



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

CIVIL SUIT NO. 29 OF 2017

SAMWEL KIPKEMOI RONO.....PLAINTIFF/APPLICANT

VERSUS

CHARLES KIPRONO BETT.....DEFENDANT/RESPONDENT

RULING

Introduction

1. By an application dated 26th July, 2018 brought pursuant to Order 45 Rule 1 of the Civil Procedure Rules the applicant seeking the following Orders: -

(i) Spent

(ii) THAT pending hearing and determination of this application, there be stay of execution of the decree issued on 16th May, 2018.

(iii) THAT this honourable court be pleased to review and/or set aside the judgment of this Honourable Court delivered on 16th May, 2018.

(iv) THAT costs of this application be provided for.

2. The application is premised on the ground that the Plaintiff/Respondent has discovered new and important piece of evidence which was not within his knowledge and was not available at the time of hearing as a result of which judgment was entered against the plaintiff.

3. The application is opposed by the Respondent through his Replying Affidavit in which he states, inter alia, that the application is an abuse of the court process and meant to unnecessarily prolong the matter.

4. The application was canvassed by way of written submissions and both parties filed their submissions.

Issues for determination

5. I have considered the pleadings, application, rival affidavits as well as counsels' submissions and the following issues emerge for determination:

i. Whether the applicant has met the threshold for review of the orders issued on 16th July 2018

ii. Whether the defendant should be granted the reliefs sought

iii. Who should bear the costs of this suit.

Analysis and determination

6. With regard to the first issue, the conditions for review are set out in Order 45 (1) of the Civil Procedure Rules as follows:

“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 a 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 review of judgment to the court which passed the decree or made the order without unreasonable delay”.

7. The applicants rely on the ground that “there is discovery of a new and important matter or evidence which was not within his knowledge and was not available to be produced at the time of the hearing and which will assist the court to reach a favourable determination of this matter”

8. Order 45 Rule 1 of the Civil Procedure Rules specifically states that there must be:

“discovery of a new and important matter 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 order made.”

9. In his supporting affidavit the applicant clearly states at paragraph 5 that immediately after delivery of the judgment he made a frantic search for the consent he had been given and found it mixed with other documents in his old box at home.

10. In my view, the applicant has not explained why he was unable to produce the letter of consent which was within his knowledge, if indeed, the said consent was in his possession. This shows lack of due diligence on his part. The applicant was ably represented by counsel who must have known the significance of producing the consent letter. The court cannot allow the applicant to go on a fishing expedition and introduce evidence which he supposedly had but failed to produce during the hearing.

11. In its judgment, the court noted that there were contradictions in the agreement dated 1.1.2011 which the plaintiff relied on. The purchase price and signatures on the agreement did not make sense. It also noted that there was no consent of the Land Control Board as only the minutes of the Land Control Board meeting and an application for consent of the Land Control Board were produced. The latter was not dated.

12. I agree with counsel for the Respondent that the ‘new evidence’ to be relied on must be put to serious scrutiny as to its importance which involves an inquiry into its veracity. In the case of **Dubai Bank Kenya Limited v Kwanza Estates Limited [2015] eKLR at page 11** the Court of Appeal sitting on appeal from the ruling of Kasango, J quoted with approval the following passage from her ruling:-

“Even if the documents presented by the Defendant’s Notice of Motion did have a bearing to the orders issued by the impugned Ruling, the issue raised on the validity of those documents in my view would disqualify them to be considered for review of Court orders....”

13. In view of the foregoing, it is my finding that the application is not merited as introduction of the consent letter without more, would not change the outcome of the case. The application is therefore dismissed with costs to the Respondent.

Dated, signed and delivered at Kericho this 26th day of October 2018.

J.M ONYANGO

JUDGE

In the presence of:

1. Mr. W.K.Ngeno for Mr. Migiro for the Applicant
2. Mr. Maina for the Respondent
3. Court assistant - Rotich