REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 1418 OF 2001

JACINTA WAIRIMU NJOROGE...PLAINTIFF

VERSUS

JULIA WANJIRU ……………………………………….…1ST DEFENDANT

ALICE WAMBUI KARANJA……………………………..…2ND DEFENDANT

AGATHA WANGECI MUIRURI………………………..…....3RD DEFENDANT

RAHAB MURINGE NDERI……………………………….....4TH DEFENDANT

JECINTA MUMBI CHEGE ……………………………….....5TH DEFENDANT

R U L I N G

The plaintiff/Applicant by a Notice of Motion dated 9th July 2012 to be brought under Order 45 rule 1 and Order 51 Rule 1 Civil Procedure Rules seeks orders that:-

1. That the judgment delivered by **M.A. Angawa, J** on 9th May 2007 be set aside and the claim by the Plaintiff/Applicant be allowed as prayed in the plaint.
2. That the costs of this application be provided for:

The application is based on the ground that there is discovery of new and important matters of evidence which were not within the knowledge of the applicant. The application is further supported on the annexed affidavit of **Jacinta Wairimu Njoroge** the plaintiff herein sworn on 9th July 2012. By the affidavit the plaintiff/Applicant acknowledges the judgment delivered by **Hon. Justice Angawa** on 9th May 2007. The Applicant however states that after the judgment was delivered she made inquiries from the Ministry of Lands on the validity of the title issued to her and the Ministry vide a letter written to **Drumvale Farmers Co-operative Society** seeking clarification on the allotment of land parcel **Nairobi/block 118/294** confirmed that her title was valid. Letter from the Ministry to **Drumvale**

Farmers Co-operative Society dated 17th April 2012 annexed and marked **"JWN2**". The Applicant also annexes a certificate of official search marked "**JWN4"** dated 13/4/2012 which confirms that the Applicant was the registered owner of the suit property. The liquidator of **Drumvale Farmers Co-operative Society Ltd** vide a letter of 4th July 2012 annexed and marked "**JWN3**" confirmed that as per their register the suit property was allocated to the Applicant.

The Plaintiff/Applicant avers that the evidence adduced vide the instant application is new evidence which was not available at the time judgment in the suit was rendered in 2007 and on that account the court should review the judgment on the basis of the discovery of new and important evidence that was not available when the suit was heard.

The Respondents filed grounds of opposition dated 22nd July 2013 on the same date and lists the following grounds:-

1. The application is a grave abuse of the process of the court and is a non starter in view of the fact that the Applicant has filed an appeal in the court of Appeal vide **Civil Appeal NO. 226 of 2010.**
2. The said appeal came for hearing on 6th May 2013 and the Respondents herein applied for the same to be dismissed and the court of Appeal reserved their ruling to 19th July 2013.
3. The Applicant's application is an afterthought, lacks any merit and ought to be dismissed with costs.

Rahab Muringe Nderi the 4th Defendant/Respondent filed a replying affidavit in opposition to the plaintiffs application for review and avers that the Plaintiff/Applicant having exercised her right to appeal against the judgment of this court cannot seek review of the judgment before this court. The Defendant has annexed a bundle of documents marked collectively as "**RMN1"** to illustrate the fact that the plaintiff appealed the judgment of this court which include:-

i. Notice of Appeal to the Court of Appeal dated 10th May 2007 and lodged in court on the same date.
ii. Notice of Motion application for stay of execution under Rule 5 (2) (b) of the Court of Appeal Rules dated 5th July 2007 and lodged in the court of Appeal Registry at Nairobi on 25th July 2007.
iii. Notice of Motion application dated 19th October 2010 lodged in the Court of Appeal Registry by the Respondents on 21st October 2010 seeking to have the record of appeal struck out.

The parties filed written submissions as directed by the court. The plaintiff/Applicant filed her submissions dated 6th February 2014 on the same date while the Defendant/Respondents filed their initial submissions dated 23rd September 2014 on 24th September 2014 and supplementary submissions dated 26th November 2014 on the same date. The parties counsel highlighted their respective written submissions before me on 27th November 2014.

The Plaintiffs written submissions reiterate the facts set out in the plaintiffs supporting affidavit and contend that there has been a discovery of new evidence as per the annextures attached to the affidavit of the plaintiff and urges the court to appraise this new evidence and find that a review is merited. The plaintiff places reliance on the case of **Kisiangani Tulienge & 2 others –vs- Paul Wafula & 2 others (1998) eKLR** where the court stated:-

> **"In order to succeed the applicants have to bring themselves within the ambit of the provision governing granting of review Order 44 Rule 1 (now Order 45 Rule 1) which states inter alia that review lies in favour of a party who from 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 an 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.**

When the above principle is applied to the facts of this application I find that a party aggrieved of a court order or judgment has two options either to appeal or to seek a review"

On the issue of lodging of an Appeal to the Court of Appeal the applicant's counsel, **Mr. Lusi Advocate** in his oral submissions argued that as the intended appeal was struck out for having been filed out of time there was technically no appeal filed and the Plaintiff/Applicants application for review should be entertained. **Mr**. **Lusi** submitted no appeal was heard on merit at the court of appeal and for this court to decline the Applicant's instant application on the basis that the Plaintiff/Applicant exercised her option of filing an appeal and therefore review would not be available to her would be a denial of justice to the Applicant.

