



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 407 OF 2012

FANIKIWA LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

JOSEPH KOMEN.....1ST DEFENDANT

SAMMY CHERASTE.....2ND DEFENDANT

CRISPUS KIPKECH LABAT.....3RD DEFENDANT

JOSEPH KOECH.....4TH DEFENDANT

RULING

1. The application before court made by ***Kiplabat Tuitoek Moi*** is dated 23.2.2018 and it seeks the review of the order and decree made by the court on 23.11.2017. The application is based on grounds that the judgment ordered for the eviction of the applicants upon issuance of a notice amongst other orders relating to the suit parcel of land ***Soy Kipsomba Block 12/30*** and that accordingly, the applicants have come to learn and discover new evidence that substantially affects the matters herein which essentially dealt with the main issues herein and that as a consequence to the finding of the new evidence, it thus is necessary for the court to grant orders of stay of execution and accordingly review its judgment. The applicant states that in view of the foregoing, there is good and sufficient cause for review of the said judgment as well as the issuance of stay orders of execution as prayed in the application filed herewith. The applicants are justifiably apprehensive that the respondent will seek to execute the learned Judge's aforesaid order and or decree before the application filed herewith is heard and determined.

2. The application is supported by the affidavit of ***Kiplabat Tuitoek Moi*** who refers himself as the 1st defendant/applicant and states that this court issued an order of eviction of the applicants upon issuance of notice. He states that the main issue taken by this court in consideration in making decision was devoid of true situation that was existent by the time of delivery of judgment. The applicant insinuates that there was an attempt to settle this matter by a meeting in Kabarak. but before settlement of the suit, Hon. Mark Too died. That it was agreed that the matter be settled at Kshs. 12,500,000 and the respondent was to communicate to court. However, before the same was done, judgment was issued. It is alleged that at the time of judgment, parties had already settled the matter.

3. ***Sophie Jelimo Chemengen***, the Managing Director of the respondent states that she is aware that the applicants filed a notice of appeal which they have not withdrawn and now they are purporting to apply for a review. She has been informed that a party who has appealed cannot apply for review of the decision of the court and that because there is a pending appeal, the Environment and Land Court is *functus officio*. The respondent (plaintiff) claims that the affidavit sworn by Kiplabat Tuitoek Moi ought to be struck out as it is not drawn in accordance with the mandatory provision of section 5 of the Oaths and Statutory Declaration Act due to the fact that it is not dated. Moreover, that Kiplabat Tuitoek Moi was not a party to the suit and therefore, he is a stranger hence the affidavit ought to be struck out.

4. The applicant submits that the plaintiff received Kshs. 12,500,000 in full settlement of the debt that was owing and therefore, the plaintiff is estopped by conduct from denying the existence of clearance of the debt. The applicant submits that the applicant has made a case for review on discovery of a new and important matter. The applicant claims to have withdrawn the notice of appeal and therefore, there can be no bar to these proceedings.

5. The respondent submits that the affidavit sworn by Kiplabat Tuitoek Moi is defective as it was not dated by the commissioner of oaths contrary to the provisions of section 5 of the ***Oaths and Statutory Declarations Act Cap 8 Laws of Kenya Cap 15 laws of Kenya***. The respondent argues further that that the applicant does not have locus standi as he is not a party to the suit and has not shown any interest in the suit. Moreover, that there is no authority for the applicant to file the application on behalf of the defendants. The respondent further argues that there is no provision for stay of execution pending review under order 42 of the civil procedure rules 2010. The respondents

argue that this court is functus officio as the defendants have filed a notice of appeal in the judgment dated 23rd November 2017. Last but most important is the argument that the applicant has not satisfied the grounds laid down in Order 45 of the Civil Procedure Rules as the applicant has not demonstrated discovery of new and important evidence after delivery of judgment that was incapable of discovering even after exercise of due diligence. The respondent argues that the alleged discussion between Mr Mak Too and the applicant was not brought to the attention of the court despite the fact that the matter was pending judgment and that the issue is only introduced after the death of Mark Too.

