REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC MISC. APPLICATION NO.58 OF 2020

J.M. NJENGA & CO ADVOCATES.....APPLICANT

VERSUS

1. MONICA WAMBUI KAMAU

2. ZACHARIA NJENGA

3. JANE NJERI

4. JOSEPH NYINGI KAMAU *(Suing in their capacity as administrators of the*

Estate of JAMES KAMAU THIONG'O alias KAMAU THIONG'O (Deceased)

5. JACOB KAMAU KAHIU.....RESPONDENTS

RULING

The application is dated 25th March 2021 and is brought under Order 45 Rule 1 of the Civil Procedure Rules, S.3A of the Civil Procedure Act seeking the following orders;

1) THAT the court be pleased to review, set aside and/or vary the orders made on 18th November 2020 in regard to the notice of motion dated 5th August 2020 and that the said application be reinstated and the applicant allowed to prosecute and/or heard on its merits,

2) THAT the costs of this application be provided for

3) THAT the Honourable court be at liberty to issue such other or further orders as if shall deem just and expedient in the circumstances.

It is based on the grounds that there is an error apparent on the face of the court record as the court went ahead to deal with the application dated 5th August 2020 before giving the applicant its constitutional and legal right to prosecute the same. The applicant was not given a chance to ventilate its case and without the benefit of the said ventilation on both the law and facts, there is an apparent error on the face of the court records and no wonder the court arrived at the decision it did. A party cannot be condemned unheard and it is pertinent that the applicant be granted an opportunity to ventilate its case in regard to the application in issue. The interest of justice dictated that the orders sought be granted and the application dated 5th August 2020 considered on its merits

This court has carefully considered the application herein. It is based on the grounds that there is an error apparent on the face of the court record as the court went ahead to deal with the application dated 5th August 2020 before giving the applicant its constitutional and legal right to prosecute the same. **In the case of Kwame Kariuki & Another vs. Mohamed Hassan Ali & 4 Others (2014) eKLR,** the Court observed that;

"It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal."

In the case of *Mwihoko Housing Company Limited vs Equity Building Society (2007) 2 KLR 171* is relevant. It was held, that;

> *"A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;*

> *"An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made…"*

Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

> *"(1). Any person considering himself aggrieved-*
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> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
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> *(b) by a decree or order from which no appeal is hereby allowed.*
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> *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.*
>
> *(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."*

The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states as follows:

> *"Any person who considers himself aggrieved-*
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> *(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
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> *(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."*

Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. In Court of Appeal, *Civil Appeal No. 211 of 1996, National Bank of Kenya vs Ndungu Njau*, the Court of Appeal held that;

> *"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law".*

I have perused the court record and find that counsel for the applicant Mr. Njenga was present in court on the 21st October 2020 together with Mr. Wameyo for the Respondent. He submitted that the notice of motion dated 30th July 2020 was exparte and he would be relying on the grounds thereon and supporting affidavit. That Mr. Wameyo had not filed any response despite being served with both the notice of motion and the bill of costs. Ruling was set for 18th November 2020 by Yano J and delivered virtually on that day in the presence of Ms Kimani holding brief for Okeyo for the applicant. From the record the allegations in the current application that he was never given a hearing are untrue. Counsel chose to rely on the ground and supporting affidavit. From the above provisions of the law, authorities cited and facts of this case I find that the applicant has failed to show any mistake or error apparent on the face of record and/or any sufficient reason to enable this court review the decision. I find this application is not merited and I dismiss.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH JANUARY 2022.

N.A. MATHEKA

JUDGE