REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 573 OF 2006

MWAURA WANG'OMBE.....................1ST PLAINTIFF/APPLICANT

VERONICA GATHIKA MWAURA....2ND PLAINTIFF/APPLICANT

-VERSUS-

JAMES MUITE RUGUYA...1ST DEFENDANT

SAMUEL NDUNG'U GATHOGA............................2ND DEFENDANT

MARY WAMBUI NJUGUNA...................................3RD DEFENDANT

MOSES MUIGAI RUGUYA....................................4TH DEFENDANT

JOSEPH TURU NGURE...5TH DEFENDANT

RULING

1. The 1st and 2nd plaintiffs/applicants took out the Notice of Motion dated 4th March, 2019 supported by the grounds laid out in its body and the facts stated in the affidavit of the 1st applicant. The applicants sought for the substantive order for a review and varying of the judgment delivered by this court on 20th December, 2017.

2. The defendants did not file any response to the Motion despite there being evidence of service of the Motion upon the advocate for the defendants.

3. The Motion was dispensed with by written submissions which the applicants jointly filed jointly.

4. I have considered the grounds set out on the face of the Motion; the facts deponed in the affidavit filed in support of the Motion; and the written submissions of the applicants together with the authorities cited therein.

5. A brief background of the matter is that the applicants instituted the suit against the defendants by way of the Originating Summons dated 16th May, 2006 and amended on 22nd December, 2011 and sought *inter alia*, for an order for dissolution of Gitangu Men and Women Self Help Group ("the partnership"); an order for the consequent winding up of the partnership; and an order directing the defendants to pay to the applicants their dues commensurate to their shareholding as at the time of winding up of the partnership.

6. The Originating Summons was opposed by the defendants by way of a replying affidavit sworn by the 1st defendant, to which the applicants rejoined with the supplementary affidavit of the 1st applicant.

7. The Originating Summons proceeded for hearing *ex parte*, with the 1st applicant giving evidence as the sole witness for the plaintiffs' case.

8. Upon close of the *ex parte* hearing, this court found that whereas a partnership existed between the parties, the circumstances surrounding the dismissal of the applicants from the partnership by the defendants had not been clearly brought out and hence the applicants had not

proved their case to the required standard. Consequently, this court dismissed the applicants' Originating Summons vide the judgment delivered on 20th December, 2017.

9. It is clear from the instant Motion that the applicant now seeks to have this court review and vary the aforesaid judgment.

10. The applicable provisions in addressing the question of review are encapsulated under **Order 45, Rule 1(1)** of the **Civil Procedure Rules, 2010** and are reaffirmed under **Section 80** of the **Civil Procedure Act Cap. 21 Laws of Kenya**, thus:

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

11. From the foregoing provisions, in particular **Order 45, Rule 1(1)** (supra), the following are the principles/grounds upon which an order for review can be granted:

a. the discovery of new and important matter or evidence, or

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

c. any other sufficient reason.

12. On the subject of whether there is unreasonable delay, the 1st applicant states in his supporting affidavit that following delivery of the judgment, the court file went missing, thereby prompting the applicants' advocate to lodge a complaint with the Chief Justice and hence the delay in bringing the instant Motion.

13. The foregoing was echoed in the submissions by the applicants.

14. Upon my perusal of the correspondences annexed to the Motion, I considered a copy of the letter dated 28th June, 2018 addressed to the 1st applicant by the Assistant Registrar in the Office of the Chief Justice, informing him of the availability of the court file at the registry. It is apparent that the letter was in response to the letter dated 17th April, 2018, though no copy of the same has been availed to this court.

15. I also looked at a copy of the letter dated 17th January, 2018 and received on 23rd January, 2018 from the applicants' advocate to the Deputy Registrar, requesting for certified copies of the judgment. There is nothing to indicate a response to the letter by the Deputy Registrar.

16. It is clear that the instant Motion was filed close to two (2) years from the date of delivery of the judgment in the matter. In my view, while there has clearly been a delay in bringing the Motion, upon considering the plausible explanation given by the applicants to explain the delay, I do not think that the delay is unreasonable.

17. On the merits of the Motion, it is clear that the applicants are seeking an order for review of the aforementioned judgment on the grounds that there is an error apparent on the face of the record and upon the discovery of new and important evidence.

