REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.381 0F 2018

(FORMERLY NAIROBI ELC NO.851 OF 2012)

KIGWE LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

NJEWAR ACADEMY.....DEFENDANT/APPLICANT

RULING

The Defendant/Applicant ***Njewar Academy*** filed this ***Notice of Motion*** dated ***10th August 2016***, anchored under ***Order 45 Rule 1(b), Order 9, Rule 9, Order 51 Rule 1*** of the ***Civil Procedure Rules***, ***Sections 1A, 1B, 3A and 63(e)*** of the ***Civil Procedure Act*** and the inherent jurisdiction of the court and sought for the following orders:-

1) That leave be granted to the Law Firm of Echessa & Bwire Advocates to come on record and act for the Defendant herein instead of Messrs Mugo Moses & Company Advocates.

2) That the Honourable Court be pleased to grant an Order of temporary Stay of Execution of the Judgment and Decree of the court of 26th September 2014, and All consequential proceedings issued pending the inter partes hearing of this application.

3) That the Honourable Court be pleased to Review its Ruling, Order and Decree of 26th September 2014, by setting aside the said Ruling and re-instating the Defendant's Defence and Counter-claim.

4) That the Honourable Court be pleased to grant any other reliefs in the interests of justice.

5) That the cost of this application be provided for.

The application is based on the following grounds;-

a) The instant application is a further application for Review of the Ruling and summary Judgment of the Honourable court issued on 26th September 2014, on the ground of sufficient cause.

b) As it is the Defendant having duly purchased the land constructed several structures on the property which were used as a school. The structures still stand on the suit premises, and unless the Honourable Court issues an Order Staying the Summary Judgment as prayed, these structures shall be demolished at egregious expense to the Defendant, and even if the application for Review is then granted, the loss occasioned shall be in-compensable.

c) The Defendant was not fully heard and or produced his evidence as guaranteed by the right to fair trial and fair administrative action. This was however not a mistake on the part of the court, but the advocates on record for the Defendant, who failed to produce the exhibits in issue. The Judgment sought to be reviewed therefore is a result of mistake of Counsel, which we plead should not be visited upon the Defendant.

d) Given occasion and if the documents sought to be demonstrated are viewed by the Honourable Court, the Ruling and Judgment of the Court of 26th September 2014, shall be reviewed without much, for the documents powerfully speak for themselves, and they shall show that the Principal Director of the Plaintiff, Christopher Kigwe has perjured himself in this court, has defrauded the Honourable Court, the Ruling and Judgment of the Court were obtained by suppressing material facts by the Plaintiff and the Plaintiff has successfully defrauded the court in to unjust enrichment.

e) The Honourable Court has a duty to listen to the Applicant in the matter since by this application has been brought to the attention of the Court that the Plaintiff defrauded the court to obtain relief. If the court closes its eyes to the present matter, then the court shall freely be allowing judicial process to be used to further fraud and gross illegality.

f) It is in the interests of justice to at very least in the meantime offer a Stay or even Order of status quo pending inter partes hearing.

g) It is in the interests of justice to grant the reliefs in this application.

The application is also further supported by the ***Affidavit*** of ***Godfrey MCN Ngugi,*** who averred that he is a proprietor of the Defendant/Applicant herein. Further that the Court on ***26th September 2014,*** issued an Order striking out the Defendant's Defence and Counter-claim and ordered vacant possession in favour of the Plaintiff herein. Further that the Defendant filed an application for review through its former Advocate ***Mugo Wairimu & Co. Advocates*** on ***4th February 2015,*** and the court delivered its ***Ruling*** on ***15th February 2016***. However the Applicant's said advocate failed to interprete the said ***Ruling*** to the Applicant herein. The Applicant only learnt in ***May 2016,*** that the said application for review had been dismissed on various grounds among them, failure to obtain the ***Land Control Board Consent*** for the transaction.

