Mutiso v Mwinzi & another (Environment & Land Case 394 of 2014) [2023] KEELC 18011 (KLR) (16 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18011 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 394 OF 2014

JO MBOYA, J

JUNE 16, 2023

BETWEEN

JONATHAN NZIOKA MUTISO .... PLAINTIFF

AND

NZUKI MWINZI .... 1ST DEFENDANT

KENYA NATIONAL ASSURANCE COMPANY (2001) LTD .... 2ND DEFENDANT

RULING

1. Vide amended Notice of Motion Application dated the 20th February 2023, the 1st Defendant/ Applicant has approached the Honorable court seeking for the following reliefs;

   i. Stay of execution of the Consent Order issued on the 23rd day of January,2023; pending the hearing and determination of the above Application.

   ii. A stay of execution of the Judgment dated 26th February,2020; and the Decree dated 7th November,2022 pending the hearing and determination of the above application.

   iii. A Temporary Injunction to restrain the 2nd Defendant/Respondent its agents, auctioneers, employees, assignees and/or servants from trespassing, selling, transferring, leasing, charging and/or dealing in any manner whatsoever with the suit premises namely, TitleNo. Nairobi/Block82/100 belonging to the applicant herein pending the hearing and determination of this application.

iv. That the Consent order dated 23rd January, 2023; and the Judgment dated 26th February,2020 and the decree dated November, 2022 Be Reviewed, Varied And/Or Set Aside.

2. The instant application is premised and anchored on a plethora of grounds contained on a total of Five (5) pages and wherein the Applicant has alluded to several albeit numerous complaints. Further, the instant application is supported by the affidavit of the Applicant sworn on the 20th February 2023; and in respect of which the Applicant has regurgitated the contents of the Grounds at the foot of the Application.

3. Upon being served with the amended Application, the 2nd Defendant/Respondent filed a Replying affidavit sworn on the 13th March 2023, and in respect of which the 2nd Respondent has disputed and contested the claims adverted to at the foot of the Application.

4. Furthermore, the instant application came up for hearing on the 16th March 2023; on which date the Parties herein agreed to canvas and dispose of the Application by way of written submissions.

5. Consequently and with the concurrence of the Parties, the Honourable court proceeded to and circumscribed the timeline for the filing and exchange of the written submissions.

6. For good measure, the 1st Defendant proceeded to and filed written submissions dated the 26th May 2023; whereas the 2nd Defendant filed written submissions dated the 22nd May 2023. Instructively, both sets of written submissions forms part of the record of the Honourable court.

Submissions By The Parties

a. Applicant's Submissions:

7. The Applicant herein filed written submissions dated the 26th May 2023; and in respect of which same has raised, highlighted and canvassed a total of six issues for due consideration and determination by the Honourable court.

8. First and foremost, the Applicant herein has contended that there was an error and/or mistake apparent on the face of record relating to and concerning the Consent order entered into and endorsed by the court on the 23rd January 2023.

9. In addition, the Applicant herein contends that even though same proceeded to and entered into the consent which disposed of the Application dated the 19th December 2023; there was an error which ought to negate and/or vitiate the said consent.

10. Furthermore, the Applicant contends that prior to the entry into and endorsement of the consent order on the 18th January 2023, same had filed a Replying affidavit and in respect of which same raised serious and pertinent issues. In this regard, it has been contended that the Applicant herein did not anticipate and/or envisage that same would enter into such a consent.

11. Secondly, the Applicant herein has contended that the Environment and Land court was not seized and/or possessed of the requisite Jurisdiction to adjudicate and entertain upon the subject dispute.

12. For good measure, the Applicant herein contends that the issue at hand touched and/or concerned the Exercise of Statutory Power of sale by the 2nd Defendant/Respondent; and hence such an issue ought to be canvassed and adjudicated upon by the High court and not otherwise.

13. Additionally, the Applicant has submitted that Jurisdiction of a court is so critical and paramount, so much so that where a court is not possessed of the requisite Jurisdiction, then the court cannot venture and entertain the impugned proceedings.