6. I have considered the application dated 23.2.2018 and do find that the same is not supported by an affidavit by the defendant's judgment debtor. It is supported by the affidavit of a stranger in the name of Kiplabat Tuitoek Moi. The same is properly commissioned contrary to the allegations of the respondent. However, Kiplabat Tuitoek Moi was neither a plaintiff nor a defendant in the matter. Moreover, he has not made an application to be enjoined in the dispute as an interested party or a person affected by the judgment of this court. He has not demonstrated to the court how he is aggrieved by the judgment of the court when he was not a party to the suit. Mr. Kiplabat Tuitoek Moi describes himself as the 1st defendant/applicant which is not true as the 1st defendant/applicant is Joseph Komen. For the above reasons alone, this court finds that the application is irregular as it is not supported by affidavits of the defendants and that the deponent of the supporting affidavit is a stranger to these proceedings and therefore, the application ought to be struck out and is ultimately the same is struck out.

7. Be that as it may, and in case am wrong on the above issues, this court finds the right for review is only reserved for a party who has not preferred an appeal. Section 80 of the Civil Procedure Act Cap 21 laws of Kenya provides as follows for review.

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.

8. Having filed a notice of withdrawal of appeal under Rule 81 of the Court of Appeal Rules 2010 on the 23.2.2018, the appeal by the defendants stood withdrawn only on service of the same to all the affected parties. **Failure to serve the notice of withdrawal of notice of appeal implied that the same was still alive on record** and therefore, the applicant had no option of filing an application for review under order 45 of the Civil Procedure Rules, 2010 before serving the notice of withdrawal of the notice of appeal and therefore, this court has no jurisdiction to entertain the application for review as there is an appeal pending in the Court of Appeal.

9. Rule 81 of the court of appeal rules provides for the withdrawal of the notice of appeal and notice of cross appeal. Thus: -

“A party who has lodged a notice of appeal may withdraw the notice of appeal by notice in writing to all the parties who have been served. The costs of the withdrawal shall be borne by the party withdrawing the notice of appeal.”

10. There is no evidence of service of the notice of withdrawal of the notice of appeal lodged herein upon the respondents and payment of costs.

11. Moreover, order 45 rule 1 is very clear on applications for review thus that: -

(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.

12. This court finds that the issues raised by Kiplabat Tuitoek Moi, ***who is not appealing***, are common to the issues raised by the defendants and therefore a review cannot lie where there is a pending appeal despite the fact that Kiplabat Tuitoek Moi is not appealing as he has brought the application in the interest of the judgment debtors due to the fact that they ceded their land to give way for Sacho High School and were allocated the Suitland. An issue which was determined and can only be subject to the jurisdiction of the court of appeal.

13. On the issue of discovery of new and important matter that substantially affects the matters herein, this court finds that though the evidence of remittance of Kshs. 12,500,000 by Kabarak Ltd to the late Hon. Mark Too to settle an old debit is new, the same is not important as it does not relate to the dispute between the Decree holder and the Judgment debtors as they are not parties to the agreement which was allegedly entered into when the matter was pending judgment. Moreover, the decree holder is a limited liability company and the remittance application form does not show that it was involved in the transaction. I agree with the respondent that the alleged discussion between Hon

Mark Too and the applicant was not brought to the attention of the court despite the fact that the matter was pending judgment and that the issue is only introduced after the death of Hon Mark Too.

14. Section **80 of the Civil Procedure Act Cap 21 Laws of Kenya** gives the power of review and Order **45 of the Civil Procedure Rules** sets out the rules. The rules in my considered view restrict 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) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

15. The applicant has not demonstrated 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.

16. The application for review is made more than 60 days after judgment and death of Hon Mark Too. I do find that the same is brought with unreasonable delay and that no explanation has been given.

17. In a nutshell, the applicant has not satisfied this court that he is entitled to a review of the judgment made by this court. The application is dismissed with costs.

Dated and delivered at Eldoret this 6th Day of April, 2018.

A. OMBWAYO

JUDGE