



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

HIGH COURT CIVIL CASE NO.45 OF 2012

CHARLES OWITI MUDUNYI & 2 OTHERS PLAINTIFF

VERSUS

APOLLOS KENNEDY MWANGI DEFENDANT

RULING

1. The applicant Ignatius Were Otsyengi filed a notice of motion dated 2.3.2015 in which he sought review of this court's Judgment delivered on 29.1.2015 whereby his claim against the defendant was dismissed with no order as to costs. The applicant was one of the three plaintiffs who had filed suit against the defendant. The defendant did not enter appearance or file defence. The case proceeded by way of formal proof. The claims of the other two plaintiffs succeeded but the applicant's claim was dismissed.

2. The application by the applicant was duly served upon him but he did not file grounds of opposition or replying affidavit. The applicant contends that his claim against the respondent was dismissed because he had not provided evidence that he deposited money into the account of the defendant. The applicant contends that he had indeed deposited money into the defendant's account at Co-operative Bank Nyahururu Branch. He annexed a copy of the bank in slip. He contends that he did not produce the copy of bank in slip because he did not consider it necessary as the purchase price had been acknowledged on the agreement.

3. I have considered the applicant's application which is not opposed. The grounds for review are set out under order 45 of the Civil Procedure Rules. The grounds can be summarized into three namely:-

- a) Discovery of new and important evidence,
- b) Mistake or error apparent on the face of the record,
- c) Any other sufficient reason.

In the instant case, the applicant is contending that he inadvertently forgot to supply a copy of receipt for payment because he was mistakenly of the view that it was not necessary to be annexed to the agreement as the same had been acknowledged in the body of the agreement. The reason given by the applicant cannot fall on the first ground of discovery of new evidence. The applicant did not discover any new and important evidence which was not within his knowledge or could not be produced during the hearing. He always knew that he had filed a case against the plaintiff and that for him to have a judgement in his favour, he had to prove his claim as required.

4. There is no issue of mistake or error apparent on the face of the record. What therefore remains to be considered is whether the applicant has shown whether there is any sufficient reason for the judgment to

be reviewed. In the judgement which the applicant seeks to be reviewed, the applicant had testified that he bought one acre from the defendant through the defendant's agent.

During the hearing, the applicant was put in the dock and adopted his statement which he had recorded and which had been filed. He also relied on the documents filed. One of the documents which he relied on was sale agreement dated 30.12.2008. Clause (2) of the said agreement read as follows:-

“ Kshs.220,000/= has already been paid to the vendor through the vendor's

account at Co-operative Bank. See attached photocopy of banking slip and receipt whereof the vendor hereby specifically acknowledges in full and final settlement through his agent Ben Simiyu.”

5. The main reason why the applicant's claim did not succeed is because it was being alleged that Kshs.220,000/= had been deposited into the defendant's account at Co-operative Bank. The said bank in slip was not attached as stated in the agreement. The court could not therefore be sure whether this amount was paid into the defendant's account or not. Mere acknowledgement on the agreement was not enough. The applicant had to produce the banking in slip. He says he did not produce the banking slip because he thought it was not necessary as the payment had been acknowledged in the agreement.

6. The applicant has now produced a copy of the banking in slip which shows that the purchase price was deposited by him into the defendant's account at Co-operative Bank Nyahururu Branch. The deposit was made at Kitale where the agreement was also prepared. I am now convinced that the applicant indeed paid the purchase price into the account of the defendant. The applicant has given sufficient ground for review of the judgment. I hereby review my judgment of 29.1.2015 dismissing the second defendant's claim and replacing it with an order allowing the second defendant's claim against the defendant with costs.

It is so ordered.

Dated, Signed and delivered at Kitale on this 19th Day of May 2015.

E. OBAGA

JUDGE

In the presence of M/S Shilwatso for Mr. Kiboi for 2nd Plaintiff. Court Clerk - Isabellah

E. OBAGA

JUDGE

19.5.2015