14. In view of the foregoing, the Applicant herein has therefore invited this Honourable court to find and hold that the Judgment which was delivered by this court (differently constituted on the 26th February 2020) was rendered by a court without the requisite Jurisdiction and is therefore a nullity.

15. Thirdly, the Applicant has submitted that even if Jurisdiction was overlooked and or not considered by the court at the time when the Judgment was rendered, it is still imperative to reconsider the question and where appropriate to vacate the Judgment.

16. Fourthly, the Applicant herein has submitted that whereas the Plaintiff and the 2nd Defendants were afforded an opportunity to be heard by the trial court, same was however denied and deprived of the requisite opportunity to be heard. In particular, the Applicant herein contends that same sought for and/or applied for an adjournment during the trial to enable him to go and prepare for his Defense case, but the Application for adjournment was declined.

17. Furthermore, the Applicant has contended that arising from the failure and/or refusal to grant the adjournment; same was therefore deprived of the opportunity to ventilate his case and place before the honorable court evidence that would have supported his claim.

18. Consequently and in the premises, the Applicant herein submits that the Judgment which was rendered by this court, albeit differently constituted, on the 26th February 2020, was therefore arrived at in contravention of the Rule of Natural Justice; and the Right to Fair Hearing as entrenched in Article 50(1) of *the Constitution* 2010.

19. Fifthly, the Applicant has submitted that same has placed before the Honorable court cogent, credible and plausible reasons to warrant the grant of an order of temporary injunction. In this regard, the Applicant contends that same has a prima facie case, which ought to be canvassed and ventilated during a primary hearing.

20. Sixthly, the Applicant has further submitted that same is entitled to an order of stay of execution of the decree of the court which was issued on the 26th February 2020. In this regard, the Applicant has cited several provisions of the law as well as decided case law, touching on and/or concerning the circumstances under which an order of stay of execution can issue.

21. Lastly, the Applicant herein has contended that the amount of money at the foot of the counterclaim on behalf of the 2nd Respondent is contrary to and in violation of the Rule in in duplum. In this regard, the Applicant has cited and relied on Section 44A of the *Banking Act*.

22. In support of the various submissions which have been reproduced hereinbefore, the Applicant cited and relied on various decisions inter-alia Joseph Muthii Kamau & Another v David Mwangi Gichure, Raila Amolo Odinga & Another v IEBC & 2 Others [2017]eKLR, Kenya Hotels Ltd v Oriental Commercial Bank Ltd (formerly known as Delphis Bank Ltd) [2019]eKLR, Lee Muthoga v Habib Zurich Finance (K) Ltd & Another [2016]eKLR, Mwambeja Ranching Company Ltd v Kenya National Capital Corportation Ltd [2019]eKLR, Pius Kimaiyo Langat v Co-oporative Bank of Kenya [2017]eKLR, Mrao Ltd v First American Bank Ltd & 2 Others [2003]eKLR, Fortune House Ltd v Business Partner International Ltd & Another [2021]eKLR and Butt v Rent Restriction Tribunal [1979]eKLR, respectively.

b. Respondent's Submissions:

23. Learned counsel for the 2nd Respondent filed written submission dated the 27th May 2023; and in respect of which same has similarly raised various issues. Firstly, Learned counsel for the Respondent has submitted that the consent order which was recorded and endorsed by the court on the 18th January 2023, was recorded with the full knowledge, participation and/or involvement of the Applicant herein.

24. Furthermore, Learned counsel for the Respondent has submitted that prior to entry into and endorsement of the consent, both the Applicant and the counsel for the Respondent addressed the Honourable court extensively culminating into a truce being entered into and thus culminating into the consent now sought to be impugned.

25. In addition, Learned counsel for the Respondent has submitted that at the time of entry into and endorsement of the consent, the Applicant herein was conscientious and knowledgeable of the consequences and the repercussions attendant to breach and/or violation of the terms of the consent.

