



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

PETITION NO. 2 OF 2009

IN THE MATTER OF SECTIONS 70, 75, 77, 78 & 80 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 70, 75, 77, 78 & 80 OF CONSTITUTION

AND

IN THE MATTER OF EAPC CLAIMING TO ENFORCE INJUNCTION TO RESTRAIN LIVING WATERS EAPC IN MERU CMCC NO. 727 OF 2004

AND

IN THE MATTER OF INTERPRETATION OF THE CONSTITUTION IN RESPECT OF THE ORDERS OF CMCC NO. 272 OF 2004

BETWEEN

JACOB MBUI

CHARITY NTARA

AMDREW NKUNJIRI

PETITIONERS

JOSPHAT KIRIMANIA & 431 OTHERS

VERSUS

EAST AFRICA PENTACOSTAL CHURCHES SUED THRO' ITS TRUSTEES

REV. JUSTUS KINOTI

RESPONDENT

SOSPETER NJERU

ANDREW KINYAMU

RULING

The application before me is the Notice of Motion dated 2nd March, 2018 brought under Order 51 CPR, Sections 1A, 1B, 3 and 3A CPA, Article 10 (2) and 159 of the Constitution of Kenya, 2010. The Applicant is seeking the following orders:

1. That this Honourable court be pleased to review/set aside/vary the orders of this Honourable Court of 7th December, 2017.
2. That this Honourable Court be pleased to issue orders of stay of execution of the judgement written by Justice E.C Cherono but delivered by Hon. Lady Justice Mbugua, ELC Judge on 7th December, 2017 pending the interparties hearing of this application(s) pending the hearing and determination of this suit.

3. That this Honourable Court be pleased to issue orders of stay of execution of the judgement delivered by hon. Lady Justice Mbugua, ELC Judge on 7th December, 2017 pending the hearing and determination of the suit.

4. That the costs of this application be provided for.

The application is premised on the affidavit of Jacob Mbui sworn on 2nd March, 2018 and grounds shown on the body of that application.

In their supporting affidavit, the Applicants stated that they came to learn later the same date on 7/12/2017 that judgement in HCCA No. 96/2008 (Meru) was delivered. The Applicants also stated that from the judgement of this court, they noted on the face of the record that the court did not make any finding on the evidence as filed by the petitioners showing that the petitioners had actually bought the suit property with money collected/raised from their various churches. The petitioners also stated that the court did not consider issues of trust, the applicable law and whether or not the orders of CMCC No. 727/2004 cannot be enforced to the detriment of the Petitioners without breaching their fundamental rights and freedom of worship.

In a replying affidavit sworn on 3rd April, 2018, the Respondent through Rev. Samuel Muguna stated that the Applicants have not set out in the body of the application or the supporting affidavit any grounds for review of the judgement of this court. The Respondents also contend that the averments contained in the body of the motion and the supporting affidavit constitute grounds of Appeal and not grounds for review or stay of execution.

The Respondents further contend that the Applicants are essentially challenging the courts understanding of the law, the appreciation of the evidence and its evaluation thereof a matter that cannot be dealt with by the same court as to do so would be sitting on Appeal. The Respondent also contend that the applicants lost the suit and the Appeal that was challenging the decision in CMCC No. 727 of 2004 (Meru) and that they now have nothing to cringe to and that they are acting desperately by applying delaying tactics.

The Respondents state that no Appeal has been preferred against the judgement herein and that a stay would be superfluous and would amount to denying the Respondent the fruits of a just judgment.

APPLICANT'S SUBMISSIONS

The Applicants through the firm of Charles Kariuki & Kiome Associates submitted that this Honourable Court on the face of record did not make any consideration of the evidence as filed showing that the Petitioners/ Applicants bought the suit properties with monies raised from various churches.

The learned counsel also submitted that the court did not determine any of the questions that were raised in the petition in its judgement and that if the court had analyzed the evidence on record it would have come to a very different conclusion, orders and judgment.

RESPONDENT'S SUBMISSIONS

The Respondent through the firm of Murango Mwenda & Co. Advocates submitted that the provisions of the statute relevant to the granting of orders of review, setting aside or variation are not set out in the body of the application. It is contended that the applicable law in this application is Order 45 CPR. The learned counsel submitted that for a party to succeed in an application such as before court, he must show the existence of any new evidence that could not have been availed after due diligence. An Applicant must also show an apparent error on the face of record. This error must be an evident error which does not require any extraneous efforts to show its correctness. It must be an error so manifest and clear that no court would permit such an error to remain on record. The learned counsel further submitted that all the grounds set out in the body of the motion and the supporting affidavit do not satisfy the criteria specified under Order 45 of the CPR. In conclusion, the counsel submitted that if the court were to proceed to determine whether it considered the submissions of the Applicants, did not render himself on the law raised by the Applicant did not determine the questions raised in the petition, did not properly evaluate the evidence, did not consider the Constitutional rights of the Applicants etc, the court would be sitting on Appeal of its own judgement which would be improper. He cited the following case:

1. Sasini Tea & Coffee Ltd –Vs- Obwogi EALR (2003) 277.

DECISION

I have considered the application and the supporting documents. I have also considered the replying affidavit as well as their submissions and applicable law. The Applicants are seeking a review/variation and/or setting aside of the judgment of this court delivered on 7th December, 2017. That application is brought under Order 51 CPR, Section 1A, 1B, 3 and 3A CPA as read with Article 10 (2) (b) and 159 of the Constitution of Kenya 2010. Those citation for an application seeking orders of Review variation and/or setting aside is a false start. The applicable law in an application for Review, setting aside and/or variation is Order 45 CPR which sets out grounds for Review as follows:

- i. 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 the order was made.**
- ii. Mistake or error apparent on the face of the record.**
- iii. Any other sufficient reasons.**

From the application itself and the supporting documents, the Applicants have not shown the existence of any new evidence that could not

have been availed to this court even after due diligence. There is also no evidence from the application, the supporting affidavit and the submissions that there is any error apparent on record. For one to succeed in an application of this nature, the party must clearly point out an error apparent on the face of the record. This error does not require scientific or extraneous effort to show its incorrectness. It must be one that is clear and manifest on the face of record. There is absolutely no any error pointed out by the Applicant either in the application or the supporting affidavit or the submissions. The Applicant only faults the judges reasoning and appreciation of the law (or lack of it) and the facts of the case. Those can hardly be regarded as errors apparent on the face of the record. Those faults in the judgement, if any, can only be dealt with in a different forum. In my respective view, all the grounds set out in the body of the application and the supporting affidavit do not satisfy the criteria specified under Order 45 CPR. In the case of **Sasini Tea and Coffee Ltd. –Vs- Obwogi (2003) EALR 277**, the court held as follows:

“The grounds set out in support of the application for review do not in our judgment satisfy the criteria specified under Order XL IV Rule 1 of the Civil Procedure Rules. They are clearly grounds for an appeal proper.....”

That decision of the superior court binds this court. The decisions cited by the counsel for Applicant are distinguishable and irrelevant to this case. An application for Review setting aside and/or variation has a specified criteria and grounds for consideration under Order 45 CPR. It is not based on the exercise of the courts discretion. For all the reasons I have given, I find the application dated 2nd March, 2018 lacking merit and the same is hereby dismissed with costs.

DATED AND SIGNED THIS 18TH DAY OF OCTOBER, 2018.

E. C. CHERONO

ELC JUDGE - KERUGOYA

DELIVERED IN OPEN COURT AT MERU THIS 31ST DAY OF OCTOBER, 2018

LUCY N. MBUGUA

ELC JUDGE - MERU

In the presence of:

C/A: Janet/Galgalo

Igweta H/B for Kiano for petitioner

Materi H/B for Murango Mwenda for respondent

1st & 2nd petitioners