18. Under the principle of *apparent error*, the 1st applicant states in his affidavit that upon delivery of the judgment, the applicants' current advocate discovered an error apparent on the face of the record in that this court reasoned in its judgment that the parties herein ought to have produced the partnership by-laws to shed light on the procedure and grounds for dismissal but did not; and yet the applicants had in fact produced the by-laws in the supporting affidavit sworn by the 1st applicant.

19. In their written submissions, the applicants argue that the error being referred to is a patent error which does not require elaborate arguments to prove. They referred this court to the case of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** where the court borrowed from the following reasoning in the case of **Levi Outa v Uganda Transport Company, 1999 HCB 340**:

> **"mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment."**

20. From the foregoing, it is clear that an error apparent on the face of the record must be a self-evident error which need not require elaborate arguments to support it.

21. In addition to the above-cited case, I make reference to the case of **National Bank of Kenya Ltd v Ndungu Njau** in which the Court of Appeal pronounced itself thus:

> **"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.**

22. Upon my perusal of the record and proceedings, I note that whereas the applicants annexed some documents to the supporting affidavit of the 1st applicant to Originating Summons, none of those documents were produced as exhibits. The by-laws purportedly annexed to the affidavit were incomplete.

23. Further to the foregoing, the documents constituted in the applicants' list and bundle of documents dated 10th November, 2009 which were produced as exhibits at the hearing do not include the by-laws of the partnership.

24. It is therefore apparent that the purported by-laws were never produced as exhibits or tendered as evidence and hence this court had no basis on which to consider them. In so finding, I associate myself with the following rendition by the Court of Appeal in the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR:**

> **"How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case…If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account."**

25. For all the foregoing reasons, I am not convinced that there is an error/omission apparent on the face of the record which would necessitate a review of the judgment.

26. This brings me to the second principle touching on *new and important evidence*. In his supporting affidavit, the 1st applicant avers that by the time judgment was delivered, he could not have produced some of the documents he had since they were written in vernacular (Kikuyu to be specific), namely: a complete copy of the English translation of the by-laws of the partnership; the letter dated 5th January, 2009 from the partnership to the then Community Development Assistant Githunguri Office; and minutes for a meeting held on 9th April, 2003 by officials and members of the partnership.

27. The 1st applicant states that had the above documents been placed before this court at the time of writing its judgment, it would have arrived at a different finding on the suit.

28. In their submissions, the applicants contend that the above documents qualify as new and important evidence within the definition of **Mulla the Code of Civil Procedure 16th Edition** that:

> **"When a review I sought on the ground of the discovery of new evidence, the evidence must be relevant and of such character that if it had been given in the suit it might possibly have altered the judgment."**

29. According to the applicants, the abovementioned documents would have supported their argument that they had been unlawfully dismissed from the partnership and without good reason, in contravention of the by-laws, and would therefore have been credible in persuading this court to find in favour of the applicants.

30. My consideration of the above arguments begs the question:

> "What constitutes new and important evidence?" An answer to this question can be found in the case of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** relied upon by the applicants, and where the court stated the following:

> **"For material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court."**

31. The court further borrowed from the following reasoning by the Supreme Court of India in the case of **Ajit Kumar Rath v State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608**:

> **"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.”

32. From my perusal of the documents being referred to by the applicants and upon my consideration of the arguments brought forth in that respect, I am not convinced that the documents in question constitute new and important evidence that the applicants had no knowledge of or could not have produced in the course of the hearing.

33. Going by the record, there is no indication by the applicants that they experienced any particular difficulties in obtaining the said documents or having them translated into English before this court heard the matter and delivered its judgment on the same.

34. The long and short of it, is that I am not convinced that the documents in question qualify as ‘new and important evidence’ so as to warrant a review of my judgment on that ground or on any other ground(s) relied upon by the applicants.

35. The upshot is the Motion has no merit hence the same is dismissed with no order on costs.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 8th day of January, 2021.

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J. K. SERGON

JUDGE

In the presence of:

………………………………. for the 1st and 2nd Plaintiffs/Applicants

………………………………. for the 1st to 5th Defendants