



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 325 OF 2012**

**DR. KIMANI WANJERI.....APPELLANT/RESPONDENT**

**T/A SUNVIEW ESTATE**

**- V E R S U S -**

**PHILIP MOGERE OMONI.....RESPONDENT/APPLICANT**

**RULING**

1) The subject matter of this ruling is the motion dated 16.11.2017 taken out by Philip Mogere Omoni, the respondent/ applicant herein. In the aforesaid motion, the respondent/applicant sought for the following orders:

- 1. THAT this application be certified urgent and be heard ex-parte in the first instance.***
- 2. THAT there be a stay of the execution of the ruling delivered on 18/08/2017 until this application is heard and determined.***
- 3. THAT the honourable court be pleased to review and or vary the judgment delivered by honourable Justice J. K Sergon herein on 10<sup>th</sup> March 2017 due to the fact that the appellant/respondent had no authority to pursue the appeal from the Sunview Residents Association (SRA) for this development came out in the appellant/respondent's submission dated 2<sup>nd</sup> August 2017 and filed on the same date.***
- 4. THAT the honourable court do order revision of the judgment delivered n 10.3.2017 to the extent that this application be found to be successful and set aside the judgment delivered on 10/3/2017 and its consequential orders.***
- 5. THAT the security deposited in court by the applicant of kshs.284,870 be deemed to be security for this application.***
- 6. THAT the costs of the application be met by the respondent.***

2) The motion is supported by the affidavit sworn by the affidavit of Philip Mogere Omoni. Dr. Kimani Wanjeri T/A Sunview Estate filed a replying affidavit he swore to oppose the motion. The parties to this dispute made oral submissions when the motion came up for interpartes hearing.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. It is the submission of the respondent/applicant that this court

delivered its judgment on 10.3.2017 in favour of the appellant/respondent believing that the appellant had authority to pursue the appeal on behalf of Sunview Residents Association. It is further argued that the aforesaid judgment was delivered without unforeseen new development that the appellant had no authority to appeal from the judgment delivered on 19.6.2012 in the Chief Magistrate's Court, Civil Case no. 5371 of 2010 confirming the judgment delivered on 17.5.2011. On the basis of the above ground, this court was urged to set aside its judgment by way of review.

4) The appellant/respondent urged this court to find this motion as res-subjudice since there are two pending applications similar to the current motion. The appellant further pointed out that the two motions were withdrawn on 17.11.2017. This court was also beseeched to find that the motion was filed in bad faith and is intended to delay the conclusion of this dispute. The appellant/respondent averred in the replying affidavit that he did not require the authority of Sunview Residents Association (SRA) to defend himself in court since he was sued in his private capacity despite the fact that the respondent/applicant recognized SRA as a legal entity and by the time of filing suit it was known he was legally elected chairman of SRA. The appellant/respondent further argued that SRA wrote two letters clarifying that it had no legal authority in Civil Appeal no. 325 of 2012 and hence the applicant's motion dated 16.11.2017 has no merit and should be dismissed.

5) Having considered the rival submissions and the material placed before this court it is now clear in my mind that the substantive issue raised and argued in the motion dated 16.11.2017 is the question as to whether or not this court's judgement delivered on 10.3.2017 should be reviewed. The principle to be considered in an application for review are well stated under Section 80 of the Civil Procedure Act. That there is a discovery of a 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 record or for any sufficient reason.

6) In the application before this court, the respondent/applicant did not specify whether or not he was relying on any of the grounds stated under Section 80 of the Civil Procedure Act. I can only infer that the applicant intended to rely on the ground that there is an error apparent on record. That error is to the effect that this court proceeded on the basis that the appellant/respondent had authority to pursue the appeal on behalf of Sunview Residents Association which was not the case. It is pointed out that as of 11.12.2016 the appellant had relinquished the chairmanship of S.R.A. I have carefully perused the record of appeal and it is clear that the aforesaid issue was never raised and argued by either party at the time when the appeal came up for hearing on 24.10.2016. It is now pointed out that the appellant/respondent had already relinquished the chairmanship of S.R.A at the time of hearing this appeal. There is no dispute that the respondent/ applicant filed the suit before the trial vide the plaint dated 1<sup>ST</sup> September 2010 against the appellant/respondent. The way the plaint is framed indicates that the suit was filed and directed against the appellant/respondent in his personal capacity. In paragraph 8 of the plaint, the respondent/applicant avers as follows

***“The plaintiff avers that the chairman is using the name of the Sunview Estate members to frustrate the plaintiff on the affairs in which he (chairman) has no moral or legal authority to enter into.”***

7) The error now being pointed out by the respondent/applicant in my view is not something which was not within the knowledge of the applicant. It cannot therefore qualify to be a ground for review. The appellant/respondent has pointed out that he did not need authority to pursue this appeal since he had been previously authorised to defend the action. The respondent/ applicant did not address this court over the issue raised by appellant/respondent. I am persuaded by the appellant's /respondent's argument that he did not need in the circumstances of this case to seek for further authority from SRA to pursue this appeal.

8) In the end, I find no merit in the motion dated 16.11.2017. The same is dismissed with costs to the appellant/respondent

Dated, Signed and Delivered in open court this 13<sup>th</sup> day of December, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

.....for the Respondent