



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT NYAHURURU

ELC APPEAL NO 15 OF 2017

NAOMI WAITHERA WANYOIKE.....APPLICANT

VERSUS

HURI KAMAU.....RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 15th January 2018 brought under Order 45 Rules 1,2 and 3 of the Civil Procedure Rules, and Sections 1A, 1B, 3A and 80 of the Civil Procedure Act and all other enabling provisions of the Law wherein the Applicant/Appellant has sought for the for the following orders;

- i. That this Honorable court be pleased to review its judgment of 13th December 2017 and set it aside.
- ii. That the honorable Court be pleased to make appropriate orders as it may deem fit and just in the circumstance and in terms of the reliefs sought in Nyahururu suit No. PMCC No. 213 of 2004.
- iii. That costs be provided for.

2. The said application was supported by the grounds on the face of it and an Affidavit, sworn on the 15th January 2018 by Naomi Waithera Wanyoike the Applicant/Appellant herein.

3. On the 19th March 2018 by consent and with approval of the court, parties agreed to have the said application disposed of by way of written submissions.

4. The applicant/Appellant filed their written submissions on the 7th May 2018 wherein the Respondent filed theirs on the 26th March 2018.

Applicant/Appellant's case.

5. It was the Applicant's submission that this application was inspired by paragraph 64 of the judgement wherein there was an error/mistake. For ease of reference the said paragraph was to the effect that;

On the other hand, there is no dispute that Respondent's father Mr. Samwel Kahunya, who is now deceased, was the registered proprietor of Plot No. Nyandarua/Kaimbaga/182 measuring 8.2 acres, a land that is now occupied by the Respondent, also passed away.

6. That this is was a mistake of the record as the registered proprietor of the suit land was the Appellant upon transmission to her as the legal Representative of her late husband. That the Respondent herein had trespassed onto the suit land which then necessitated the filing of Nyahururu PMCC No. 213 of 2004.

7. The Applicant asked the court to gain sight of paragraph 65 of its judgement, which I shall again reproduce as ;

There was however no evidence adduced at the trial that the Respondent had applied for and obtained letters of administration in respect of the estate of his late father or in respect to Plot No. Nyandarua/Kaimbaga/182, a fact that was admitted in his defence which in essence meant that he had no *locus standi to defend and/or be sued before the Senior Principal Magistrate's court at Nyahururu and neither does he have the locus standi to be sued in the present Appeal until such a time as he shall have taken out letters of administration.*

8. To find that there was an error on the face of it to the effect that the Respondent herein was not sued as a legal representative of his late father's estate and neither was the suit land herein being No. Nyandarua/Kaimbaga/182 registered in the Respondent's father's name.

9. The Applicant's main argument was that this matter was decided on the mistaken belief that the Respondent had been sued in respect of his late father's estate wherein the correct position was that the Respondent had been sued in his individual capacity as a trespasser on No. Nyandarua/Kaimbaga/182.

10. That the confusion may have arisen when in his defence the Respondent had stated that he was occupying his late father's land No. Nyandarua/Kaimbaga/189 and was not a trespasser on No. Nyandarua/Kaimbaga/182.

11. That the applicant was not asking the court to sit on its appeal but that there had been an error on the face of the record which was apparent therefore necessitating re-consideration without going through the motions of an Appeal.

12. The Applicant relied on the unreported cases of;

i. Meshak Salwa vs Alfayo Wetende and another [2009] eKLR. and

ii. JMK vs. MWM and MFS [2015] eKLR to buttress their submission and to pray that their application be allowed.

The Respondents case.

13. The Application was opposed by the respondents who raised their grounds of opposition to the effect that this court lacked jurisdiction to entertain the application as it was functus officio having pronounced its judgement and that the applicant's grievance could only be addressed in the court of appeal.

14. The Respondent further submitted that the Applicant's Application was misconceived as it offended the doctrine of Res judicata.

15. That further the prayers sought herein went to the root of the judgement and could only be dealt with at an appeal level.

16. That the application was misconceived, bad in law and an abuse of the process of the court and ought to be dismissed.

17. The Respondent submitted that the application did not meet the threshold set out under Order 45 Rule 1 of the Civil Procedure Rules in that there was no new discovery of new and important matter or evidence nor was there some mistake or error apparent on the face of the record. There was also no discernible matter that could constitute any other sufficient reason on the basis of which review could be justified. The Respondent relied on the decided cases of:

i. Abdullah Mohamud vs. Mohammud Kahiye [2015] eKLR and

ii. National Bank of Kenya Ltd vs. Ndungu Njau [1997] eKLR

18. I have carefully considered the grounds in support of and against the application and the submissions by both parties and the relevant law and authorities and the peculiar facts of this case. In my considered opinion the key issue that emerges for determination is *w hether the applicant has satisfied the grounds for review.*

19. Order 45 Rule 1 of the Civil Procedure Rules, 2010 under which the application is brought provides 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 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 judgement to the court which passed the decree or made the order without unreasonable delay."

20. Section 80 of the Civil Procedure Act provides as follows:-

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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

21. From the above provisions, it is clear that whereas Section 80 of the Civil Procedure Act gives the court the power to review its orders, Order 45 Rule 1 of the Civil Procedure Rules sets out the rules which restrict the grounds upon which an application for review may be

made. These grounds include;

- i. 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;
- ii. on account of some mistake or error apparent on the face of the record, or
- iii. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

22. A look at the provisions of Order 45 of the Civil Procedure Rules and the reason given by the Appellant/ Applicant to the effect that judgement in this matter was based on the mistaken belief that the Respondent had been sued in respect of his late father's estate wherein the correct position was that the Respondent had been sued in his individual capacity as a trespasser on parcel of land No. Nyandarua/Kaimbaga/182, being the reason why this court should review its orders, in my humble view does not fall within the scope of Order 45 Rule 1 cited above and more particularly as enumerated in paragraphs (i), (ii) & (iii) stated herein above.

23. In the decided case of *Ajit Kumar Rath vs State of Orisa & Others on 2 November, 1999 Court at Page 608* the Supreme Court of India 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”

24. The grounds relied upon in this application qualify to be grounds of appeal as opposed to grounds for review. In the case of **National Bank of Kenya Ltd vs Ndungu Njau [1996] KLR 469** the court held:-

“In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose.”(Emphasis added).

25. In **Francis Origo & another v. Jacob Kumali Mungala [2005] eKLR**, the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. The court of appeal on appeal held that:-

“our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.”

26. Further Bennett J in **Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557** held that:

“a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal”

27. On the same point the authors of **Chittaley & Rao in the Code of Civil Procedure (4th Edn) Vol.3, page 3227** in explaining the distinction between a review and an appeal had this to say:

“A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal.”

28. Section 3A of the Civil Procedure Act provides that:

‘Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.’

29. In this application, it cannot be urged for the court to consider whether the finding that the registered proprietor of the suit land was the Appellant upon transmission to her as the legal Representative of her late husband and that the Respondent herein had trespassed onto the

suit land. That would amount to asking this court to question its previous judgment in the same matter which in turn would amount to sitting on appeal of its own decision. Having looked at the reasons herein advanced by the Applicant/Appellant seeking that this court reviews its judgment of 13th December 2017 and set it aside, I find that the same did not meet the threshold set out under Order 45 Rule 1 of the Civil Procedure Rules. I find that this is not a proper case for this court to exercise its discretion in favour of the applicant and accordingly, I proceed to dismiss the application dated 15th January 2018 with costs to the Respondent.

Dated and delivered at Nyahururu this 11th day of October 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE