



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 20 OF 2017**

**JOSEPH KITHUKNUMUKI KITONGA .....PLAINTIFF**

**VERSUS**

**DENA KALUME.....1<sup>ST</sup> DEFENDANT**

**KADENGE KALUME.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Application before me for determination is the Notice of Motion dated 25<sup>th</sup> July 2018 brought under Section 1, 1A, 1B, 1, 3, 3A and 63(e) of the Civil Procedure Act and Order 40 Rule 2 and 7 of the Civil Procedure Rules. The Defendants/Applicants are seeking orders:

**1. Spent**

**2. That the court be pleased to vacate, vary and/or set aside the orders issued on the 26<sup>th</sup> June 2018 specifically Order 2 whereby the Plaintiff was granted an order of eviction against the Defendants for PLOT KNOWN AS LR. NUMBER 1043/111/155 MAZERAS TOWNSHIP and demolition of the stalls and such eviction be supervised by the OCS Mariakani Police Station.**

**3. That in the interim, this court does issue a stay of the orders issued on 25<sup>th</sup> June 2018 pending the hearing and determination of this Application.**

**4. That the costs be provided for.**

2. The Application is supported by the affidavit of Dena Kalume sworn on 25<sup>th</sup> July 2018 and is premised on the following grounds:

**i. That the defendants are dissatisfied with this court's ruling dated 26<sup>th</sup> June 2018.**

**ii. That the defendants pray that the mandatory orders given on 26<sup>th</sup> June 2018 be discharged, varied or set aside.**

**iii. That the mandatory orders issued is highly prejudicial as it mandates the plaintiff to evict and demolish the defendants structures constructed ON PLOT NUMBER LR. 1043/111/155 MAZERAS TOWNSHIP.**

**iv. That the Defendants have been in occupation of the entire property known as LR. NUMBER/1043/111/155 MAZERAS TOWNSHIP since 1974 to date.**

**v. That the alleged squatters that the Plaintiff paid to vacate the premises were defendants tenants for many years and some were sisters who were allocated a portion by their late father.**

**vi. That it is in the interest of justice that this court does stay execution of its orders of 26<sup>th</sup> June 2018 pending the hearing and determination of this Application.**

**vii. That the defendants are ready and willing to abide by any order of this court in compliance with this court's orders.**

3. The applicants aver that they were informed of this court's ruling of 26<sup>th</sup> June 2018 on 12<sup>th</sup> July 2018 by their previous advocates. That they are dissatisfied with the said ruling in that it fails to recognize that the applicants have been in occupation on the said premises since 1974 and that their late father was the proprietor of the said property. The applicants further aver that by virtue of the survey report filed on 24<sup>th</sup> November 2017, they were shocked to learn that indeed they had encroached on the property known as **LR. NUMBER 1034/111/155**. The applicants state that it was an honest mistake brought about by blind devotion to what their father informed them to have been his land. They further state that ever since they were born, they have lived and worked on the entire piece of land and never got to know the plaintiff or the alleged proprietor being George Mea Karissa.

4. Relying on advise, the applicants argue that the documents purportedly relied on by the Plaintiff to show proof of ownership being an allotment letter dated 19<sup>th</sup> February, 1998 and Rates receipts and clearance certificate are not proof of ownership because the allotment letter has expired and there is no proof of payment of the allotment fees and that the Plaintiff only annexed rates for the year 2016 and 2017 with clearance certificates of 2012 and 2016. It is the Applicants contention that the issue of ownership of the suit property is suspicious and that the plaintiff has not sufficiently demonstrated that in the interim he is the owner of the property so as to warrant demolition of the structures. The applicants aver that they have spent approximately Kshs.1,000,000/= on the development that they stand to lose from the demolition order. That they applied for and obtained building plans on the entire property including the disputed sections that this court has ordered to be demolished. The applicants argue that the orders issued by the court would greatly prejudice them as they had developed the stalls to supplement their income and that the suit would have been determined without their participation. The applicants pray that an order of status quo be maintained pending the hearing and determination of the suit.

5. The application is opposed by the plaintiff who filed a replying affidavit sworn by himself on 2<sup>nd</sup> November, 2018. The plaintiff avers that ruling in this matter was delivered on 26<sup>th</sup> June, 2018 and no appeal has been filed against it and the defendants have to date failed to comply with the terms of the said ruling. That the defendants have thwarted all the plaintiff's efforts to execute the court order using violence and thugs to keep the plaintiff out of his land. It is the plaintiff's contention that the defendants were duly served and entered appearance and filed their response and on 13<sup>th</sup> April 2017 the court issued an order that the status quo be maintained, but the defendants continued with the construction despite the order being made inter-partes and in the presence of their counsel. The plaintiff avers that the application is made in bad faith to circumvent compliance with the court order. The plaintiff argues that the application lacks merit and ought to be dismissed as the court is now being asked to sit on appeal on its decision. That the application does not meet the conditions for review and is otherwise bad in law, mischievous, vexatious and abuse of the court process.

6. Both parties filed written submissions through their respective advocates in support of their opposing positions.

7. I have considered the application and the submissions made as well as the authorities cited. I have also considered the relevant law. The application basically seeks to vacate, vary and/or set aside the orders of the court (Komingoi, J) issued on 26<sup>th</sup> June, 2018. Whereas order 40 Rule 7 of the Civil Procedure Rules states that an order for injunction may be discharged, varied or set aside, the rules for review are clear. Section 80 of Civil Procedure Act gives power of review while Order 45 sets out the rules. The rules restricts 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 of the face 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.

8. 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 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 the law cannot be a ground for review.”***

9. In the instant case, the application is made principally on the ground that the applicants are dissatisfied with the court's ruling of 26<sup>th</sup> June 2018. The ruling dated 26<sup>th</sup> June, 2018 was made after the court (Komingoi, J) had heard the arguments of both the parties herein on the notice of motion dated 31<sup>st</sup> January, 2017. It was after considering the application that the court made the ruling dated 26<sup>th</sup> June, 2018 and granted the orders therein. The mater 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 contrary to the law. In my view, if the applicants were dissatisfied with the said ruling as they allege, their remedy was to lodge an appeal against it. In this regard, I am guided by the Court of Appeal decision in the National Bank of Kenya case (supra) where it held inter alia, that it cannot be a ground for review that the court proceeded on an incorrect exposition of the law.

10. By reason of the foregoing, I find that the application has no merit. Accordingly, the notice of Motion dated 25<sup>th</sup> July 2018 is hereby dismissed with costs to the Respondent.

**DATED, SIGNED and DELIVERED at MOMBASA this 14<sup>th</sup> day of March 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Maiga holding brief for Matheka for Applicants.

Ms. Osino for the Respondent.

Esther Court Assistant

**C.K. YANO**

**JUDGE**