26. Secondly, Learned counsel for the Respondent has submitted that the Applicant herein is not entitled to setting aside of the Judgment which was rendered by the court on the 26th February 2020, insofar as the said Judgment was an inter-partes Judgment which was taken and/or arrived at after a plenary hearing and wherein all the Parties, the Applicant not excepted, participated inn.

27. Thirdly, Learned counsel for the Respondent has submitted that the claim by and on behalf of the Applicant herein that same has a defense on merits, which raises triable issues, is erroneous and misconceived.

28. In any event, Learned counsel for the Respondent has submitted that the Applicant herein was duly served with the counterclaim by and on behalf of the 2nd Defendant/Respondent and same was therefore knowledgeable of the claims contained and alluded to at the foot of the said counterclaim.

29. Furthermore, Learned counsel has added that the issues raised at the foot of the counterclaim by the Respondent were also part of the issues that were canvassed by the Learned Judge of the High court culminating into the ruling wherein an order of temporary injunction was rendered in favor of the Plaintiff and the Applicant herein.

30. Fourthly, Learned counsel for the Respondent has also submitted that the Applicant herein is not entitled to an order of Temporary injunction, either as sought or at all. Instructively, Learned counsel for the Respondent has submitted that the Applicant herein had hitherto been granted an order of Temporary injunction at the foot of the ruling rendered on the 20th September 2011, but which order of injunction stood extinguished and discharged upon the dismissal of the Suit by both the Plaintiff and the Applicant herein.

31. To the extent that the Applicant had been granted an order of Temporary injunction, Learned Counsel for the 2nd Respondent has submitted that this Honorable court is divested of the Jurisdiction to grant any further orders of temporary injunction, either as sought or otherwise.

32. Fifthly, Learned counsel for the Respondent has further submitted that the Judgment which was rendered on the 26th February 2020; was a culmination of a plenary hearing which involved all the Parties to the subject dispute. In this regard, Learned counsel for the Respondent has submitted that the impugned Judgment does not therefore lend itself to setting aside and/or variation in the manner alluded to by the Applicant.

33. Finally, Learned counsel for the Respondent has submitted that the Applicant herein has been knowledgeable of the terms and tenor of the Judgment of the court, but same has never sought to

challenge and/or impugn the said Judgment. In any event, Learned counsel has added that the current application has been mounted with unreasonable and/or inordinate delay.

34. Learned counsel has submitted that the Applicant herein is only intent on playing Lottery with the Due process of the Honourable court and seeking to obstruct, delay and/or otherwise to defat recoveries of the money at the foot of the counterclaim; and by extension the exercise of the Statutory Powers of sale by the Respondent.

35. In support of the foregoing submissions, Learned counsel for the Respondent has cited and relied on, inter-alia, the case of Kenya Commercial Bank Ltd versus Specialized Engineering Company Ltd [1982]eKLR, National Bank of Kenya Ltd v Ndungu Njau [1997]eKLR, Tiras Karanja Ngatha v Silas Gachugu Ngagi & Another [2017]eKLR, James Kanyita Nderitu & Another v Marions Philotas Ghikas & Another [2016]eKLR, Jimmy Mutuku Kiambo vwersus Nation Media Group Ltd & 2 Others [2020]eKLR and Vijay Morjaria versus Nansigh Madhusingh Darbar & Another [2002]eKLR, respectively.

Issues for Determination

36. Having reviewed the amended Notice of Motion dated the 20th February 2023; together with the Supporting affidavit thereto and having taken into account the Response thereto and upon considering the lengthy written submissions filed on behalf of the respective Parties, the following issues do arise and are thus worthy of determination.

   i. Whether the Consent entered into and recorded on the 18th of January 2023; is capable of being Review and/or varied in the manner sought by the Applicant.

   ii. Whether the Judgment of the court rendered on the 26th February 2020; can be Reviewed in the manner sought by the Applicant.

   iii. Whether the Honorable court is seized and possessed of the requisite Jurisdiction to grant an order of Temporary Injunction either as sought or at all.

   iv. Whether the instant Application has been mounted timeously and with Due promptitude and if not; whether the Application has been defeated by the Doctrine of Latches.

