REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 13 OF 2019

JESICA SONGOLE

BERNARD SONGOLE.....PLAINTIFFS/APPLICANTS

VERSUS

CHARLES A. MUYUNZU KWENYA

GEORGE BWOTERE AKOTO.....DEFENDANTS/RESPONDENTS

RULING

The application is dated 24th June 2016 and is brought under order 45 rules, 1, 2 & 3 of the Civil Procedure Rules 2010, Section 63 (e) of the Civil Procedure Act seeking the following orders:-

1. That this honourable court be pleased to review the judgment herein dismissing the plaintiff's suit as being res judicata and instead allow the suit to be determined on merit.

2. That this honourable court be pleased to set aside the award of costs herein.

3. That the costs of this application be provided for.

It is premised upon the following main grounds that there is an error apparent on the face of the record since the suit was commenced on advise by the Chief Magistrate's Court. That the award of costs was harsh on the plaintiff. That there is sufficient cause warranting review of the court's judgment.

The 2nd respondent submitted that, the said motion as preffered is an absolute abuse of this honourable court's process, grossly vexatious, annoying and a waste of precious judicial time by the plaintiff. That the application as filed is procedurally defective, the applicants have not established a foundational basis on which they premise their current application to review, the entire suit having been dismissed on 11th May, 2016, the applicants have not sought to reinstate the suit for any sufficient cause. That the application as framed is inherently defective, incompetent since it offends section 7 of Civil Procedure Act, the same is res judicata and this court lacks the requisite jurisdiction to determine the same, this honourable court having rendered itself on 11th May, 2016. (Annexed herewith and marked "GA1" is a copy of the ruling striking out the suit for being res-judicata). That all the issues raised therein are issues which have been previously raised, canvassed and determined by several courts with jurisdiction in civil cases to wit:- Civil Case 64 of 1985. Misc. Civil application 1/95. ELC 138/2015 and Succession Cause 2344/2007. (Annexed and marked "GA 2" are copies of proceedings, rulings and judgments to evidence the same). That the grounds contained in the supporting affidavit and the application are not adequate grounds for review or at all, the grounds relied upon do not constitute new and important matter or evidence which was not within the applicant's knowledge, further the applicants have not demonstrated the existence of any error apparent on the face of the record, or any other sufficient cause to warrant a review under order 45. That the application as preferred is hopelessly defective and another attempt by the applicants to re-open and re-litigate matters which were heard and determined by courts of competent jurisdiction, the applicant wrongly wants this honourable court to wrongly sit as an appellate court of its own decision. That the plaintiff is a vexatious litigant who wants to litigate ad infinitum and vex the defendants' forever with the same tests and unless this honourable court intervenes then the defendant's stand to suffer serious financial prejudice in terms of the legal costs incurred in defending sham proceedings. That the instant application is a tactical way used by the plaintiff to forestall taxation of their bill of costs dated 30th May, 2016 and the same should be dismissed for lack of merit. (Annexed and marked "GA3" is a copy).

This court has considered the application and the submissions therein. In the case of Kwame Kariuki & Another Vs. Mohamed Hassan Ali & 4 Others (2014) eKLR, the Court observed that:-

"It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal."

In the case of *Mwihoko Housing Company Limited Vs Equity Building Society (2007) 2 KLR 171* is relevant. It was held, that;

"A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;

"An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made…"

Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

"(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.*

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states as follows:

"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.

Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However this discretion should be exercised judiciously and not capriciously. I see no mistake or error or omission on the part of the court when it found this suit was res judicata. In Court of Appeal, *Civil Appeal No. 2111 of 1996, National Bank of Kenya Vs Ndungu Njau,* 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 evidence and should not require an elaborate argument to be established. It will not be 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 proceed on an incorrect expansion of the law".

From the above provisions of the law, authorities cited and facts of this case I find that the applicant has failed to show any mistake or error apparent on the face of record and/or any sufficient reason to enable this court set aside its decision. The matter was struck out for being res judicata and not on the merit of the case. To review the decision would mean I would be reviewing a decision of a court with concurrent jurisdiction which powers I do not have. The applicants ought to file an appeal in this matter if they feel aggrieved with the decision of the learned judge. The application is not merited and is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD JULY 2019.

N.A. MATHEKA

JUDGE