



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 97 OF 2015

JOSEPH MUTHIANI KIVINDU.....1ST PLAINTIFF

WAYUA KIVINDU.....2ND PLAINTIFF

VERSUS

FREDRICK MWANIKI MUSAU.....1ST DEFENDANT

AUGUSTINE NZUKI MULI.....2ND DEFENDANT

BONIFACE MAKAU.....3RD DEFENDANT

THE REGISTRAR OF LANDS, MACHAKOS

AND THE ATTORNEY GENERAL.....4TH DEFENDANT

KENYA UNION OF SAVINGS AND CREDIT

CO-OPERATIVES LIMITED.....5TH DEFENDANT

RULING

1. This Ruling is in respect to the Application dated 7th November, 2017. In the Application, the Applicants are seeking for the following orders:

a. That the Honourable Court be pleased to review part of the Ruling and order entered herein on 3rd March, 2017 sentencing the 1st Defendant to pay a fine of Kshs. 2,000,000 for contempt of court.

b. That the Honourable Court be pleased to order refund and restitution to the 1st Defendant of the amounts paid that exceed the maximum limit set under the law.

2. The Application is premised on the grounds that there is an error apparent on the face of the record; that the maximum legally permissible penalty for contempt of court is Kshs. 200,000 and that the excess fine levied against the 1st Defendant can only be an error on the part of the court.

3. In his Affidavit, the 1st Defendant deponed that he paid the sum of Kshs. 2,000,000 as ordered by the court to avoid serving a jail term of thirty (30) days as ordered by the court; that as at the time of sentencing, the Contempt of Court Act was in operation and that the maximum fine allowed under the Act is Kshs. 200,000.

4. In his Grounds of Opposition, the Plaintiffs/Respondents averred that the Contempt of Court Act cannot apply retrospectively; that the orders that the 1st Defendant disobeyed were issued on 23rd May, 2015 when the suit land was sold and that an error of law or failure to apply the law correctly cannot be the basis for review but appeal.

5. The Plaintiffs further averred that in any event, the maximum sentence prayed of Kshs. 200,000 will not meet the ends of justice and a sentence of imprisonment of six (6) months together with the fine should be imposed.

6. The parties filed brief written submissions which I have considered.

7. On 3rd March, 2017, this court found the 1st Defendant/Applicant in contempt of the orders of the court for the maintenance of the *status quo*. After hearing the 1st Defendant's mitigation, the court sentenced the 1st Defendant by ordering him to pay a fine of Kshs. 2,000,000 and in default to serve a jail sentence of thirty (30) days. The 1st Defendant duly paid the fine of Kshs. 2,000,000.

8. The 1st Defendant's Application is seeking for a review of the order of this court on the basis that the order is contrary to the provisions of the Contempt of Court Act. On the other hand, the Plaintiffs' advocate has argued that by the time the contemptuous actions were being committed, the Contempt of Court Act was not yet in force and that in any event, the Applicant should be imprisoned for six (6) months.

9. The 1st Defendant's Application, as I understand it, is that this court misinterpreted the law while meeting out its sentence. The Applicant wants this court to review its own Ruling on that account alone. The Court of Appeal addressed that issue in the case of **Pancras T. Swai vs. Kenya Breweries Limited (2014) eKLR** as follows:

“The Appellant's right to seek review, though unfettered, could not be successfully maintained on the basis that the decision of the court was wrong either on account for wrong Application of the law or due to failure to apply the law at all.”

10. The court in the **Pancras case (supra)** quoted with approval the case of **National Bank of Kenya vs. Ndungu Njau (Civil Appeal No. 211 of 1996)** in which it was held as follows:

“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 evident and should not require an elaborate argument to be established. It will not be a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

11. The court in the above matter went further and stated that if parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set.

12. Consequently, considering that the Applicants' Application is hinged on the assumption that the court did not comply with the provisions of the Contempt of Court Act while meeting out the sentence, I find that that is an issue to be ventilated in the Court of Appeal and not before this court. I will therefore not delve into the legality of the sentence that was meted out to the 1st Defendant.

13. For those reasons, I dismiss the Application dated 7th November, 2017 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 11TH DAY OF MAY, 2018.

O.A. ANGOTE

JUDGE