Analysis andDetermination

Issue Number 1. Whether the Consent entered into and recorded on the 23rd of January 2023 is capable of being Review and/or varied in the manner sought by the Applicant.

37. Before venturing to canvass and address the issue herein, it is worthy to recall and reiterate that the honorable court (differently constituted) entertained and thereafter rendered a Judgment in respect of the subject matter wherein the claims by the Plaintiff and the 1st Defendant/Applicant herein were dismissed.

38. On the other hand, the Honorable court proceeded to and entered Judgment in favor of the Respondent and wherein, the endeavor by the Respondent to alienate and/or dispose of the suit property was given greenlight.

39. Arising from the Judgment and decree issued by the Honorable court, the 2nd Defendant/Respondent commenced the process of exercising her statutory powers of sale and thereafter sought to undertake a statutory valuation in accordance with the provisions of Section 97 of The *Land Act*, 2012.

40. Nevertheless, the attempt by the Respondent to access the suit property with a view to undertaking statutory valuation was defeated by the Applicant, who instructed the occupants of the suit property not to allow any ingress by agents of the Respondent.

41. Following the difficulties that the 2nd Respondent herein met in accessing the suit premises and carrying out the statutory valuation, the Respondent approached the Honorable court vide application dated the 19th December 2022; and in respect of which same sought the assistance of the Honourable court to facilitate ingress into the suit property for purposes of undertaking statutory valuation.

42. Instructively, the said Application came up for hearing on the 18TH January 2023 and wherein both the current Applicant and the Learned counsel for the Respondent were present. For good measure, the Applicant and learned counsel for the Respondent thereafter addressed the court extensively on their respective positions.

43. Nevertheless, after entertaining various address by the Applicant and Learned counsel for the Respondent, the court suggested to the Parties and in any event brought to the attention of the Applicant the import and tenor of the provisions of Section 97 of the *Land Act*, 2012.

44. Upon drawing the attention of the Applicant and Learned counsel to the import and tenor of the provisions of Section 97 of the *Land Act*, 2012; both the Applicant and Learned counsel for the Respondent internalized the import thereof and thereafter entered into a consent. For good measure, the consent order was entered into conscientiously, knowingly and voluntarily.

45. Furthermore, it is important to recall that the Applicant herein intimated to the court that same is indeed an advocate of the High court of Kenya and by virtue of being such an advocate, the Applicant therefore fully appreciated the meaning of the consent order that was being entered into.

46. Having entered into the consent on the 18TH January 2023, the Applicant herein cannot now be heard to feign ignorance and purport that same was not keen to enter into a consent. Surely, the Applicant herein knew and understood the import of the consent orders and the consequences thereof and in any event, the Applicant herein was not induced into entering and adopting the consent.

47. Furthermore, the Applicant herein has not stated and or indicated that there was any inducement, coercion, fraud and/or misrepresentation culminating into the consent under reference. For good measure, an order entered into and recorded with the concurrence and involvement of the Parties is deemed to have been entered into by consent and is thus binding on the Parties.

48. Additionally, such an order like the one which was entered to on the 18TH January 2023, can only be set aside, reviewed and/or rescinded on limited and circumscribed grounds. In this regard, it is instructive to take cognizance of the holding of the Court of Appeal in the case of Flora N Wasike v Desterio Wamboko [1988]eKLR, where the court of appeal stated and held as hereunder;

> " It is now settled law that a consent judgment or order has contractual effect and can only be set side on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J M Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983. In Purcell v F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676;

"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."

49. Similarly, the circumstances under which a consent order can be set aside and/ or varied was also canvassed and enunciated in the case of Kenya Commercial Bank of Kenya Ltd v Specialized Engineering Company Ltd [1980]eKLR, where the court held and observed as hereunder;

" Both counsel relied, for different purposes, upon the decision of the former Court of Appeal for East African in Brook Bond Liebig (T) Ltd v Mallya [1975] EA 266, where, in declining to set aside a consent judgment, the court cited with approval a passage from volume 1 of the 7th Edition of Seton on Judgments and Orders page 124 to the effect that, prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient materials or in misapprehension or ignorance of material facts in general for a reason which would enable the court to set aside an agreement."