That the Applicant sought the services of another advocate after understanding the impact of the said ***Ruling***. It was his contention that the Defendant/Applicant has shown diligence and interest since the filing of this suit in ***2012,*** and he urged the Court to review its ***Ruling*** and ***Order*** that struck out the Defendant's/Applicant's Defence and Counter-claim. It was his contention that his outgoing advocate failed to furnish to the court the relevant evidence and that was a gross mistake on the part of the advocate and the same should not be visited on the Applicant who is a diligent litigant. He averred that if the said mistake is visited on the Applicant, it will prejudice its quest for justice and the Court was urged to allow the application.

The instant application is vehemently opposed by the Plaintiff/Respondent, who filed a ***Replying Affidavit*** through ***Christopher Kangethe,*** a Director of the Plaintiff/Respondent herein who averred that the Defendant's/Applicant's application is ***misconceived, unmeritorious, frivolous, vexatious*** and brought in ***bad faith***. It was his contention that his advocate has advised him that this application is an abuse of the court process as the Defendant/Applicant had filed a similar application dated ***4th February 2015,*** which raised similar issues as the present application. That the said application was determined through a ***Ruling*** delivered on ***17th March 2016***. Therefore the application herein is *Resjudicata* and the court lack requisite jurisdiction to sit on an Appeal against its own Judgment and decision.

Further that the court is *functus officio* having entered ***Judgment*** on ***26th September 2014,*** and having concluded the matter herein, and therefore, the only remedy available is an Appeal. Again that the application falls between the Statutory requirements for review under ***Order 45 Rules 1,2*** and ***3*** which requires that there should be discovery of new and important matters or evidence, mistakes or an error apparent on the face of record.

Further that the subject parcel of land is no longer in possession of ***Kigwe Ltd*** as it was donated a year ago to ***"Jesus Winner Ministry Church"*** for their ***Orphans Program*** and the said Church has taken possession of the subject land parcel and it is not party to the present proceedings and no adversonal orders should be made against a party not in the suit.

It was also contended that the Applicant has taken two years to file the instant application and therefore the application lacks merit,

is an abuse of the court process and should be dismissed with costs. The Respondent urged the Court to dismiss the instant application with costs.

The application was canvassed by way of written submissions which this court has carefully read and considered. The Court too has considered the whole pleadings and the exhibits thereto. Further the Court has considered the relevant provisions of law and the cited authorities and it makes the following findings;-

There is no doubt that on ***26th September 2014***, the Court (Mutungi J) delivered a ***Ruling*** wherein the court allowed the Plaintiff's ***Notice of Motion*** dated ***12th November 2013*** and ordered that the Defendant's Defence and Counter-claim be struck out with costs to the Plaintiff. Further the Court entered ***Judgement*** for the Plaintiff against the Defendant and directed the Defendant to vacate and deliver vacant possession of ***LR.No.10823/5 Juja***, the suit property. The said vacation was to take effect on or before ***31st December 2014,*** and failure of which the Plaintiff was at liberty to apply for eviction Order.

There is no doubt that subsequently thereto, the Defendant filed a ***Notice of Motion*** dated ***4th February 2015,*** and sought for review of the Order made on ***26th September 2014,*** and also sought for setting aside of the said ***Ruling*** and ***Stay of the Execution*** of the ***Ruling*** made on ***26th September 2014.***

Again the Court considered the said application and dismissed it for being incompetent and for lack of merit with costs to the Plaintiff herein. The said ***Ruling*** was delivered on ***17th March 2016***.

It was against the above background that the Defendant/Applicant filed the instant application seeking for temporary ***Stay of Execution*** of the ***Judgment*** entered on ***26th September 2014,*** and Review of the said ***Ruling, Order*** and ***Decree*** of ***2014*** and setting aside the said ***Ruling*** and reinstating the Defendant's ***Defence*** and ***Counter-claim***.

Prayer No.2 was allowed by consent of both advocates and therefore the ***Law Firm of Echessa & Bwire Advocates*** were granted Leave to come on record for the Defendant/Applicant herein instead of ***Mugo Moses & Co. Advocates.***

Further ***Prayer No.3*** was seeking for temporary ***Stay of Execution*** of ***Judgment*** and ***Decree*** of the Court of ***26th September 2014*** and all consequential proceedings pending the interparties hearing of this application. The application was canvassed by way of written submissions and is being determined vide this ***Ruling***.

