



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
MISC. APPLICATION NO. 89 OF 2008

MARY WAMBERE IRERI &

ANN WATHITHA.....APPLICANTS

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

PETERSON MURIUKI NJERU.....2ND RESPONDENT

RULING

1. This is the application dated 8/4/2015 seeking to review/or setting aside the order for dismissal of suit made on 4/12/2014 for want of prosecution. The application is supported by the affidavit of Mary Wambere Ireri. In the affidavit, the 1st applicant states that she was never informed by her advocate that the notice to show cause why the matter should not be dismissed was slated for 4/12/14.
2. The notice for dismissal served upon her advocate indicated that the same was coming up on 19/9/14. Her advocate attended court on 19/9/14 but the court was not sitting and only discovered that the same had been dismissed when he instructed his clerk to invite the respondent for purposes of fixing a hearing date.
3. The applicant was never given a chance to show why the matter should not be dismissed. Their advocate has not been able to trace the court file on numerous occasions and this prompted him to write to the Deputy Registrar. The applicants are still interested in pursuing the appeal which has a high chance of success and should not suffer from the mistakes of their advocate.
4. The 2nd respondent filed a replying affidavit stating that the applicants have not demonstrated any basis to warrant the setting aside of the order for dismissal. Even though the applicants were supplied with proceedings, they did not file the appeal. Over six years have lapsed without any action being taken on the matter and this clearly shows that the applicants are not interested in pursuing the appeal.
5. The applicants in their submissions stated that their advocates tried to fix the matter for directions but was informed that the file could not be traced and finally decided to seek the assistance to the registrar. On 7/8/14 after they wrote the letter to the Deputy Registrar, a notice of dismissal was prepared by the office of the DR.
6. The applicant purports to have annexed the hearing notice from the office of the DR for 19/9/14 but

the same was the position in the file is that no notice was issued by the DR for a reason to be stated later in this ruling not attached. She further states that no hearing notice for 4/12/14 when the matter was dismissed was served on the applicant and therefore he was denied a chance to be heard. The applicants relied on the following authorities whose relevance they did not explain:-

- **CMC MOTORS GROUP LIMITED VS DINKEN LIMITED & ANOTHER [2013] eKLR**
- **GIBSON KAMAU KURIA VS RACHEL WAMBUI KAMAU [2009] eKLR**

7. Even though the proceeding indicates the 2nd respondent filed submissions, the same are not in the court file and it is unlikely that the submissions were recovered by the court registry.

8. The application is mainly brought under Order 45 Rule 1 of the Civil Procedure Rules and also under Order 17 Rule 2 of the same rules.

9. Order 45 Rule 1 provides;

(1) 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.

10. **PANCRAS T. SWAI VS KENYA BREWERIES LIMITED [2014] eKLR** the court held that"

The power to review decisions on appeal is vested in appellate courts. Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or "for any sufficient reason."

11. The appellant did not bring his application within any of the limbs nor did he show that there was any sufficient reason for review to be granted. As repeatedly pointed out in various decisions of this Court, the words, "*for any sufficient reason*" must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking with the other grounds specified in the order.

12. In **SARDER MOHAMED VS CHARAN SINGH NAND SING AND ANOTHER [1959] EA 793**, the High Court correctly held that Section 80 of the Civil Procedure Act conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

13. In **SHANZU INVESTMENTS LIMITED VS COMMIS- SIONER FOR LANDS (CIVIL APPEAL NO.100 OF 1993)** this Court with respect, correctly invoked and applied its earlier decision in **WANGECHI KIMATA & ANOTHER VS CHARAN SINGH (C.A. NO. 80 OF 1985) (unreported)** wherein this Court held that

"any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a

genus or class of things which the third general head could be said to be analogous.”

14. The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to.

15. The applicants have not satisfied the court as to any of the conditions listed under order 45 Rule 1 of the Civil Procedure Rules. Neither have they demonstrated discovery of new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time when the decree was passed. No mistake or error apparent on the face of the record, or any other sufficient reason to warrant review of the order has been shown.

16. The case was dismissed under Order 16 Rule 2 which is Order 17 Rule (2) in the Civil Procedure Rules, 2010. This rule mandates the court on its own motion to dismiss the suit where no action has been taken by either party for a period of three years. There is no requirement under this rule to serve any of the parties with a notice to show cause. The issue of the applicants having not been served does not arise. The provision allows the party to file a fresh suit subject to the law of limitation.

17. In this suit, no action had been taken by the parties for more than 3 years since 31/07/2009 to 4/12/2014 when the suit was dismissed. The court therefore fully complied with Order 17 Rule 6 in dismissing this suit.

18. The applicant has failed the test under Order 45 Rule 1 and has not shown that the court violated Order 17 Rule 6 in any way.

19. I find the application not merited and dismiss it with costs.

DATED, DELIVERED AND SIGNED AT EMBU THIS 27TH DAY OF JULY, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Mugambi for Ms. Kimotho for Applicant