



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CIVIL CASE NO. 140 OF 2004**

**SAMUEL JUMA KUTOLOBWA.....PLAINTIFF**

**VERSUS**

**FRANCIS SIMIYU WABWILE**

**MOSES WEKESA**

**ELIZAPHAMIA NASIMIYU WANYONYI**

**JANE WANJALA WANYONYI .....DEFENDANTS**

**RULING**

[1] The applicant in this case filed this application under Section 7(a) 3(a) and 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. He prays that there be a stay of execution of the judgement delivered on 9<sup>th</sup> March 2016 and the subsequent decree that followed. He equally prays for a review and setting aside of the judgement aforesaid.

[2] The applicant bases his argument on the fact that, after judgement on 7/4/2016 he attended a meeting at a chief's Baraza and she came across crucial documents which she thinks, that had the court had a chance to look at, the verdict of the matter could have been different. She states also that after judgement she came across the office file of the late Peter Wanyama Wanyonyi advocate who had previously acted for them and that on the said file was a Notice of Revocation of a Power of Attorney issued to the plaintiff herein unregistered and finally that there were a host of witnesses who have accepted to testify on their behalf.

[3] The application is opposed by the respondent who states in his submissions that the 3<sup>rd</sup> and 4<sup>th</sup> defendants were represented by competent advocates throughout the proceedings and that they cannot therefore feign ignorance. Further that there is nothing new to warrant the court to interfere with the judgement in that the applicant's husband died before the case was filed. That on his death the donor of the Power of Attorney attended his funeral and if he stated that he sold 1 ½ acres to the applicant's husband during the funeral, then the applicants were aware of that fact and it cannot be said that the information has been discovered or that it is new. Finally, that the applicants were represented by Mr. Kweyu advocate who was appointed by the Law society to replace the firm of Wanyama Wanyonyi & Co. Advocates. That there was no issue of a missing file raised by Mr. Kweyu advocate and that allegation is an afterthought.

[4] One thing is clear in this application, that there is no claim that there is no error or mistake on the face of the record that is alleged of the judgement by the applicants.

[5] The applicants want the judgement of the court reviewed on the basis that they have found 'new' evidence. The same being that the donor of Power of Attorney admitted in the funeral of their husband that a portion of 1 ½ acres was sold to him by the donor herein at her then husband's funeral.

Is that a new information?

Were the applicants not at the funeral?

If they were, were they not aware of that information and therefore capable of adducing evidence on the same at the trial of the case hereof?

[6] The applicants allege that their court file with the firm of Wanyonyi Wanyama was lost. This particular issue was not brought to the court's attention by Mr. Kweyu advocate who conducted the case on their behalf. How was Mr. Kweyu able to conduct the case without the applicant's file?

Why didn't they raise such an issue in court? I am not at all convinced that the file was missing. There is no affidavit by Mr. Kweyu to support such allegation. It cannot therefore be true.

[7] A court of law cannot review a case, for the reason that a party did not prepare its case thoroughly or on the pretext that some evidence was not tendered to court by the party or his advocate during the hearing. Parties to suits are under a duty to prepare their cases thoroughly before the hearing of the suit. Indeed, that is what is envisaged by Order 11 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act and Rule 45(1) are not meant for such a situation. They are meant for errors on the judgement or decree on a point of law that stares at you or those that should not elicit any debate, for example clerical and/or arithmetical errors see Nyamongo and Nyamongo Advocates Vs Kago(2001) IEA 173.

The applicant in this case is asking the court to give him another chance to bring further evidence. She wants a second bite of the cherry. This court having determined the case and pronounced its final judgement is functus official. It has no such powers under the law.

The application herein is misconceived and is dismissed with costs.

Dated, Signed and Delivered at Bungoma this 27<sup>th</sup> day of July 2016

**S.MUKUNYA - JUDGE**

**In the presence of**

Gladys/Joy court assistants

Mr. Watanga for the plaintiff

Mr. Murunga hold brief for Mr. Milimo for the defendants