Therefore this prayer has been spent and the Court will not determine whether to grant or not to grant temporary ***Stay of Execution*** of the ***Judgment*** and ***Decree*** of ***26th September 2014***.

The remaining ***prayer is No.4*** for review of the ***Ruling, Order*** and ***Decree*** of ***26th September 2014***, by setting it aside and by reinstating the Defendant's ***Defence*** and ***Counter-claim.***

The said application is anchored under ***Order 45 Rule 1(b)*** of the ***Civil Procedure Rules*** which provides:-

"Any person considering himself aggrieved—

(a) ……

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

It is apparent from the above provisions of law that for an Applicant to succeed in an application for review, he needs to establish:-

a) 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.

b) Existence of some mistake or error apparent on the face of record.

c) Any other sufficient reason.

d) Application be made without unreasonable delay.

The Plaintiff/Respondent has opposed the instant application on the grounds that it is an abuse of the court process as the same application for review was determined by the court on ***15th February 2016***. Further that the application is *Resjudicata* and that the Applicant is attempting to have a ***'second bite at the cherry'*** and asking the court to sit on its own Appeal.

The Court has considered the relevant provisions of law and indeed ***Order 45 Rule 6*** of the ***Civil Procedure Rules*** provides that:-

"Application to review an Order made on an application for review of a Decree or Order passed or made on review shall not be entertained".

From the above provisions of law, no application can be made for review of an Order made in an application for review. The Applicant has alleged that the application herein is for review of the initial ***Judgment*** made on ***26th September 2016***.

However, the Court did deal with an application for review and settings aside of the said ***Decree*** and ***Order*** and dismissed the said application on ***15th February 2016***.

By asking this Court to review the said ***Ruling, Order*** and ***Decree***, the Applicant is asking the Court to sit on its Appeal which is a scenario not allowed in law.

Once the Court issued its ***Ruling*** on ***15th February 2015***, it became *functus officio* and the Court cannot re-open the said matter. See the case of ***Akithii Ranching (Director Agricultural) Co. Ltd…Vs…District Land Adjudication & Settlement Officer-Tigania District & 2 Others (2014),*** where the Court held that:-

"…once a court has made its final decision it has no jurisdiction to re-open the suit upon which its decision was made."

The Court made a decision on ***26th September 2014*** and declined an application for review by its ***Ruling*** of ***15th February 2016***. Therefore the only option that the Defendant/Applicant had herein was to Appeal against the said ***Ruling*** and/or ***Judgment*** of ***26th September 2014*** and not to seek a second application for review of the said ***Ruling***.

The Court having ruled on the issue of review of its ***Ruling*** of ***26th September 2014***, and declined the same, filing the instant application which is seeking similar Orders goes against the spirit of ***Section 7*** of the ***Civil Procedure Act***, which provides:-

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court".

See the case of ***Uhuru Highway Development Ltd…Vs…Central Bank of Kenya & 2 Others C.A No.36 of 1996***, where the Court held that:-

"There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for re-hearing…."

Equally in this matter, the Court finds that the court did decide an application for review and disallowed it. The Applicant has sought to review the same same Ruling and/or Order that it had sought to be reviewed. The second application is *Resjudicata* and the Court finds that the instant application is an ***abuse*** of the court process, ***frivolous*** and ***vexatious***. The Defendant/Applicant should have lodged an Appeal either against the ***Ruling*** of ***26th September 2014*** or the one of ***15th February 2016*** delivered on ***17th March 2016***, instead of filing the Instant application.

For the above reasons, the ***Court finds that the instant application is not merited and consequently the Court disallows the said application dated 10th August 2016 entirely with costs to the Plaintiff/Respondent***.

It is so ordered.

Dated, Signed **and** ***Delivered*** **at** ***Thika*** **this** ***19th*** **day of** ***December 2018*****.**

L. GACHERU

JUDGE

19/12/2018

In the presence of

Mr. Webo holding brief for Odour for the Defendant/Applicant

Mr. Mungai holding brief for M/S Githii for the Plaintiff/Respondent

Lucy - Court Assistant

Court – Ruling read in open court in the presence of the stated advocates.

L. GACHERU

JUDGE

19/12/2018