



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC NO. 5 OF 2013.

GEORGE MATEYI GABRIEL..... PAINTIFF

VERSUS

JOSEPH MALALA.....1ST DEFENDANT

DENIS S. NAWATE.....2ND DEFENDANT

SELLA N. NASIMIYU

T/A DELJOEXPRESS LIMITED.....3RD DEFENDANT

FAMILY BANK4TH DEFENDANT

RULING

On 27th September 2017 when this case came up before **MUKUNYA J, MR ASWANI** Counsel for the plaintiff informed the Court that his client needed some **“30 days to pay a substantial amount of the debt”** owed to the 4th defendant.

MR KITUYI Counsel for the 4th defendant reluctantly agreed to indulge the plaintiff for 30 days when it was expected that the plaintiff would deposit Kshs. 1.5 million towards settling his obligation to the 4th defendant. **MUKUNYA J** therefore made the following order:-

“The Applicant is indulged for another 30 days. If he does not comply, then the execution shall proceed. It is so ordered.”

In the meantime, the plaintiff had filed an application dated 30th August 2017 seeking to stop the public auction of land parcels **NO E.BUKUSU/S. KANDUYI/15325, 15326, 15327, 15328, 15329 and 15330**. No date was taken for that application which had not yet been canvassed to-date. The record shows that when the matter next came up for mention on 7th November 2017, **MR KITUYI** informed the Court that it was for mention to see if the defendant had made any deposit and since none had been made, he asked the Court to dismiss the application dated 30th August 2017. The Court obliged and dismissed the said application and directed that execution proceeds.

That order provoked the plaintiff’s Notice of Motion dated 13th November 2017 in which the plaintiff seeks the following orders:-

(a) Spent

(b) Spent

(c) That the said orders made on 7th November 2017 be reviewed, varied and or set aside and the Honourable Court be pleased and reinstate the Applicant’s application dated 30th August 2017.

(d) That costs be provided for.

The application is grounded on the pleading that the Court was misled on the nature of the proceedings that culminated in the orders made on 7th November 2017 in that the plaintiff was not aware that the application dated 30th August 2017 was coming up for hearing on 7th November 2017. That when the matter was last mentioned on 27th September 2017, no orders were made as to the next hearing date and therefore the plaintiff should not be punished for the mistake of the Court.

The application is also supported by the Applicant's affidavit in which he repeats the above averments adding that he only learnt on 8th November 2017 that his application had been dismissed.

Grounds of opposition have been filed stating that the application is in bad faith meant at denying the 4th defendant from recovering his loan. That the plaintiff was in Court on 27th September 2017 and committed to pay Kshs. 1.5 million within 30 days failure to which execution would proceed. That the plaintiff was fully aware that the matter was coming up on 7th November 2017 to confirm compliance (Counsel has erroneously indicated the date as 7th March 2017).

The application has been canvassed by way of written submissions but I must confess I have been unable to comprehend the submissions filed by **MR ASWANI**.

I have considered the application dated 13th November 2017, the grounds of opposition thereto and the submissions by Counsel.

The plaintiff seeks the main prayer that the orders issued on 7th November 2017 be reviewed varied or set aside and his application dated 30th August 2017 be reinstated to hearing. The main ground is that there is an error on the face of the record and in my view, that prayer is well merited.

Order 45 Rule 1(1) of the Civil Procedure Rules 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 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 orders, may apply for a review of Judgment to the Court which passed the decree or made the order without unreasonable delay.”

It is clear therefore that a party moving the Court for an order of review must establish:-

(a) Discovery of new and important matter or evidence or,

(b) Some mistake or error apparent on the face of the record or,

(c) Any other sufficient reason; and

(d) Must make the application without unreasonable delay.

The plaintiff has deponed that he learned about the dismissal of his application on 8th November 2017 when he visited the Court Registry. This application was filed on 13th November 2010 less than one week later and therefore there has been no un-reasonable delay.

From the application, the ground of review is that there is an error on the face of the record in that on 7th November 2017 when the application dated 30th August 2017 was dismissed, it was not slated for hearing. I have already captured above the orders made by **MUKUNYA J** on 27th September 2017 when the plaintiff was given 30 days to deposit Kshs. 1.5 million. No date for the hearing of the plaintiff's application dated 30th August 2017 was fixed and when the matter was mentioned on 7th November 2017 when the plaintiff's application dated 30th August 2017 was dismissed, there is nothing to show that the said application was listed for hearing. It was essentially a mention date and in any case, there is nothing to show that the plaintiff was served. Yet on that day, a substantive order dismissing the plaintiff's application dated 30th August 2017 was made. That was an error on the face of the record because no application was coming up for hearing on that day. Indeed on 7th November 2017 when the plaintiff's application dated 30th August 2017 was dismissed, **MR KITUYI** addressed the Court as follows:-

“Case coming for mention to see if the plaintiff has made any deposit (sic) will be made. None has been made. The advocate is not here and his advocate (sic). I ask for the application dated 30/8/2017 to be dismissed.” Emphasis added.

Counsel for the 4th defendant having conceded that the matter was **coming up for mention**, it was not proper for the application dated 30th August 2017 to be dismissed on a mention date. A similar scenario occurred in **WANJIKU .V. ESSO KENYA LTD E.A.L.R 1995 – 1998 332** where on a mention date of an application for injunction, the Judge dismissed the application without hearing any of the parties. On appeal, the Court of Appeal stated that:-

“We have no doubt that where a matter is fixed for mention, as was in this case, the learned Judge had no business

determining on that date, the substantive issues in the matter. He can only do so, which was not the case here, if the parties so agree and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties, which he did not do and moreover, gave no good reasons for adopting such a procedure which is repugnant to the administration of justice.” Emphasis added.

In this case, not only did the Court dismiss an application on a mention date but further, that date had not even been communicated to the plaintiff. The last order made on 27th September 2017 was that the plaintiff would be indulged for another 30 days to comply then execution shall proceed. There was no order made directing that the plaintiff’s application would be heard on 7th November 2017. Clearly the order made on 7th November 2017 dismissing the plaintiff’s application dated 30th August 2017 was made in error.

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It was held that an error by the face of the record must be self evident and should not require an elaborate argument to be established. In my view, there is an obvious error in the record of 7th November 2017 which this Court must rectify and give the plaintiff an opportunity to canvass his application dated 30th August 2017.

The up-shot of the above is that the plaintiff’s application dated 13th November 2017 is hereby allowed in the following terms:-

- 1. The orders issued on 7th November 2017 dismissing the plaintiff’s application dated 30th August 2017 are set aside.**
- 2. The plaintiff’s application dated 30th August 2017 is reinstated to hearing.**
- 3. Given the circumstances of this case as is clear from the record, I make no order as to costs.**
- 4. I invite the parties to take the earliest hearing date for that application right away.**

Boaz N. Olao.

JUDGE

30th May 2019.

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

Ms Mutunda for Mr Kituyi for the Respondent present

Mr Aswani for the Applicant – absent

Joy/Felix – Court Assistant - present

Boaz N. Olao.

J U D G E

30th May 2019.

Court: - The application dated 30th August 2017 will now be heard on 26th June 2019.

Mr Aswani be served.

Boaz N. Olao

J U D G E

30th May 2019