



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.CASE NO 387 OF 2016

MUKURU MUNGE.....PLAINTIFF

VERSUS

GILIED MWANYASI.....DEFENDANT

RULING

1. For determination is the application for review dated 5<sup>th</sup> JULY 2017 seeking the following orders to be granted.

**1. Spent**

**2. That this honourable court be pleased to Review and/or set aside its ruling delivered on 20<sup>th</sup> April, 2017 by Hon. Justice L. Komingoi.**

**3. That cost of this application be provided for.**

2. The application was opposed by a preliminary objection dated 29<sup>th</sup> September 2017 that the court lacks jurisdiction and is functus officio

The parties filed written submissions which were highlighted on 19<sup>th</sup> July 2018. Mr Gikandi for the applicant argued that this is a land matter therefore the plaintiff should be given a hearing. Mr Gikandi referred the court to paragraph 4 of the amended plaint where the applicant pleaded of the existence of a judgment in H.C. Appeal. Number 93 of 2005. That the previous judge only referred to case no 181 of 2011 without mentioning **Case No 93 of 2005**. That this was an error on the face of the court. He submitted further that the court is not functus officio to review the orders. He relied on the submissions filed and added that the court cannot rely on documents filed from one side. He urged the court to give them a chance to be heard.

3. Miss Mwainzi advocate appearing for the defendant submitted on the previous cases no 30 of 1998 and appeal no 93 of 2005 where the applicant herein was successful and there was no prayer for determination of ownership. That she saw nothing wrong with the judge for not mentioning no 93 of 2005 as it was not brought to her attention. Miss Mwainzi submits that there was no error on the face of the record and any dissatisfied party ought to have filed an appeal. That this court is functus officio because the issues were already determined. She urged the court to dismiss the application.

4. I have read the ruling delivered on 20<sup>th</sup> April 2017 which is the subject of the current application for review. Komingoi J. in her ruling found the subject matter being **LR 4118/148** had been dealt with from the RM's court in civil case no. 16 of 2008 where the suit was struck out the suit for being time barred. The decision of the trial magistrate was upheld by both the High Court and the Court of Appeal. She therefore found that with the issues raised in the preliminary objection dated 3<sup>RD</sup> FEBRUARY 2017 were merited and proceeded to strike out the current suit.

5. The applicant felt that the Judge erred in failing to make reference to the **Case No. H.C Civil Appeal no 93 of 2005** which overturned the decision of the magistrate's court in case no 30 of 1998 .I have read the decision that was made in Civil Appeal no 93 of 2005. At page 1 of the Judgment, the learned judge stated this;

***“In that case (no 30 of 1998), the plaintiff who is now the respondent prayed for Judgment against the appellant for Kshs. 57,600 being the value of the structures which the appellant without any colour of right demolished on 24<sup>th</sup> April 2017.The Respondent also claimed for the value of the goods that were in the demolished structure, interest and costs of the suit.”***

At page 9, the Judge further stated this, ***“Even if the house belonged to the respondent, his claim is for special damages and these should***

***not only be specifically pleaded but should also be strictly proved,”***

The judge concluded that the respondent did not present evidence to prove any of the expenses alleged that were incurred in the construction of the house and the respondent did not therefore strictly prove his claim. For this reason, the appeal was allowed with costs.

6. The applicant has pleaded on the grounds of the current application that the court made an error since the court overlooked the decision in **Civil Appeal no 93 of 2005** where a determination was made that the applicant was the owner of the suit property. I have read the entire judgment in **Case No 93 of 2005** and what I find to have been in issue in that case (**No 93 of 2005**) was whether the high court had jurisdiction to entertain the appeal and if it did whether the Respondent in that Appeal was entitled to his claim for payment of Kshs 57600 being the value of the demolished structure. The issue of ownership of the plot did not arise and was not determined.

7. On the finding by Komingoi J that the current suit is time barred as well as *res judicata*, the remedy available to the applicant to challenge that decision/finding was by way of appeal. This court cannot reverse the finding of a court of concurrent jurisdiction on matters that go to the root of the decision. I do not agree with the applicant that there is an error in the ruling made on 20<sup>th</sup> APRIL 2017 that is capable of being reviewed. Consequently I find the present motion does not fall under the ambit of review thus lacks merit in the present motion. I do hereby dismiss it with costs to the defendant/respondent.

**Ruling delivered, dated and signed at Mombasa this 19<sup>th</sup> December day of December 2018**

**A. OMOLLO**

**JUDGE**