



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 806 OF 2015

SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA) LTD

– VICTORY SDA CHURCH.....PLAINTIFF/RESPONDENT

VERSUS

CALEB OUMA1ST DEFENDANT/APPLICANT

JOHN MUGA.....2ND DEFENDANT/APPLICANT

SAM OTIENO.....3RD DEFENDANT/APPLICANT

RICHARD OLUOCH.....4TH DEFENDANT/APPLICANT

BARRACK WERE.....5TH DEFENDANT/APPLICANT

ABAS WAHEB.....6TH DEFENDANT/APPLICANT

RULING

The Applicants filed a Notice of Motion on 8th October 2019 for orders that the court “recall, review and set aside its orders issued on 18 September 2019 pending the hearing and determination of the main suit ELC No. 25 of 2018 as per the directions of the court order dated 4th October 2018.

The grounds of the application are that the Respondent has already extracted and served the orders dated 18th September 2019 and is ready for execution after 30 days’ notice period. Sufficient cause has been shown to warrant orders sought.

- 1. The court issued orders in the main suit (issued on 4th October 2018) restraining the Respondent from using or developing land parcel KISUMU MUNICIPALITY/ BLOCK 5/ 40 (pending hearing and determination of the main suit therefore the orders dated 18th September 2019 amounts to a serious contempt of court orders.**
- 2. Execution of the orders of 18th September 2019 would amount to the defeat of the ends of justice in this matter.**
- 3. The main suit ELC No. 25 of 2018 is still in progress and pegged on the suit parcel herein and judgment for the same has not been pronounced, therefore execution of the orders of 18th September 2019 would complicate the outcome of the main suit.**
- 4. The court orders as issued on 4th October 2018 have not been recalled, reviewed or set aside thus subsisting provided judgment in the main suit has not been pronounced.**
- 5. Orders of 18th September 2019 could open a floodgate of other cases involving similar matters, thus the court should exercise its powers of review to promote the adherence and respect of court orders; and to enhance confidence in court process.**

Summary of Facts

Judgment was delivered in this suit on 16th May 2018 in which the court entered judgment against the Defendants, granting a mandatory injunction to be complied with within 90 days failure to which an eviction order to issue; and that upon giving vacant possession or being evicted, the Defendants are restrained from interfering with the Plaintiff's enjoyment of the land in any way. The decree to this effect was issued on 15th August 2018.

Meanwhile, in a separate suit ELC No. 25 of 2018, ***Kaloleni Muslim Mosque Committee & Kisumu Muslim Association v. Seventh Day Adventist Limited & National Land Commission***, concerning the same parcel of land in dispute, the Plaintiffs therein filed an application on 3rd August 2018 for an order of status quo to maintain and preserve the subject matter of the suit on the grounds that the Defendant (ie. the Plaintiff in this suit) had mischievously obtained eviction orders against some artisans who they had temporarily allowed to use the land (ie. the Defendants in this suit), without enjoining or serving the Plaintiffs. The court, on 4th October 2018, issued an order *by consent* (hereinafter referred to as the Consent Order) restraining both Plaintiff and 1st Defendant from using or developing the land pending hearing and determination of the suit.

The plaintiff in this suit, upon failure of the Defendants in this suit to comply with the orders of 16th May 2018, filed an application dated 19th March 2019 which was heard and the court issued an eviction order dated 18th September 2019 with a 30 day notice period (hereinafter referred to as the Eviction Order). This is the order which the Applicants herein seek to recall, review and set aside pending the hearing and determination of ELC N0. 25 of 2018.

Plaintiff/ Respondent's Reply

Through an affidavit deposed by the Plaintiff's Resident Church Clerk, the Plaintiff contends that the Consent Order merely restrained the parties from using or developing the land but not from evicting the Defendants in this suit. That the Defendants' occupation of the suit parcel has been lawfully adjudged to be unlawful and the illegality should not be sustained by the court.

Defendants/ Applicants' Submissions

Counsel for the Defendants submitted that the Respondent should have disclosed the material fact of a court order subsisting in another suit which deals with the same subject matter. That the Respondent had a duty to disclose this fact, being an *ex-parte* applicant, citing the case of ***BAHADURALI EBRAHIM SHAMJI V. AL NOOR JAMAL 7 2 OTHERS CIVIL APPEAL NO. 210 OF 1997*** and ***Republic v Kenya Medical Training College & another Ex-Parte Kenya Universities and Colleges Central Placement Service [2015] eKLR***.

Counsel submitted that should the court not review, recall or set aside the Eviction Order, the court would be rewarding the Respondents for their contempt of court. That the act of obtaining orders varying or replacing the Consent Order and not disclosing the same to the court amounted to contempt of court.

Plaintiff/Respondent's Submissions

Counsel for the Plaintiff submitted that ever since the Plaintiff obtained judgment on 16th May 2018, the Defendants herein have never appealed or sought a review of the judgment and it stands to date. That the Consent Order did not prevent the Plaintiff from executing the decree by evicting the Defendants from the suit property.

Counsel submitted that the Defendant have no right of use of the property that ranks in pari pasu with the Plaintiff's right of use of the property. That litigation of this suit has come to an end for the Defendants. That only the Plaintiffs in ELC No. 25 of 2018 can challenge the Plaintiff's right to execute the decree and evict the Defendants who are a stranger to the proceedings in ELC No. 25 of 2018.

Counsel submitted that the Defendants have not met the grounds for seeking orders of review under Section 80 of the Civil Procedure Act. That since the Defendants claimed to be occupying the land with the authority of the Plaintiffs in ELC No. 25 of 2018, the existence of the Consent Order in that suit could not have been the discovery of a new fact prior to the granting of the Eviction Order in this suit. That the application was not brought within a reasonable time frame.

Issues for Determination

1. *Threshold for seeking orders of review or setting aside orders*

Order 45 of the Civil Procedure Rules restricts the grounds for review to:

- (a) **discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;**
- (b) **on account of some mistake or error apparent on the face of the record, or**
- (c) **any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.**

Mativo J. in ***Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR*** elaborated on the meaning of "sufficient reason" within the context of Order 45, citing several cases as follows:

“Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*[8] had this to say:-

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule”

A similar view was held in the case of *Sadar Mohamed vs Charan Singh and Another* [9] where it was held that:-

“Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter).”

2. Whether the issuance of the Consent Order constituted a sufficient ground to review or set aside the Eviction Order

Did the issuance of the Consent Order in ELC No. 25 of 2018 amount to a new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the Applicants herein?

- It is evident from the pleadings within the 2nd August 2018 application for maintenance of status quo in ELC No. 25 of 2018 that the Plaintiffs in that suit were in close communication with the Defendants/Applicants in this suit about the progress of both suits. So much so that the Secretary of the 2nd Plaintiff in ELC No. 25 of 2018 deponed in a supporting affidavit that the Applicants herein had informed them of the judgment delivered and Eviction Order issued in this suit. It is therefore highly unlikely that the Applicants, after exercising due diligence, would not have had knowledge of the Consent Order of 4th October 2018 by the time the Respondent filed its application for eviction dated 19th March 2019.
- The Consent Order of 4th October restrained both the Plaintiffs in ELC No. 25 of 2018 and the Plaintiff in this suit from using or developing the suit property. In ELC No. 25 of 2018, the Plaintiffs pleaded that the Defendants/Applicants in this suit are occupying the land with their authority. The action of the Plaintiffs to license the occupation of the property by the Defendants/Applicants in this suit is tantamount to Plaintiffs in that suit using the property in contravention of the Consent Order. Therefore, rather than varying or replacing the Consent Order, the Eviction Order has the effect of coincidentally enhancing and reinforcing the Consent Order.
- The Applicants’ right of occupation in this suit is based on their claim of being allocated portions of the property by the Municipal Council of Kisumu who they aver is the registered owner of the property. In ELC No. 25 of 2018, the Applicants’ right of occupation of the property is pegged on being given authority to do so by the Plaintiffs in that suit i.e. Kaloleni Muslim Mosque Committee & Kisumu Muslim Association. The Applicants’ basis of occupation in this suit seems to run contrary to the claim of ownership made by the Plaintiffs in ELC No. 25 of 2018, rendering the Applicants herein total strangers to the action constituting ELC No. 25 of 2018, which cannot be considered “the main suit” as claimed by the Applicants. Even though the subject matter in both suits is the same, the Applicants’ standing fundamentally differs in each of the suits. The contradictions as to the nature of the Applicants’ occupation of the suit property leads to a reasonable inference that the Applicants have not approached the court with clean hands. The Applicants cannot be allowed to benefit from an order in a separate action which contradicts their legal standing in the present suit.

In summary, the Consent Order of 4th October 2018 in ELC 25 of 2018 cannot be considered a new and important matter necessitating review or setting aside of the Eviction Order. It merely indicates that there is a separate legal dispute yet to be settled over the same subject matter in this suit.

Matavo J. in *Michael Muriuki Ngubuini v East African Building Society Limited* [2015] eKLR cited with approval the case of *Zacharia Ogomba Omari and Another vs Otundo Mochache* thus:

“ii. It must be remembered that even a land dispute must be brought to an end and a land dispute per se is no ground to reopen a case, which is concluded.”

The upshot of the above is therefore that the application to set aside and review the orders of 18th September 2019 ought to be, and is hereby, dismissed with costs.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 22nd DAY OF NOVEMBER, 2019.

In the presence of:

Mr. Odeny holding brief for Achira for Defendant

Mr. Orieyo for Plaintiff.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE