REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC CASE NO.43 of 2013

FORMERLY CIVIL SUIT 181 OF 2008

ELIZABETH NYAMBURA NJUGUNA.....1ST PLAINTIFF

FRANCIS KAMAU NJUGUNA(Suing as the administrator of Estate of

NJUGUNA MWAURA MBOGO.....2ND PLAINTIFF

-VERSUS-

JUMAA FARMERS CO. LTD.....1ST DEFENDANT

JERAMIAH MUTUURA KINYANJUI.....2ND DEFENDANT

RUTH WANJIRU.....3RD DEFENDANT

JONAH KIMARU.....4TH DEFENDANT

JOSPHAT MBURU.....5TH DEFENDANT

EZEKIEL KIARIE.....6TH DEFENDANT

ELIJAH MACHARIA.....7TH DEFENDANT

ENDAO COMPANY LIMITED.....8 TH DEFENDANT

RULING

1. Judgment in the suit was delivered on the 21st September 2017 upon full hearing with participation of all the parties.

The 1st – 7th Defendants have lodged an appeal against the court's judgment. It is pending for hearing in the Court of Appeal.

2. By an application dated the 22nd February 2018, the 8th Defendant has approached the court seeking an order

Prayer 4: ***That this court be pleased to exercise its discretion and review, vary discharge and set aside its judgment delivered on 21st September 2017 and consequential decree and orders and***

Prayer 5: That the Honourable court be pleased to exercise its discretion and reinstate the orders issued on the 14th May 2009 pending the hearing and determination of the suit.

3. The application is premised on provisions of **Section 1A, 1B, 3A, 63, 78, 80 of the Civil Procedure Act and Orders 42,45, 51** of the **Civil Procedure Act and Article 159 of the Constitution**, on grounds that,

i) The orders issued in the judgment in effect amount to orders of eviction.

ii) The Plaintiff never pleaded for eviction or vacant possession.

iii) There is glaring error of both substance and procedure apparent on the face of the record.

iv) The applicant has obtained possession of additional documents which were not in their possession during the trial.

v) That the plaintiff has sought with assistance of the police, eviction of the applicants members.

vi) That no prejudice will be suffered by the respondent if the court were to re-open the matter and allow additional documents which would aid it to arrive at a just and fair decision.

Shadrack Cherogony a Director of the 8th Defendant swore the supporting affidavit on the 22nd February 2018.

4. In opposing the application which is basically between the 8th Defendant and the plaintiff, **Francis Kamau Njuguna** the 2nd plaintiff swore the replying affidavit on the 6th March 2018.

5. In his oral submissions on the application, Mr. Kipkoech Advocate urged the court to review its judgment by setting it aside on the matter of **discovery of new documents discovered after the judgment was delivered.** I have considered the said new documents, being exhibits marked as **SC 1** – being payment documents by the 8th Defendants of shares of Ampiva, and averments that the law firms of Kaplan and Straton who acted for the seller and the 8th Defendant advocates are ready to give testimony over the sale of the shares.

6. I have considered the bundle of documents. The court has not been told why the documents could not be availed during the hearing nor why the advocates did not testify.

7. Mr. Waiganjo Advocate for the Respondent (plaintiff) relying on the Replying affidavit strenuously opposed the application and urged that the applicant is trying to sneak in an appeal by his application for review of the judgment as demonstrated by the grounds stated on the face of the application.

8. I have taken liberty to state the grounds of the Review application based on **Order 45 of the Civil Procedure Rules**.

Order 45 Rule 1(1) (b) states**:**

"A person considering himself aggrieved

(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 was 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."***

9. **Discovery of new and important matter or evidence**

The alleged new documents discovered after judgment are stated as letters exchanged between the applicant and the then Head of Public Service, the applicants advocates letters to and by its then advocates and its auditors Price Waterhouse.

No explanation has been tendered as to why these documents, if they were necessary, were not produced to the court during the hearing. No attempt whatsoever has been offered to explain the failure by the applicant, nor that upon due diligence, and if so, by who, they could not be found and provided to court. Nothing of the sort has been demonstrated.

10. During the hearing of the suit, the applicant testified to having purchased the suit land by shares in the parent company but produced no sale agreements or deeds of assignment and no payment documents. It never indicated that it could not trace the receipts or any necessary documents for that matter. Even if the receipts could not be traced it was not stated that it was also difficult to trace and bring the advocates who allegedly acted for them to court to testify.

11. Clearly, the affidavit in support of the application does not disclose any new information that could not have been available during the hearing of the suit. See **Salama Mahmoud Saad -vs- Kikas Investment Ltd & another (2014) e KLR**. In the above case Gikonyo J citing the **Court of Appeal in D.J. Lowe & Co. Ltd -vs- Banque Indosuez Civil App. NAI 217/98(UR)** where the court stated:

"where such a review application is based on fact of discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."

12. I agree fully with the above holding. What the applicant is trying in my view is an attempt to persuade the court to allow it adduce the alleged new evidence but which evidence was at all material times available, and its failure to produce the same not explained at all. See **Jacinta Wairimu Njoroge -vs- Julia Wajiru & 4 Others (2015) e KLR.** To that extent, I find no merit in that ground.

13. **Unreasonable delay**

The application was brought to court six months after delivery of the judgment. The last limb of **Order 45 Rule 1(1) (b)** states that such application ought to be brought without unreasonable delay.

I am not persuaded that there was unreasonable delay in bringing the application to court. The six months delay has been satisfactorily explained in the supporting affidavit.

14. **Error apparent on the face of the record**

The applicant's submission is that there was no prayer for eviction and vacant possession of the defendants yet the judgment had the same effect.

15. I have considered the plaintiff's pleadings and the totality of the Judgment. What the applicant is saying is that the Judge failed to apply the law and facts correctly. If that is so, then the remedy ought to be an appeal not a review application, as the court stands *functus officio* and has no appellate jurisdiction on its own matter. If a party were to be allowed to sneak in an appeal in the guise of a review, and the court proceeds to entertain the same, a dangerous precedent would be set. I have not seen in my judgment any evidence or apparent mistake on the face of the record that qualifies to be addressed under **Order 45 of the Civil Procedure Rules – Pancras T. Swai -vs- Kenya Breweries Ltd (2014) e KLR.**

16. The **Court of Appeal in National Bank of Kenya Ltd -vs- Ndungu Njau No. 211 of 96 (UR**) made it clear that

> ***"misconstruing a statute or other provision of law cannot be a ground for review --- if the judge had reached a wrong conclusion of law, it could be a good ground for appeal but not review."***

17. For the court to consider this ground, the error must be self-evident and should require no elaborate argument to be established.

The applicant is obviously trying to fault the court on its construction and application of the law, which are good grounds for appeal and not for review.

18. I am not persuaded of any merit in the application for review dated the 22nd February 2018.

It is dismissed with costs to the plaintiff/respondent.

Dated, signed and delivered this 27th Day of September 2018.

J.N. MULWA

JUDGE