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| Case Number: | Environment and Land Case 51 of 2003 |
| Date Delivered: | 25 Nov 2021 |
| Case Class: | Civil |
| Court: | Environment and Land Court at Kericho |
| Case Action: | Ruling |
| Judge: | Mary Clausina Oundo |
| Citation: | William K Too v Simion K Langat [2021] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Environment and Land |
| History Magistrates: | - |
| County: | Kericho |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Application dismissed with costs |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ELC NO. 51 OF 2003**

**WILLIAM K. TOO.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**SIMION K. LANGAT.....DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff/Applicant herein filed the present application by way of a Notice of Motion dated the 26th October 2020 pursuant to the provisions of Section 1A, 1B, 3, 3A & 63 (e) of the Civil Procedure Act and Section 3, 19 (1), (2) & 3 (f) of the Environment and Land Court Act, Gazette Practice Directions and Enabling Regulations under the laws of Kenya, seeking that the Court's judgment of 3rd November 2006 be declared un-executable and thus be set aside and/or in the alternative, the same be declared as a judgment in vacuo.

2. The application was supported by the grounds therein as well as by a supporting affidavit of the Plaintiff/Applicant herein dated the 26th October 2020.

3. Upon service of the said application, there was no response from the Defendant but instead the firm of M/s E. M Orina & Co Advocates filed a Notice of appointment of advocates dated the 8th March 2021.

4. On the 28th July 2021, the court directed for the application be canvassed by way of written submissions, wherein the Defendant/ Respondent herein filed their submissions on 19th October 2021 irrespective of the fact that they had not responded to the application in that there was no replying affidavit.

5. There were no submissions filed by the Plaintiff/Applicant.

**Determination.**

6. I note that the present application has been brought under the provisions of Section 1A & 1B, 3 & 3A of the Civil Procedure Act, provisions which do not give this Court jurisdiction to grant the prayers sought.

7. Indeed in the case of **Mumias Out growers Company (1998) Ltd vs Mumias Sugar Company Ltd NRB HCCC No. 414 of 2008** the court held that:

'The Applicants has invoked the inherent jurisdiction of this court. I have always known the law to be that the inherent power of the court cannot be invoked where the rules have provided for the procedure to be followed'.

8. Bosire J (as he then was) in the case of **Muchiri vs Attorney General & 3 Others (1991) KLR 516** stated at page 530 that:-

"Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be anchored, or where the invocation of rules of procedure will work an injustice."

9. Also in **Halburys Laws of England 5th edition Vol. II, 2009 paragraph 15**, it was observed that:-

"… a claim should be dealt with in accordance with the rules of the court and not by exercising the court's inherent jurisdiction……...and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary. Where it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexations or oppression to do justice between the parties and to secure a fair trial between them."

10. Secondly, it is trite that a Replying Affidavit is the principal document that sets out a Respondent's reply and the basis of any submissions and/or list of Authorities that may be subsequently filed. Absence of this foundational pleading, the Replying Affidavit, it follows then that even the Written Submissions purportedly filed by the Respondent on 19th October 2021 are of no effect. The Court will be excused therefore for deeming that the application as unopposed. See the SCK in its holding in **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others [2018] eKLR**

11. Be that as it may, as a court of Law, I have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of cause grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, that the application is meritorious and the prayers may be granted.

12. I have considered the application herein as well as the impugned judgment and the fact that the Applicant seeks that the same be set aside for what he terms as being un-executable. The applicant seeks that in the alternative, the judgment be declared as a judgment in vacuo.

13. The impugned judgment was delivered on the 3rd November 2006 and its subsequent decree issued on the 27th December 2006. In the said judgment, after the having dismissed the Plaintiff's suit, the court had ordered the Defendant to refund the purchase price of Ksh. 11,500/- with 14% interest per annum, from the date the said amount was paid.

14. The Applicant's reason as to why he now seeks that the judgment be set aside was because the suit parcel No. Kericho/Kapsuer/4048 was nonexistent. I find that the application herein seeks to challenge the judgment of the court despite there having been neither an Appeal nor an application for Review filed against the judgment.

15. The applicable law for setting aside a judgment or decree of the court is found in Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. 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 judgment to the court which passed the decree or made the order, *and the court may make such order thereon as it thinks fit."*

16. Order 45 Rule 1 of the Civil Procedure Rules on the other hand elaborates on the grounds on which a judgment or decree can be set aside, as follows:

" (1) Any person considering himself aggrieved—

c. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

d. 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."

17. If the Applicant was desirous to have the judgment set aside, the proper cause was either to make an application for the Review of the judgment or to Appeal against the decision. The Applicant did neither. The case was heard inter-parties. The Applicant was heard extensively before the court then entered its Judgment herein. There is no law invoked which allows for a judgment entered after a full trial to be set aside in the manner suggested by the Applicant. I find that the Applicant herein seeks that this court sits on its own Appeal which is a jurisdictional impediment and which renders the application a non-starter. I therefore proceed to dismiss the Application dated the 26th October 2020 with costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 25TH DAY OF NOVEMBER, 2021**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**