REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 34 OF 2013

TURBO MUNYAKA CO-OPERATIVE SOCIETY LIMITED...............PLAINTIFF

VERSUS

JOHN MBUGUA NJOROGE...1ST DEFENDANT

WAITI NJOROGE..2ND DEFENDANT

JAMES KIAMBUTHI MUNGAI...3RD DEFENDANT

STEPHEN MWAURA MUNGAI...4TH DEFENDANT

FRANCIS KINGARA MBUGUA...5TH DEFENDANT

DANIEL NJOROGE GICHARU...6TH DEFENDANT

WAWERU WAHOME...7TH DEFENDANT

JOHN WAWERU...8TH DEFENDANT

RULING

(On Review and or Setting Aside Judgment Delivered on 15/11/2018)

THE APPLICATION

1. By a Notice of Motion dated **2/11/2021** the Defendants/Applicants sought orders for review and or setting aside of a judgment delivered on the **15/11/2018** and all consequential orders or proceedings in respect of the suit. They also sought an order dismissing the Plaintiff's suit. The Applicants invoked the provisions of **Sections 1A, 1B, 3, 3A, 63 (e)** and **80** of the **Civil Procedure Act, Order 45 Rule 1** and **2** of the **Civil Procedure Rules**, **Articles 10, 40** and **159(2) (d)** and **259** of the **Constitution** of Kenya and all other enabling provisions of the law.

2. Specifically, the Applicants jointly sought orders that:

> **1. …spent**
>
> **2. ....spent**
>
> **3. That this Honourable Court be pleased to review and/or set aside its judgment delivered on 15/11/2018, the resulting decree and all consequential orders and /or proceedings**
>
> **4. That this Honourable Court be pleased to substitute the judgment delivered herein on 15/11/2018 with a judgment and decree dismissing the plaintiff's suit with costs or with such other orders as this court may deem fit in the circumstances.**
>
> **5. That the plaintiff be condemned to pay costs of this application and the same be paid by the deponent of the plaintiff's verifying affidavit.**

THE APPLICANTS' CASE

3. The grounds on which the Applicants relied for their Application were that the Court delivered judgment on **15/11/2018** by which it found that the Plaintiff was the registered proprietor of the suit land being **Makutano/Kapsara Block 2/Turbo Munyaka/91**. The other ground was that the plaintiff misled the court into believing that the Plaintiff existed at the time of filing the suit, thereby obtaining the impugned judgment whereas the Plaintiff ceased to exist in **1986**. They also argued that at the time of the hearing, they did not know that the Plaintiff never existed and only learnt about its non-existence when it obtained warrants of arrest against them. They stated that the Plaintiff lacked *locus standi* to institute the suit against them and that it had already assessed it bill of costs and extracted warrants of arrest in execution of the decree of this Court. They then argued that this court had the discretion to issue the orders sought and unless the judgment and decree of this court were reviewed it would perpetuate an illegality contrary to the provisions of **Articles 10** and **40** of the **Constitution** of Kenya. Finally, that they stated that the Application would be rendered nugatory if it was not heard expeditiously because the defendants would be arrested and committed to civil jail in execution of a judgment obtained fraudulently.

4. The Application was supported by an Affidavit sworn by the **1st** Defendant on **2/11/2021** on his own behalf and that of the other Defendants. The affidavit basically repeated the contents of the grounds on the face of the Application.

THE RESPONSE

5. The Application was opposed by way of a Replying Affidavit sworn on **25/11/2021** by **James Kariuki Gichora**. He described himself as the Vice Chairman of the Plaintiff. His response was that that the Plaintiff existed and it had never changed its name and that the Plaintiff produced its certificate of registration at the hearing of the main suit. He deponed further that the purported certificate of change of name annexed by the Applicant was forged and the alleged change of name of the Plaintiff prior to the filing of this suit was not a new and important matter or evidence which had been discovered by the Defendants. He deponed further that the Defendants participated fully at the hearing of the main suit and were represented by counsel. He then stated that the records held by the Commissioner for Co-operative Development were public records available to the public on request and the Defendants would have obtained the document they now wish to rely to reopen the suit if they would have exercised due diligence. It was his further response that the Application has been brought after an inordinate delay of **three (3)** years after delivery of judgment and there was no ground for reviewing the judgment as the Application had been brought in bad faith only for purpose of delaying the Plaintiff's enjoyment of the fruits of its judgment. He urged the court to dismiss the Application with costs.

