



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 308 OF 2004

DAVID HOPCRAFT.....1ST PLAINTIFF/APPLICANT
PHILIP JOHN TILLEY.....2ND PLAINTIFF/APPLICANT
JOSEPH MATHEKA MICHAEL.....3RD PLAINTIFF/APPLICANT
ALBERT MUTIO MUTEI.....4TH PLAINTIFF/APPLICANT
NAHASON OGUTU.....5TH PLAINTIFF/APPLICANT
SIMON ELAL.....6TH PLAINTIFF/APPLICANT
DAVID ADAN.....7TH PLAINTIFF/APPLICANT

-VERSUS-

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT
THE KENYA WILDLIFE SERVICE.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiffs/applicants in the present instance brought the Notice of Motion dated 28th June, 2019 in which they sought for the following orders:

- a. THAT this Honourable Court be pleased to order that Rustam Hira advocate has ceased acting for the 2nd defendant in the matter.
- b. THAT this Honourable Court be pleased to review and set aside its decision of 3rd April, 2019 by which it dismissed the suit with costs to the defendants.
- c. THAT the plaintiffs do have costs of the application.

2. The Motion is supported by the grounds set out on its face and the facts stated in the affidavit of Mohamed Zahir-Ud-Din Ahmad Malik.

3. The deponent who is the advocate acting for the applicants stated that the suit was last in court for hearing on 14th June, 2017 but was adjourned by the court on its own motion and the parties were directed to obtain fresh hearing dates from the registry.

4. The deponent asserted that before a fresh hearing date could be obtained, Rustam Hira who was at all material times acting for the 2nd defendant passed away on 22nd December, 2017 and that prior to his demise, he had notified the Law Society of Kenya (LSK) of the fact that he had instructed the firm of A.H. Malik & Co. Advocates to take over all his pending matters and wind up his practice.

5. It was the deponent's contention that the applicants' firm of advocates could not fix the matter for hearing until the 2nd defendant/respondent appointed a new advocate, ensuring to add that unless the suit is reinstated, his clients will suffer irreparable loss.

6. The 2nd defendant/respondent put in Grounds of Opposition dated 4th November, 2019 and the replying affidavit sworn by its Principal Legal Officer *Doreen Mutunga* to oppose the Motion.

7. The deponent largely asserted that the application has not only failed to meet the threshold for review but that it is an abuse of the court process.

8. The deponent further asserted that the suit is quite old and it would be greatly and substantially prejudicial to the defendants if the same were to be reinstated.

9. The 1st defendant did not participate at the hearing of the Motion.

10. This court directed the parties to put in written submissions in respect to the application. On their part, the applicants restated the averments made in the Motion save to add that courts are vested with inherent jurisdiction to be exercised in meeting the ends of justice, as held in the case of **Leiyangu v IEBC & 2 others [2013] eKLR**.

11. The 2nd defendant/respondent likewise reiterated its position as portrayed in the Grounds of Opposition and replying affidavit, though adding that the application is not only *res judicata* by virtue of the fact that the issues raised therein were previously raised before this court; but that this court became *functus officio* upon delivery of its ruling on 3rd April, 2019. The 2nd defendant/respondent relied upon a variety of authorities, including the case of **Samuel Mathenge Ndiritu v Martha Wangare Wanjira & Another [2017] eKLR** where the High Court held that where a party is of the view that the court arrived at a wrong conclusion, such view would constitute a proper ground for appeal but not review; as well as **the Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR** in which case the Court of Appeal set out the elements that give rise to the *res judicata* principle pursuant to the provisions of Section 7 of the Civil Procedure Act, Cap. 21 Laws of Kenya.

12. I have taken into consideration the grounds laid out on the face of the Motion; the facts deponed in the affidavits supporting and challenging the same; the Grounds of Opposition and the competing written submissions and authorities relied upon.

13. It is clear that the Motion touches on the subject of review. The applicable principles to guide the courts in determining whether to review their earlier decisions are found under **Order 45 of the Civil Procedure Rules, 2010** and are as follows:

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.

14. The above provision also insists on the filing of applications without unreasonable delay. In this respect, I have considered that the Motion was filed slightly over two (2) months from the date of the ruling in question. This to my mind does not amount to inordinate delay.

15. That said, I have taken note of the explanation given by the applicants and it is my view that the same does not give rise to any new evidence or matter, neither does it disclose any mistake or error on the face of the record. More importantly, I find that the applicants have not offered any sufficient reasons to necessitate a review of this court's ruling.

16. In fact, it is noteworthy that the explanation given in the present instance replicates that previously given to this court by way of an affidavit sworn by the applicants' advocate in response to the notice to show cause and which explanation this court took into account before finally dismissing the suit.

17. It therefore follows that the applicants' attempts at revisiting issues that have already been determined by this court would essentially be calling for an appeal by this court against its very decision.

18. If anything and as was rightly held in the case of **Samuel Mathenge Ndiritu v Martha Wangare Wanjira & Another [2017] eKLR** which I have cited hereinabove, the grounds brought forth by the applicants are more suited as grounds of appeal as opposed to review. I therefore have no basis on which to review the ruling already in place.

19. The upshot is that the Motion is an abuse of the court process and my only option is to dismiss it with costs to the defendants.

Dated, Signed and Delivered at Nairobi this 19th day of December, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiffs/Applicants

..... for the 1st Defendant

..... for the 2nd Defendant/Respondent