



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 64 OF 2012

ELIJAH MACHIRONDA CHENGO.....PLAINTIFF

VERSUS

1. ATHUMAN HASSAN MWANGUVU

2. OMAR GOSI

3. ALI JUMA GOSI

4. BAKARI JUMA GOSI

5. ALI HASSAN MWANGUVU

6. ALI MWABAVU

7. ZAMA OMAR KARAUKA

8. YUSUF MOHAMED.....DEFENDANTS

RULING

(Application for review; plaintiff having filed suit against defendants seeking them to be restrained from land which the plaintiff claimed to own within a Group Ranch; judgment entered for the plaintiff and defendants barred from the land; no judgment entered in respect of damages being crop damage as no proof provided; applicant now seeking a review of the judgment in respect of failure to award damages; applicant seeking leave to adduce a crop assessment report; review not mechanism through which a party ought to be allowed to fill in gaps in his previous evidence; the evidence of crop damage not being new evidence and being available when plaintiff testified; in any event no pleadings for damages; application dismissed save for prayer to change counsel)

1. The application before me is that dated 25 July 2018 filed by the plaintiff. The application is said to be premised upon the provisions of Sections 1A, 1B, 3A and 80 of the Civil Procedure Act, Cap 21, Laws of Kenya; Order 9 Rule 9 and 10; and Order 45 Rule 1 (1) and 2 (2) of the Civil Procedure Rules. The applicant first wishes to appoint a new counsel in the matter, that is Messrs Marende Necheza & Company Advocates in place of his erstwhile counsel, Messrs Okanga & Company Advocates. The substantive prayer in the application is the prayer seeking a review of the judgment of Honourable Justice A. Omollo delivered on 8 December 2015. The applicant avers that the Judge failed to assess damages payable to the applicant. The applicant also wishes to have admitted a Crop Damage Assessment Report and asks this court to proceed to assess damages based on the said report. He also wants orders to have the OCS Lungalunga Police Station assist in the execution of the judgment.

2. By way of background, this suit was commenced through a plaint which was filed on 12 April 2012 by the law firm of M/s Okanga & Company Advocates. In his plaint, the plaintiff pleaded that he is a group member of Mwereni Group Ranch, the owner of the land parcel Kwale/Mwereni/14 measuring approximately 43,466 Hectares. He averred that he and his family own an undivided portion of this land measuring approximately 198.88 acres. He pleaded that the defendants had invaded his land and continue to cultivate it against his wishes. In the suit, he asked for the following orders :-

(a) A mandatory injunction against the defendants restraining the defendants jointly and/or severally forming anyway (sic) interfering with the plaintiff (sic) parcel of land comprising 198.88 acres or thereabouts and forming part of plot No. Kwale/Mwereni/14 also known as Mwereni Ranch.

(b) Vacant possession of the parcel of land measuring 198.88 acres forming part of Plot No. Kwale/Mwereni/14 known as Mwereni Group Ranch, by the defendants.

(c) Costs of the suit.

3. The defendants did not enter appearance and filed no defence and the case was thus uncontested. In a judgment delivered on 8 December 2015 by my predecessor, Justice A. Omollo, the plaintiff's case was allowed to the extent that he is entitled to a portion of the suit land and the defendants were barred from interfering with his use and occupation thereof. The court declared that he owns 198.8 Ha and left it to the executive committee of the ranch to establish the boundaries. No orders as to costs were granted. The Judge also addressed the issue of damages and stated that there was not produced a report made by an agricultural officer and the court stated that the only evidence tabled by the plaintiff on crop damage were photographs from which the court could not assess damages. The judge also held that there was no proof of who caused the damage.

4. It will be noted that in this application, the applicant wishes to review the order which failed to make an award of damages. It is averred in the supporting affidavit that it was an oversight on the part of his former counsel to submit the report of the agricultural officer and he now wishes to be allowed to produce it.