SUBMISSIONS

6. The Application was disposed of by way of written submissions in terms of Direction **33** of the *Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts*, Legal Notice **No. 5178** of **2013**. The Applicant filed their submissions on the **23/11/2021.** On **29/11/2021**, **Mr. Bisonga**, learned counsel for the Plaintiff/ Respondent indicated that he would not file any submissions but would rely entirely on the Replying Affidavit filed on **25/11/2021**.

ANALYSIS, ISSUES AND DETERMINATION

7. I have carefully considered the Application, the Affidavits in support and in opposition, the case law cited and the statutes relied on together with the submissions on record. I am of the view that the issues for determination in this Application are as follows:-

(a) Whether the Application for review and /or setting aside the judgment herein is merited

(b) Whether the suit should be dismissed

***(c) What orders to issue and who to bear the costs of the Application*?**

8. The issues are analyzed below:

a) Whether the Application for review and/or setting aside the judgment herein is merited

9. In order to fully consider the issue, this Court began by considering the relevant law. I sieved through the provisions cited by the Applicants in order to make findings on whether or not the provisions were properly invoked. Needless to state that **Article 159(2)** of the **Constitution** could come to the aid of the Applicant in case it was found that the Applicants did not invoke the proper provisions of law since that would amount to a technicality. The Article cited cures the defect of failure to rely on the proper provisions of law, although it is advisable that every party bring himself or herself within the law when they move the Court.

10. In arriving at the above conclusion, I was guided by the case of ***Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR (Petition No. 1 of 2015)*** where the Supreme Court stated as follows:

> ***"This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.***

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2) (d) of the Constitution, which proclaims that, "… courts and tribunals shall be guided by…the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts."

11. Similarly, regarding reliance by courts on technicalities in order to dismiss (election) matters, the Court of Appeal in ***Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others[2018] eKLR*** stated as follows:

"Therefore, taking into consideration our historical background which is replete with determination of disputes on technicalities, and now the legal underpinning provisions of superiority of our constitutional value system, we think that the route taken by the learned judges to dismiss petitions on technicalities that do not affect the jurisdiction is not a reflection or manifestation of our current jurisprudence and justice system. … The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of the Constitution implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence….There may be instances where the procedural infraction goes to the root of the dispute."

12. In essence, by virtue of **Article 159(2)** of the **Constitution** of Kenya, this Court would be prepared to excuse technicalities which did not go to the root of the merits of the case or Application before it. For instance, in the instant Application, the Applicants cited Articles **10, 40** and **159(2) (d)** and **259** of **the Constitution**. This Court notes that there is a tendency by many a learned counsel in many matters to cite the Articles of the Constitution as provisions they invoke Applications on. With due respect to such learned counsel, this should not be the case: interlocutory applications in matters are not similar to constitutional petitions which require parties to indicate the Articles they bring them on. Interlocutory applications often have provisions that provide for invoking of the power of the Court. A party may rely on the constitutional provisions in their submissions to make the point regarding what their argument is, for instance, the need of the Court not to rely on technicalities to dismiss or strike out an Application. One does not have to and should not cite the constitutional provision in the body or title of the Application.

13. Additionally, the Applicants relied on sections **1A, 1B, 3, 3A, 63 (e)** of the **Civil Procedure Act**. They also cited "all enabling provisions of law" as one other legal provision they brought their Application on. All I can say in summary is that these provisions are both irrelevant and redundant in relation to the Application before me in so far as the law provides for and the manner of bringing an Application for review and setting aside a judgment or order such as the one herein. I find so because **Section 1A** of the **Civil Procedure Act** gives the objective of the **Act**. This, the Court is alive to. **Section 1B** provides for the duty of the Court. This Court and all others are enjoined by law to carry out that duty irrespective of whether they are reminded of the provision or not. **Section 3** is on the saving powers of the Court to act in absence of any specific provision to the contrary. All courts will, should and do exercise their discretion judicially in that respect irrespective of whether or not they are reminded that there is no provision to the contrary. Moreover, the Applicants did not submit on how these and even the next provisions apply to the instant case. It is not enough to copy and paste provisions onto applications and let the courts wade through the mud to find how they apply. **Section 3A** gives the Court discretionary power to make any orders for the ends of justice to be met or avoid abuse of its process. Second to last, **Section 63(e)** provides for the discretion of the Court to make such interlocutory orders as may appear just and convenient for the ends of justice to be met.

