



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC APPEAL NO. 3 OF 2018**

**MUSA LICHUNGU.....APPELLANT**

**VERSUS**

**MAMISABU ARAP SITIENEL.....RESPONDENT**

**RULING**

The application is dated 30<sup>th</sup> May 2019 and is brought under Order 9 Rule 9, Order 24 Rule 3(1) and Order 42(rule 6) at the Civil Procedure Rules and Sections 1A,1B, 3,3A and 63 of the Civil Procedure Act Cap 21 Laws of Kenya seeking the following orders;

- a. Service of this application be dispensed with and the same be heard exparte in the first instance.
- b. The firm of M/S J.N. NJUGUNA & CO. ADVOCATES be granted leave to file Notice of Change of Advocates to represent the Applicant in the place of the firm of M/S AMASAKHA & COMPNAY ADVOCATES.
- c. This Honourable Court be pleased to substitute JEFETHA MBAKAYA MUSA as the Appellant herein in place of MUSA LICHUNGU(now deceased)
- d. Pending the hearing and determination of this application interparties there be a stay of execution of the Judgment of this Honourable Court delivered on 8<sup>th</sup> May, 2019 and any decree or eviction orders subsequent, emanating or resultant thereto and this Honourable court be pleased to order that the status quo obtaining on the suit property land parcel LR No. KAKAMEGA/CHEMUCHE/355 be maintained being that the family/estate of the appelland (now deceased) do continue to reside and cultivate thereon.
- e. There be a stay of execution of Judgment delivered on 8<sup>th</sup> May, 2019 and any decree or eviction orders emanating or resultant thereto and this court be pleased to order that the status quo obtaining in the suit land LR NO. KAKAMEGA/CHEMUCHE/355 be maintained being that the family/Estate of the Appellant (now deceased) do continue residing and cultivating thereon pending the hearing and determination of the intended appeal to the Court of Appeal.
- f. The costs of this application to abind the outcome of the Appeal to the Court of Appeal.

It is based on the grounds that, the Applicant herein is the son of MUSA LICHUNGU the Appellant (now deceased). Following the death of MUSA LICHUNGU the Applicant herein JEFETHA MBAKAYA MUSA was issued with a Limited Grant of Letters of Administration Ad Litem of the Estate of his father. The Applicant has appointed the firm of M/S J.N. NJUGUNA & CO. ADVOCATES to act herein in the place of the firm of M/S AMASAKHA & COMPANY ADVOATES and leave of court for the said firm to come on record is necessary by the fact that Judgment was delivered herein on 8<sup>th</sup> May, 2019. The Estate of the Appellant (now deceased) was aggrieved and dissatisfied with the judgment. That a Notice of Appeal was filed herein. That court proceedings herein have been typed. That unless this court issues orders of stay of execution and status quo as prayed then the Estate of the deceased Appellant will suffer substantial loss and damage as they face imminent eviction from their homes in which event they will be rendered homeless and destitute. That the family of the Appellant has resided and cultivated on the suit property for more than thirty (30) years. That the application has been filed without unreasonable delay noting that the Applicant had to apply for a Limited Grant at the High Court which was issued on 27/5/2019. That the intended appeal will be rendered nugatory unless this Honourable Court grants the Orders sought in favour of the Applicant in so far as the Respondent has threatened to forcefully evict the family. That the intended appeal to the Court of Appeal is bestowed as of right and the Applicant should be allowed to exercise this right subject to such reasonable terms of conditions as the Honourable Court may deem fit to grant. That the Honourable Court is vested with unfettered and equitable Jurisdiction to grant the orders applied for in favour of the Applicant.

**This court has considered the application and the submissions therein. The application was not opposed. 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 dismissed the appeal. 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 application has no merit and is dismissed with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23<sup>RD</sup> JULY 2019.**

**N.A. MATHEKA**

**JUDGE**