50. Arising from the foregoing, there is no gainsaying that it was incumbent upon the Applicant herein to implead and thereafter justify anyone of the known grounds upon which a consent can be vitiated, impeached and/or set aside.

51. However, I am afraid that from the totality of the averments placed before the Honourable court, the Applicant herein has not been able to justify the basis under which the said consent can be varied and/ or set aside.

52. For clarity, the fact that the Applicant had hitherto filed a Replying affidavit in opposition to the Application dated 19th December 2022; does not found a basis to impeach the terms of the consent that were entered into subsequent to the filing of the Replying affidavit and in any event, voluntarily.

Issue Number 2. Whether the Judgment of the court rendered on the 26th February 2020 can be Reviewed in the manner sought by the Applicant.

53. Other than the endeavor to impeach and set aside the consent order which was entered into and endorsed by the court on the 18th January 2023, the Applicant herein has also sought to review and/ or set aside the Judgment rendered on the 26th February 2020.

54. For good measure, the Applicant herein has raised a plethora of reasons as to why the impugned Judgment ought to be set aside and/or varied. Firstly, the Applicant contends that the said Judgment was entered and rendered without him having been afforded a reasonable opportunity to be heard.

55. It is the contention by the Applicant that whereas the Plaintiff and the 2nd Defendant/Respondent were afforded an opportunity to be heard, same was denied an adjournment to go and prepare for his Defense case.

56. Secondly, the Applicant herein also seeks to review the Judgment rendered on the 26th February 2020; allegedly on the basis that the Environment and Land Court was not seized of the requisite Jurisdiction to entertain and adjudicate upon the subject dispute.

57. According to the Applicant, the dispute beforehand ought to have been entertained and adjudicated upon by the High Court and not the Environment and Land court. Consequently, it is the contention by the Applicant that lack of Jurisdiction there forms a basis to warrant review.

58. Thirdly, the Applicant contends that the Judgment of the court did not take into account the import and tenor of the provisions of Section 44 of the *Banking Act*; and hence as a result of such failure, the Judgment ought to be set aside or vacated.

59. Having considered the various grands upon which the Applicant herein seeks review of the Judgment rendered on the 26th February 2020; it is now appropriate to address same seriatim. For coherence, the question that the Applicant was denied an adjournment and thus that his rights to Fair hearing was breached and violated, cannot found and anchor an application for review.

60. To my mind, if the Applicant was aggrieved by the refusal to grant an adjournment, which is an exercise of judicial discretion, then the Applicant herein ought and should have appealed against the decision refusing to grant an adjournment. For clarity, the manner of addressing a refusal to grant an adjournment was ably canvassed and enunciated in the case of Giella v Cassman Brown Limited [1973]EA, which decision is popular on Question of Temporary Injunction, but provides an important guideline as to how to impeach a refusal to grant and adjournment.

61. On the other hand, the complaint that the Environment and Land court was not seized of the requisite Jurisdiction; was a point that was neither canvassed nor ventilated before the Honorable Judge who entertained and ultimately rendered the Judgment sought to be reviewed.

62. In any event, it is not lost on this Honourable court that even though the Applicant herein was afforded the opportunity to file written submissions, but same failed and neglected to do so. For good measure, the fact that the Applicant herein did not file the written submissions either within the set timeline or at all was duly underscored at the foot of paragraph 16 of the Judgment rendered on the 26th February 2020.

63. To the extent that the Applicant herein failed to raise and/or canvass any such issue including the issue of Jurisdiction; the question does arise as to whether such an issue can now be raised allegedly on the basis of review.