14. Finally, the omnibus phrase "all other enabling provisions of the law" is nothing but a meaningless device designed to scare every other pass by of the law that there are other provisions that exist under which an Application should have been brought. While the Court is deemed to know the law, it is not for a Court, in the adversarial system that our legal system is, that it should fill in the gaps left for any party in handling a dispute to build up his/her case. In so doing the Court shall cease to be impartial and descend into the arena of the dispute and that will go against the principles that govern the legal system and will destabilize it. If only Applicants would go to the broad and length of preparing pleadings to the required standard!

15. That said, the relevant provisions to the instant Application which were cited were **Section 80** of the **Civil Procedure Act** and **Order 45 Rules 1** and **2** of the Civil Procedure Rules. **Section 80** of the **Act** provides as follows:

"Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

16. Order 45 Rule 1(1) of the **Civil Procedure Rules** provides as follows:

"1) any person considering himself aggrieved-

a) by a decree or order from which an appeal is allowed but which no appeal is preferred; or

b) by a decree or order from which no appeal is hereby allowed, and who from the 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 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."

17. In terms of the **Order** cited, the conditions for the grant of orders of review are as follows:

> ***a) discovery of new and important matter or evidence,***
>
> ***b) some mistake or error apparent on the face of the record,***
>
> ***c) other sufficient reason and these have to be in consideration of the fact that there should be;***
>
> ***d) no unreasonable delay in bringing the Application.***

18. The onus of proving the fulfillment of the above-mentioned conditions is on an Applicant. On the first limb, the Applicant must prove that he has discovered of new and important matter or evidence which after he had exercised due diligence it was still not within his knowledge, and for that reason he could not have produce at the time the order was made.

According to the Applicants herein, the new and important evidence that has emerged and come to their knowledge is that the Plaintiff Company had ceased to be in existence at the time of filing the instant suit. They argued that they just discovered that the Plaintiff company changed its name in **1986** when the warrants herein were extracted and due for execution. They stated that thus the Plaintiff ceased to exist in **1986** and for that reason did not have the *locus standi* to institute the suit against them. Further, they stated that the Plaintiff procured judgment in their favour by presenting misleading evidence to the court which made it to believe that the plaintiff existed when in reality it was non-existent. In countering the argument, the Respondent stated in the Replying Affidavit that it never changed its name and that the certificate of change of name presented by the Applicants was forged. Further it stated that the alleged change of name was not a new and important matter or evidence discovered by the Defendants as alleged. In this Court's view, the Court pronounced itself on that issue in the judgment impugned as will be seen below. How could that be if the matter was discovered by the Defendants at the time of execution of the judgment? It is a plain lie to say so. Lies are what has caused a lot of pain and suffering in this world! The defendants seem to think that lying is a virtue.

19. The important aspect here was for the Defendants to prove they discovered new and important evidence. The defendants have not demonstrated what due diligence they exercised at the hearing of the matter in search of what is now purported to be new and important evidence. In any event they had this information and presented it on oath in evidence before the Court. What amounts to new and important evidence to be described so must meet the criteria set out in the case of ***Republic -v- Advocates Disciplinary Tribunal Ex parte Apollo Mboya (2019) eKLR where*** *the court* held that:

> **"......for material to qualify to be new and important evidence or matter, it must be of such a nature that could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court."**

20. I have perused the judgment of the court dated and delivered on **15/11/2018.** I note that the time of delivery of the judgment by brother **Hon. Njoroge J**., in determining whether there was fraud on the part of the Plaintiff in the acquisition of title in respect of **Plot No. 21**, stated in **Paragraph 17** that <u>*" it is not disputed that in accordance with **P. Exhibit 1** the Plaintiff was registered as a cooperative society pursuant to the provisions of the co-operative societies Act on **8/5/1964;** that its name was changed to Munyaka Marketing Cooperative Society Limited on **7/4/1986;** that it acquired title to the suit land on **02/10/08** in the old name of Turbo Munyaka Co-operative Society Limited, that the area list whose certified copy was produced as **P. Exhibit 2** named "Munyaka F.C.S" as the holder of the suit land."*</u>