5. I have assessed the application. The first prayer for admitting a new counsel has no problem and is allowed. Henceforth, the applicant will be deemed as being represented by the law firm of M/s Marende Necheza & Company Advocates. That is the limb of the application brought pursuant to Order 9 Rule 9 which requires court's leave before a new counsel takes over a matter after judgment.

6. The second limb of the application is that of review. Applications for review fall under Order 45 and specifically Order 45 Rule provides as follows on applications for review :-

1. Application for review of decree or order [Order 45, rule 1.]

(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.

7. It will be noted from the above, that a party may apply for review if the following are met :-

(i) That there is discovery of new matter or evidence which was not within the knowledge of the applicant despite exercise of due diligence and could not be produced by the applicant when the decree was made.

(ii) That there is a mistake or error apparent on the face of the record.

(iii) That there is otherwise other sufficient reason.

(iv) That the application has been made after unreasonable delay.

8. Before I go too far, I must say that a review application is not a substitute for an appeal, and where the applicant is aggrieved by a judgment or order of court, where the above points given in Order 45 Rule 1 do not apply, then the applicant would well be advised to file an appeal. Neither is a review application meant to fill in potholes that the applicant created when he gave evidence in a matter whether it be an application or the main suit. One cannot be heard to come and say in an application for review that he/she forgot to give some important evidence and should therefore be allowed to produce it after the court has made its order or judgment. It is the duty of each party to ensure that he/she avails all his/her evidence when an application is being heard, whether it be an application or the full hearing of the suit. The administration of justice will be put into chaos if the court allows every person to revisit with new evidence where the evidence was all along available or could have been made available. That is why in applications for review, Order 45 Rule 1, makes clear that, if an application for review is based on the ground of new evidence, it must be demonstrated that the new evidence was not available at the time the matter proceeded and or could not be available despite the exercise of due diligence. The threshold therefore is pretty high.

9. In this application, the applicant wants the order that failed to award damages reviewed. He blames his erstwhile advocate for not producing the crop assessment report to court so that damages could be assessed. To me, this does not qualify to be termed as new evidence. It is clear to me that the applicant was aware of this evidence when he testified in court. I have in fact seen the Crop Damage Report and I note that it is dated 23 May 2013. The plaintiff gave evidence in court 9 July 2015. He stated inter alia that an agricultural officer visited his land and confirmed the damage. He was thus aware of the report, which he now wishes to produce in court, at the time that he testified. This to me does not meet the threshold of new and important evidence that was not available or could not be made available when the case was heard.

10. In addition, an application for review must be brought promptly and there must not be any inordinate delay. The judgment of the court was delivered on 8 December 2015. This application is dated 25 July 2018 which is close to three years after judgment. It has not been said why the applicant waited for all this period before filing his application for review. To me this application has been brought after unreasonable delay and would still have flopped on that basis.

11. Finally, even if I am wrong on all the above, I would still dismiss the application for it serves no purpose at all. In his plaint, the plaintiff never sought any orders in respect of damages. Parties are bound by their pleadings and it will be an exercise in futility for me to allow the applicant reopen his case to produce the report so as to prove damages. I cannot award any damages for none is sought in the plaint.

12. From the above discourse, it will be observed that I see no merit in the application for review and that prayer is dismissed.

13. The final prayer is for the OCS Lungalunga Police Station to execute the judgment of this court. I do not see the place of this order. First, it has not been alleged that there is continuing interference by the defendants of the applicant's land. Secondly, I am not sure whether the Executive Committee of the Group Ranch have ascertained the boundaries of the plaintiff's land for the court did leave it to this Committee to point out the boundaries of the land of the plaintiff. Unless and until this is done, I do not see how I can order the Police to go to the ground to execute this judgment. I think this prayer is premature and I cannot grant it.

14. In all, it will be noted that I have not been persuaded to grant any of the orders sought save for the prayer for a new counsel to come on record for the plaintiff. This application is therefore hereby dismissed save for that one prayer to change counsel. I however make no orders as to costs as it was not opposed.

15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF OCTOBER 2019.

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MUNYAO SILA.

JUDGE.

IN THE PRESENCE OF: