



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

MISCELLANEOUS NO. 213 OF 2004

MODE OF PROCEEDINGS.....FAST TRACK

BENSON KAKAI NAMISI.....1ST PLAINTIFF/RESPONDENT

JOHNSTONE MUKASA NAMISI..... 2ND PLAINTIFF/RESPONDENT

VERSUS

STUFFORD MUKASA NAMISI.....DEFENDANT/APPLICANT

REPUBLIC.....DEFENDANT

R U L I N G

On 8th October 2018 I granted the Respondents herein the orders as sought in their Notice of Motion dated 26th September 2018 seeking the stay of execution of the ruling and orders issued by **MUKUNYA J** on 29th September 2016 pending the hearing and determination of **KISUMU COURT OF APPEAL CIVIL APPEAL NO 108 OF 2016**. The application dated 26th September 2018 was not opposed by the Applicant herein.

I now have before me the Applicant's Notice of Motion dated 14th December 2018 seeking the following orders:-

1. Spent

2. That this Honourable Court be pleased to set aside or review the orders made on 8th October 2018 for stay of execution of the ruling dated 19th July 2018.

3. That costs be provided for.

The application is based on the grounds set out therein and is supported by the Applicant's affidavit dated 14th December 2018.

The gravamen of the application, as per ground (a) thereof reads:-

(a) ***"That the order dated 19th July 2018 has already been implemented."***

The Applicant then goes on to depone in his affidavit that after this Court granted him orders to Curve from land parcels **NO NDIVISI/NDIVISI/1117** and **NDIVISI/NDIVISI/1118**, he served the said order on the County Commissioner who went and implemented it. He was therefore surprised to be served with the order of stay which he now seeks to set aside or review.

The application is contested and **BENSON KAKAI NAMISI**, the 1st Respondent herein, has by his Replying Affidavit dated 12th March 2019 deponed, inter alia, that this application is an abuse of the Court process, frivolous, vexatious and bad in law and should be dismissed with costs. That this Court's orders issued on 19th July 2018 pursuant to the ruling made on 29th September 2016 have never been implemented and neither have the land parcels been subdivided. It is therefore not factual for the Applicant to claim that this Court's orders have been implemented.

When the parties appeared before me on 30th April 2019, it was agreed that the application be determined on the basis of their respective affidavits.

I have considered the application and the rival affidavits.

Judgment in this case was entered by **MUKUNYA J** in terms of the award of the arbitrators filed herein on 15th June 2015. That award directed that the Respondents transfer seven (7) acres out of land parcels **NO NDIVISI/NDIVISI/ 1117** and **1118** to the Applicant and in default, the Deputy Registrar of this Court signs all the necessary documents to facilitate such transfer. The Respondents refused to sign the documents to facilitate such transfer and so by my ruling delivered on 19th July 2018, I authorized the Deputy Registrar to sign the said documents. According to the Applicant, that order has already been implemented. The Applicant has in paragraph 5 of his Supporting Affidavit deponed that:-

“That this order has been over taken by event and wish the same to be set aside and or reviewed.”

The Respondents have deponed that the said order has not been implemented. The Applicant is acting in person and perhaps has challenges comprehending the proceedings herein. If this Court’s orders have already been implemented, then there is nothing left for this Court to set aside or review. The orders issued on 19th July 2018 were in the Applicant’s favour and he says they have been implemented. So what is there to stay?

On 8th October 2018, this Court granted a stay of the orders issued on 19th July 2018 pending the hearing of **KISUMU COURT OF APPEAL CIVIL APPEAL NO 108 OF 2016**. This was pursuant to the Respondents’ application dated 26th September 2018 which the Applicant did not oppose. If that is the orders that the Applicant seeks to be reviewed, then he was required to satisfy the requirements of **Order 45 Rule 1(1) of the Civil Procedure Rules** which provides that:-

“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 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 the Judgment to the Court which passed the decree or made the order without unreasonable delay.” Emphasis added.

The Applicant was therefore required to demonstrate that he has discovered new and important matter or evidence that was not within his knowledge, or some mistake or error apparent on the face of the record or any other sufficient reasons. His application does not disclose any of the above and cannot therefore be allowed.

The up - shot of the above is that the Applicant’s application dated 14th December 2018 is devoid of merit. It is dismissed with costs.

Boaz N. Olao.

J U D G E

30th May 2019.

Ruling dated, delivered and signed in Open Court this 30th day of May 2019.

Mr. Kopere for Mr Anwar for Respondent – present

Applicants present

Joy/Felix – Court Assistants - present

Boaz N. Olao.

J U D G E

30th May 2019.