21. From the judgment, it is clear that the issue of the names of the Plaintiff was very pertinent in the judgment. The Court dealt with it exhaustively. For instance in **Paragraph 23** of the judgment, the court said that <u>*"I also observe that the name of the plaintiff having changed, it is possible to have the title deed amended to reflect the new name and the issuance of the title in the old name is therefore only an irregularity that can be rectified by the Land Registrar in the normal manner provided for by law. It is not per se evidence of fraud*</u>*."* Thus, as to whether the Defendants could and should have exercised due diligence to get the information, as was stated by the deponent of the Relying Affidavit, it was neither here nor there because the Court had settled the issue at the time of judgment.

22. A cursory perusal of the exhibits produced by the Plaintiff and Defendants at the hearing which took place on **06/07/2015** and **16/0/2018** respectively reveals that the certificate of change of name that they now claim as new and important evidence discovered formed part of its evidence in defence at the hearing. During the cross-examination of the Plaintiff's witness on **06/07/2015**, the said Certificate of change of name was marked as **DMFI 1**. Then, on **16/07/2018** when **DW 1** testified, the same was still marked as **DMFI 1**. It was then later, on **03/10/2018** produced by consent of both counsel as **D. Exhibit 11**. Thus, the Defendants relied on it in evidence as **"D. Exhibit 11**." Both that **D. Exhibit 11** and **Annexture JM3** are similar documents in all respects**.** Clearly, the document was and had been within the knowledge of the Defendants all along from the inception of the suit.

23. Perhaps the Defendants thought that my brother having gone on transfer they now had a chance to lie and mislead this court. They may have thought that I am a lazy judge who could not read the bulky Court record and verify facts. That should be far from their mind. It is not open for the Defendants to lie on oath through the Affidavit sworn by one, John Mbugua Njoroge on **2/11/2021**, that this issue had just been discovered at the time of execution of warrants against them, and persist on submitting on the lie as was done. The deponent (John Mwangi Njoroge) of the said Affidavit committed the despicable – <u>perjury</u> – and should be punished accordingly! The registry and the Respondent should take up this matter and report to the relevant authorities for prosecution and further action. Let this be a warning to all and sundry that no one should dare lie against the record of the Court.

24. The end result is that there is no **new and important evidence** discovered by the Applicants as required by law and buttressed by the threshold in the case of ***Republic -v- Advocates Disciplinary Tribunal Ex parte Apollo Mboya (2019) eKLR.*** If the Applicants were dissatisfied by the finding of by brother judge on that issue they should have appealed against it rather than presenting the same issue as novel and lying to the Court that they 'came from Mars at the execution of the decree of the Court' and discovered it and then brought the

Application. On that limb, the Application fails.

25. For the reason of my finding above, I need not go to the other grounds that the **Section** and **Rule** referred to give. But I have to say in passing that the delay of **three (3)** years in bringing the Application is not only unreasonably long and inexcusable but also unexplained: the white lie is not an explanation whatsoever. Again, the Applicants are referred to **Section 66** of the **Companies Act, 2015**, Act **No. 17** of **2015** of the Laws of Kenya on the effect of change of a company name. I will not go into discussing the provision of the law since it was a matter before my predecessor at the time of giving the judgment impugned.

b) Whether the suit should be dismissed

26. Having found that the Applicants did not merit in the first issue, the second one also fails since its determination was basically dependent on the success of the first one. The judgment is undisturbed. It was neither appealed from nor has it been set aside by any order of this Court. Thus, **prayer 4** of the Application fails.

c) What orders to issue and who to bear the costs of the Application?

27. In conclusion, this court finds that the Defendants' Application dated **2/11/2021** is devoid completely of any merit. Paragraph **22** above should not be lost sight of. The Application is hereby dismissed in its entirety with costs to the Plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 24TH DAY OF JANUARY, 2022.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.