64. In my humble view, a point of law which was neither canvassed nor raised before the trial court cannot now be utilized for purposes of achieving Review. In this regard, it is appropriate to take cognizance of the holding in the case of Mumby's Food Products & 2 others v Co-operative Merchant Bank Limited [2008] eKLR,

> " With respect, the finding of the learned Judge that by the review application the appellants were re-opening the matter with a new point of law which had not been argued before him in the application for striking out the defence and counter – claim is undoubtedly correct and unassailable. The discovery of such a new point of law is not a sufficient ground for reviewing the previous decision."

65. Nevertheless, it is also my finding and holding that if the Applicant herein is indeed convinced that the Environment and Land court was not seized of the requisite Jurisdiction, (which I humbly doubt), then it behooved same to pursue an appeal to the Honorable court of appeal and not to engage in an application for review.

66. For good measure, it is imperative to state and underscore that the decision sought to be impugned by way of review is a decision of a Court of coordinate Jurisdiction and therefore it would be absurd for

this court to purport to interrogate the decision of the sister court and to proclaim that the court acted albeit without Jurisdiction. Clearly, such a scenario would be tantamount to attacking the knowledge and legal understanding of the predecessor court, which situation would be antithetical to the Rule of Law.

67. Notably, there must be a distinction between an error which can lend itself to review and an erroneous understanding and conception of the law. In respect of the latter, the only recourse available; is to appeal and not otherwise.

68. In this respect, the succinct exposition of the law in the case of National Bank of Kenya Ltd v Ndungu Njau [1997]eKLR, is appropriate and expedient.

69. For coherence, the court of appeal stated as hereunder;

> " 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. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review".

70. Finally, it is my humble albeit considered view that the dispute which was before the Court was primarily a dispute touching on ownership of the suit property and title thereto; wherein the Plaintiff had claimed that the Applicant herein had defrauded same of the title to and in respect of L.R No. Nairobi/Block 82/100.

71. In any event, the 2nd Defendant herein was only roped in by the Plaintiff and the 1st Defendant when same sought to sell and or dispose of the suit property. Consequently, the pre-dominant issue which was being canvassed before the Honorable court was the question of ownership and title.

72. Clearly, the contention by the Applicant herein that the Environment and Land court did not have the requisite Jurisdiction to entertain and adjudicate upon the subject dispute flies on the face of the pleadings that were filed before the court.

73. Before departing from the subject issue, it is also important to mention that the subject suit was hitherto being heard by the high court and thereafter same was transferred to the Environment and Land court, certainly with the knowledge and involvement of the Applicant herein. In this regard, if the Applicant was of the contrary position, then same ought to have ventilated his reservation at the onset.

74. To my mind, the issue of Jurisdiction, which is now being adverted to and raised by the Applicant is merely a scarecrow, which is intended to buy the Applicant more latitude and altitude to frustrate the Respondent from exercising her right of foreclosure.

75. Be that as it may and in my humble view, the Applicant herein has had sufficient time and same cannot continue to hold the file alive in the corridors of the court. For coherence, the subject matter was filed before the Honourable Court in the year 1996.

76. Consequently and in view of the foregoing observation, I come to the conclusion that no Legal basis has been laid and/or highlighted to warrant the review of the Judgment rendered on the 26th February 2020.

Issue Number 3. Whether the honorable court is seized and possessed of the requisite Jurisdiction to grant an order of Temporary Injunction either as sought or at all.

77. The Applicant herein has similarly implored the court to grant and issue an order of temporary injunction, allegedly to bar and/or restrain the 2nd Respondent from alienating and/or disposing of the suit property.

78. In particular, the Applicant has contended that same has put and placed before the Honourable court a prima facie case with overwhelming chances of success. However, the question that does arise is which is this prima facie case which has been placed before the court to warrant the grant of a temporary order of injunction.

79. To start with, it is the same Applicant who is arguing that the Environment and Land court does not have Jurisdiction to entertain the subject suit. In this respect and adopting the Applicant's arguments elsewhere, can a court without jurisdiction grant the Applicant temporary injunction as sought.

80. Secondly, the Applicant herein concede that though served with the counterclaim by the 2nd Defendant; same did not file any statement of Defense. In this regard, it is apparent that the claim by the 2nd Defendant was never controverted.

