



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 218 OF 2014

JOHNSON GITHAIGA D MUGO.....PLAINTIFF

-VERSUS-

JACOB KARIUKI NJOROGE.....1ST DEFENDANT

ISAAC WANJOHI GACHURU.....2ND DEFENDANT

RULING

1. By the Notice of Motion application dated 28th August, 2018, Johnson Githaiga D. Mugo (*the Plaintiff*) prays for orders crafted as follows:

1. Spent.

2. That this Honourable court be pleased to grant leave to the firm of M/S Wanjiru Mwangi Advocates to come on record for the Plaintiff/Applicant for review after ruling.

3. That this Honourable Court be pleased to grant leave for filing for review of the ruling out of time and set aside the order from the ruling issued by the Honourable Lady Justice L. N. Waithaka on 20th November, 2017 dismissing the Plaintiff's suit herein on grounds of there being sufficient reason to so do.

4. Spent.

5. Spent.

6. That the costs of this application be in the cause.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds that:

(a) In the Ruling of 20th November, 2017, the court directed that the parties herein do file a joint list of issues within 30 days of the Ruling and that the Applicant in the application dated 31st July, 2017 fixes the matter for hearing within 60 days of the Ruling failure to which the suit would be deemed dismissed.

(b) Though the 2nd Defendant has not complied with the orders of this court, he now threatens to execute the orders against the Plaintiff in respect of costs;

(c) The 2nd Defendant has taken out warrants of sale of property in execution of the decree for money and warrants of attachment of moveable property;

(d) Despite instructing his advocate, the Plaintiff's previous Advocate, failed to take the requisite step to prosecute the case leading to its dismissal;

(e) The Plaintiff has now appointed a new Advocate upon learning of the laxity of the former Advocate and is keen on pursuing the matter to conclusion;

(f) The Plaintiff prays that the consequences of the inaction, laxity and mistakes of the previous counsel are not visited upon him;

and

(g) *There are sufficient reasons for the court to review its Ruling and orders so as to protect the interest of all parties.*

3. Jacob Kariuki Njoroge (*the 1st Defendant*) is opposed to the application. In his Replying Affidavit sworn and filed herein on 10th January, 2019, the 1st Defendant avers that the Plaintiff's application is misplaced and lacks merit. The 1st Defendant avers that the execution of the decree complained of was in line with the ruling dated 20th February, 2015 following the dismissal of an application that was brought by the Plaintiff dated 29th October, 2014.

4. The 1st Defendant further avers that he did file a Bill of Costs dated 21st August, 2015 and that the same was taxed in the sum of KShs.104,430/- on 20th November, 2015 after being served upon all parties.

5. The 1st Defendant avers further that vide an application dated 31st July, 2017, the 2nd Defendant sought to have the suit dismissed for want of prosecution. Thereafter the parties were directed to file joint issues for determination within 30 days after which the matter was to go for pre-trial and in default the suit would stand dismissed.

6. Similarly opposed to the application is Isaac Wanjohi Gachuru (*the 2nd Defendant*). In his Replying Affidavit sworn on 11th October, 2018 and filed herein on 12th October 2018, the 2nd Defendant avers that the Plaintiff's application is unmerited and a gross abuse of the court process. The 2nd Defendant asserts that this court is *functus officio* having dismissed the matter and there are no new or important matter that has been raised to warrant a review.

7. I have carefully perused the Plaintiff's application and the response thereto by the two Defendants. While the application before me is not framed in a clear manner, what I understand the Plaintiff to be seeking is an order that the Ruling herein dated 20th November, 2017 be reviewed and/or set aside to enable the Plaintiff to proceed with the suit.

8. From the record, that Ruling arose from an application dated 31st July, 2017 instituted by the 2nd Defendant in which he sought to have the suit dismissed for want of prosecution. Having heard the application, the Honourable Lady Justice L. N. Waithaka in her Ruling dated 20th November, 2017 found that the 2nd Defendant was perfectly in order to bring the application given that the matter had last been in court on 20th February, 2014.

9. The Learned Judge however declined to outrightly dismiss the suit and instead granted the parties 30 days to file joint issues for determination and for the 2nd Defendant to set the matter for pre-trial within 60 days from the date of the Ruling. In default, the suit would stand dismissed.

10. A perusal of the record reveals that the said Ruling was read in the absence of the parties and it is not clear when they came to learn of the same. Subsequently, on 10th April 2018, the parties appeared before Lady Justice L. N. Waithaka for mention with the Plaintiff's counsel urging that the matter be transferred to the Lower Court. That request was declined as the court correctly stated that the suit stood dismissed 60 days after the Ruling dated 20th November, 2017.

11. Some four (4) months thereafter, the Plaintiff brought this application seeking a review of the Ruling and for the dismissal order to be set aside on account that his previous Advocate failed to act urgently on his instructions.

12. While this court has power to review its orders, such power must be exercised within the framework of **Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules**. In this respect **Section 80 of the Act** provides as follows:

“80. 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 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.

13. **Order 45 Rule 1 of the Civil Procedure Rules** on the other hand provides as follows:

“(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 review of Judgment to the court which passed the decree or made the order without unreasonable delay.”

14. My reading of the above provisions shows that while **Section 80** gives the power to the court to review its orders, **Order 45** sets out the rules and restricts the grounds within which such power may be exercised. Accordingly, **Order 45** limits review to the application being made expeditiously and on the following grounds:

(a) Discovery of a new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order was made, or;

(b) On account of some mistake or error apparent on the face of the record, or;

(c) For any other sufficient reason.

15. In the matter before me, the application for review was instituted more than 10 months after the orders sought to be reviewed were made. The Plaintiff does not offer any explanation for the delay save for what he states was the laxity of his counsel. There is no explanation when he came to learn of the orders set to be reviewed and what specific actions he took to deal with a matter that had been instituted in court in the year 2014.

16. More significantly, the Plaintiff has failed to bring himself within the parameters for review as set out under **Order 45 Rule 1 of the Civil Procedure Rules** cited hereinabove. He neither claims to have discovered any new and important matter of evidence that was not within his knowledge at the time the application was argued nor that there was an error or mistake apparent on the face of the record to warrant orders of review.

17. The upshot is that the application before me dated 28th August, 2018 is misconceived and must fail. I dismiss the same with no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 20TH DAY OF JANUARY, 2022.

In the presence of:

Mr. Mbuthia holding brief for Wanjiru for the Plaintiffs

Ms Wambui Mwangi holding brief for Muchiri for 1st Respondent

Ms Miriti for 2nd Respondent

Court assistant - Wario

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J. O. Olola

JUDGE