st September, 2018 (sic) dismissed for non-attendance. That on being informed so, he instructed his advocates on record to have the said orders set aside as the orders dismissing the suit have just come to fore.

4. The applicant contends that the respondent has never filed any suit in the form of plaint, counter-claim or otherwise seeking orders for vacant possession and none have been granted or issued.

5. The applicant deposes that the respondent has now moved to the suit premises and has started erecting a perimeter wall, denying the applicant and his family from entering or leaving the premises. He states that on making inquiry he learned that this court issued ex parte orders directing the OCS Rabai Police Station to provide security to the respondent while evicting the applicant from the suit premises.

6. The application is opposed by the respondent through a replying affidavit sworn by himself on 30th April, 2018. The respondent deposes that the applicant sued him seeking to be declared the owner of the suit property known as MGUMOPATSA/MAZERAS/1452 by way of adverse possession which parcel of land belonged to the respondent. The respondent avers that he instructed the firm of M/s Menezes, Oloo & Chartur Advocates to act on his behalf and the said firm entered appearance and filed a replying Affidavit to the originating summons. He states that on 21st September, 2017 this suit was dismissed for want of prosecution as the applicant and his advocates failed to attend court to prosecute the same.

7. The respondent states that subsequent to the dismissal of the suit, the applicant was served with notice to vacate as was required under the provisions of Section 65 of the Land Regulations, 2017. That the said notice was also served on the Sub-County Commander Rabai and the OCS Rabai Police Station. It is the respondent's contention that despite being served with the said notice to vacate, the applicant refused, declined and/or ignored to comply therewith. The respondent states that after expiry of the mandatory 30 day, his advocates made an application seeking the provision of police security while the applicant and trespassers were being evicted and that the order was issued on 19th March, 2018.

8. The respondent contends that this application has been overtaken by events because the eviction has already been carried out. It is respondent's contention that the prayer seeking variation and/or setting aside of the order of 21st September, 2017 dismissing the suit for want of prosecution is an afterthought as the applicant and his advocate were aware of the order for dismissal all along. The respondent further contends that the application for reinstating the suit has been made after inordinate delay and is vexatious, frivolous, bad in law and an abuse of the due process of the court.

9. Relying on advice, the respondent avers that since the plaintiff and his kinsmen were trespassers *ab initio*, there was no requirement for issuance of a decree as the provisions of Land Regulations, 2017 is very clear on how to deal with trespassers. It is his argument that the order of 19th March, 2018 was not made in error and was simply directly the police to provide security while the eviction was being undertaken and was to avoid any violence and/or loss of lives and property.

10. Both parties filed written submissions which were also highlighted by their respective Counsel. I have considered all the issues raised in the application and the rival submissions.

11. Section 80 of the Civil Procedure Act 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.”

12. Order 45 Rule 1 of the Civil Procedure Rules states as follows:

“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 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.”

13. It is clear from the above provisions of the law that whereas Section 80 gives power of review, Order 45 sets out the rules. The rules restrict the grounds for review and lays down the jurisdiction and scope of review limiting it to the following grounds: a) 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; b) on account of some mistake or error apparent on the face of the record, or; c) for any other sufficient reason and whatever the ground, there is a requirement that the application has to be made without unreasonable delay.

14. In the case of **National Bank of Kenya Ltd -v- Ndungu Njau** [1997] eKLR, 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-evident and should not require an elaborate argument to be established. It will not be a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provision of law cannot be a ground for review.”

15. In the instant case, the application for review is made principally on the ground that there was an error in granting the order of 19th March, 2018 because no decree capable of being executed has been issued. I note that the order of 19th March, 2018 was made pursuant to an application made *inter alia*, under the Land Regulations 2017. It never sought to execute a decree. It was after considering the application that the court (Komingoi, J) granted the order. The matter in dispute had been canvassed before the Learned Judge who made a conscious decision in favour of the respondent. I would be sitting on appeal against a judgment of this court if I was to decide otherwise, which is against the law. If there was an error as alleged by the applicant, the same is not self-evident that would not require an elaborate argument to be established. In this regard, I am guided by the Court of Appeal decision in National Bank of Kenya case (supra) where it was held, *inter alia* that it cannot be a ground for review that the court proceeded on an incorrect exposition of the law.

16. By reason of the foregoing, I find that the application has not passed the test for grant of an order for review.

17. The application also seeks an order for stay of execution of the orders granted by the court on 19th March, 2018. The Respondent has deponed that the eviction has already been carried out. This fact has not been controverted by the applicant. Indeed, in the supporting affidavit, the applicant confirms this state of affairs when he deponed in paragraph 7 thereof that the respondent has moved to the suit premises and has started erecting a perimeter wall denying the applicant and his family from entering the premises. In the circumstances, it is my view that the prayer for stay of execution cannot issue because what is sought to be stayed has taken place. The court cannot issue orders in vain.

18. The other issue for determination is whether the court should set aside the order issued on 21st September, 2017 dismissing the plaintiff's suit and have the same reinstated.

19. The applicant admits that this suit was dismissed for on –attendance on his part and that of his advocates. What remains is for me to determine the reason for non-attendance during the hearing of the case on 21st September, 2017 and whether the delay is inordinate and unexplained.

20. According to the applicant, he was informed by his advocates on record that this suit was dismissed on 21st September, 2017 for non-attendance. No reason has been given as to why neither the applicant nor his advocate attended court on 21st September, 2017. I have looked at the court record and specifically the affidavit of service by Ezekiel Omondi dated 20th September, 2017 and filed on 21st September, 2017. It is clear that the firm of M/s Mburu Kariuki & Company Advocates was served on 19th June, 2017 with a hearing notice dated 9th June, 2017. The hearing notice clearly stated that the matter was fixed for hearing on 21st September, 2017.

21. The courts have discretion generally to reinstate a suit which is dismissed for non-attendance but in all matters involving the exercise of the court's discretion, it must be exercised judicially based on facts and law. The applicant must satisfy this court that he has good reasons why he failed to attend court. In this case, the applicant has not given any reason why he failed to attend court with respect, the applicant and his Counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no indulgence is extended to them. The plea they make is that the order dismissing the suit be set aside and the same reinstated. However, they do not give the reason for non-attendance on 21st September, 2017 despite having been served by the respondent.

22. I am aware that dismissal of a case is a draconian judicial act which drives the plaintiff away from the seat of judgment. It should be done sparingly and in cases where dismissal is the feasible and just thing to do. Therefore, courts should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the delay. However, any explanation for the non-attendance and the delay should be given for evaluation by the court to see whether it is reasonable. That notwithstanding a court of law should not hesitate to decline to set aside an order dismissing a suit where no explanation or no reasonable reason has been offered.

23. Looking at the material before me and considering that no explanation has been offered by the applicant, this is one matter where the applicant's conduct precludes me from exercising my discretion in his favour. No reason has been provided as to the absence of the plaintiff and his advocate on 21st September, 2017.

24. For the reason stated above, I find the notice of motion dated 6th April, 2018 without merit. It is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 14th day of January, 2019.

C.K. YANO

JUDGE

In the presence of:

Nalela holding brief for Mburu Kariuki for the plaintiff/applicant

Ottieno for the defendant/respondent

Court Assistant-Yumna