81. Thirdly, the entire suit which was placed before the Honourable court was heard and disposed of vide the Judgment of the court rendered on the 26th February 2020. Consequently, there is no gainsaying that no suit remains alive and thus capable of being entertained henceforth.

82. With the foregoing in mind, I must ask myself which is this prima facie case that the Applicant is talking about. Clearly, a prima facie case must relate to what is pending and not what has already been determined before the Honourable court.

83. Lastly, it is not lost on this Honourable court that the Applicant herein had hitherto filed an application for temporary injunction dated 3rd February 2011 which was heard and disposed of vide the ruling of Justice Mbogholi Msagha, Judge; (as he then was) dated 20th September 2011.

84. Insofar as the Applicant had previous filed and application for temporary injunction and which was duly considered and thereafter granted, the Applicant herein cannot be heard to seek yet another order of temporary injunction. To my mind, the Honorable court is Functus officio as far as the question of temporary injunction is concerned.

85. Without belaboring the point, I come to the conclusion that an order of temporary injunction cannot be sought for and/or obtained in the absence of a substantive suit which can ground same.

86. In a nutshell, the Application for temporary injunction by and at the instance of the Applicant has therefore been made and mounted in vacuum. In this respect, the prayer for temporary injunction is not only misconceived, but same is stillborne and otherwise legally untenable.

Issue Number 4. Whether the instant Application has been mounted timeously and with due promptitude and if not; whether the Application has been defeated by the doctrine of Latches.

87. It is common knowledge and beyond peradventure that the Judgment in respect of the instant matter was rendered and/or delivered on the 26th February 2020 and yet the current application was not filed until the 20th February 2023. For clarity, the duration between the delivery of the Judgment and the lodgment of the current application translates to a duration of three years.

88. One would have expected the Applicant herein to provide an account and/or justify why same took a total of three years or thereabouts; before mounting the application for review. However, it is instructive to note that the despite the length of the supporting affidavit, not even a single paragraph has been supplied to explain the lengthy duration of delay.

89. It is not lost on this Honourable court that whoever seeks an order for review is obligated to commence and mount the application for Review without unreasonable and inordinate delay. In any event, where there is delay it calls upon the Applicant to supply reasons for such delay, which is not the case before the court.

90. Whilst discussing the importance of mounting an Application for review without undue delay, the court in the case of Stephen Gathua Kimani versus Nancy Wanjira Waruingi T/a Providence Auctioneers [2016]eKLR, held thus;

> " One thing is clear in this application. The delay of one year has not been explained. Perhaps, it's important to recall the last sentence of Order 45 Rule 1 (1) (b) which reads '.......may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.'
>
> The logical question that follows is, was the present application made without unreasonable delay? Or is a delay of one year reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal circumstances it should not take an applicant one year to file an application in court. It would require sufficient explanation to justify a delay of one year. To my mind this is a long period, and indeed an unreasonable delay."

91. Clearly, it was incumbent upon the Applicant to endeavor to and/or explain why same was unable to commence and/or lodge the current application earlier. However, no reason has been availed and/or supplied. Consequently and in the absence of any explanation, I hold the firm opinion that the instant application is defeated by the Doctrine of Latches.

Final Disposition

92. Having considered and evaluated the issues that were highlighted and enumerated in the body of the Ruling herein, I come to the conclusion that the Amended Notice of Motion Application dated the 20th February 2023; and which sought a plethora of reliefs is not only misconceived, but an abuse of the Due process of the court and is otherwise tantamount to having a second bite on the cherry.

93. Consequently and in the premises, the Application dated the 20th February 2023; whose purpose and intent is to revive a 27 year-old suit, be and is hereby Dismissed with costs to the 2nd Defendant/ Respondent.

94. It so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE, 2023.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – court assistant

Mr. Nzuki Mwinzi – the Applicant.

Mr. Gathara Mahinda for the 2nd Defendant/Respondent.

N/A for the Plaintiff