The Defendant/Respondents submissions are two prolonged, firstly, that the application is unmaintainable the Applicant having exercised her option to appeal rather than seek a review, and secondly, that the application lacks any merit as there is no discovery of new and important evidence that would not have been available through exercise of reasonable due diligence at the time the suit was heard and judgment delivered. The Respondents further submit that at any rate the application for review was not made without unreasonable delay.

The Respondents rely on the cases of **Draft and Develop Engineers Ltd –vs- National Water Conservation & Pipeline Corporation (2014) eKLR** for the proposition that a party cannot file an appeal and at the same time apply for a review. In the Court of Appeal case of **Anthony Gachara Ayub –vs- Francis Mahinda Thinwa (2014) eKLR** the court held that:

> **"Under the provisions of Order 45 of the Civil Procedure Act, a party who chooses to proceed by way of review loses the right to appeal".**

In the same **Anthony Gachara –vs- Francis Mahinda case (Supra**) the court held that an application for review ought to be brought promptly and that inordinate delay in bringing such an application would disentitle a party of a positive order.

The Judges in the case stated thus:-

> **"In the instant case, we are of the considered view that the appellant has not been able to demonstrate to us that the judge erred in the exercise of his discretion in declining to grant the order for review. The Judge considered the three year period of delay as inordinate and no sufficient explanation for the delay was given. The appellant submitted that the delay was occasioned by failure to obtain leave to extend the time to lodge an appeal. We are of the view that when a party takes a wrong legal step in prosecution of its case, time continues to run and such a wrong step is not prima facie an excuse for the inordinate delay.**

I have considered the pleadings and the facts as per the parties affidavits and the submissions made on behalf of the parties and the issues to determined are whether:-

i. **The Applicant having chosen the avenue of appeal is debarred from pursuing the review application.**
ii. **There is discovery of new and important evidence that could not by exercise of due diligence have been available at the time the judgment was made.**
iii. **The application has been brought without unreasonable delay.**

It is not in dispute that after the delivery of judgment on 9th May 2007 the plaintiff/Applicant on 10th May 2007 filed a Notice of Appeal signifying her intention to appeal against the judgment to the Court of Appeal. The plaintiff/Applicant prosecuted an application for stay of execution in the Court of Appeal which was disallowed.

The Respondents successfully prosecuted a Notice of Motion seeking to strike out the plaintiff/Applicant's record of appeal in the Court of Appeal.

Order 45 rule 1 provides:-

45.(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 way 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, 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".**

The court of Appeal in the case of **Equity Bank Ltd –vs- West Link Mbo Ltd (2013) e KLR** considered what amounts to an appeal and **Musinga JA** rendered himself thus on the issue:-

"I must go back to the question – "What is an appeal?"

> **The Constitution does not define what an appeal is. The constitution is the fundamental law of the land and provides general framework and principles that prescribed the nature, functions and limits of government or other institutions. Acts of Parliament and subsidiary legislation contain the details regarding its operationalization. I must therefore turn to rule 2 (2) of the Court of Appeal Rules which states that:-**
>
> **"appeal" in relation to appeals to the court, includes an intended appeal.**

What is an intended appeal?

Rule 75(1) states as follows:-

> **"Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court".**
>
> **The first step in instituting an appeal is the filing of a notice of appeal. Order 42 rule 6(4) of the Civil Procedure rule is also relevant in considering what an appeal is. It states that:-**
>
> **"for purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that court notice of appeal has been given".**
>
> **It follows therefore that as soon as a notice of appeal is lawfully filed, an appeal is deemed to be in existence----".**

I need say no more respecting whether or not the plaintiff/Applicant had filed an appeal to the Court of Appeal. She had, and the fact that the appeal may have been struck out cannot derogate the fact that she had filed the appeal and therefore had exercised one of the options available to her under order 45 Rule 1 of the Civil Procedure Rules and having done so cannot change course midstream. Having made the choice she remains bound by it and that is why it is critical for parties and their legal advisors to exercise caution whenever they have to make an erection as the law requires that a party makes only one choice. In the present case the plaintiff wants to get the benefit of the two options. The law does not permit and quite clearly the essence is to prevent parties from doing try and error where one tries an appeal and if it fails the party goes back to try a review. The court must at all times guard against abuse of the court process.

On the issue whether there is discovery of new and important matter or evidence that could not by

exercise of due diligence have been available at the trial, I dare say not. From a perusal of the file record it is clear that the plaintiff had been registered as owner of the suit property way back in 2001 and there was a copy of certificate of official search that was tendered by the plaintiff. The evidence from **Drumvale** was sought in 2012 after judgment had been given in 2007. **Why was it not sought and obtained in 2007**?. The scenario created herein gives the impression of a party who having lost a litigation goes back to cause fresh investigations to be done with a view of boosting the evidence of a case that has already been determined. A party cannot seek evidence to plug what may have been the weaknesses of his/her case after the court has rendered judgment on the basis of the evidence before it and then come back to attempt to revive the case. The court of Appeal in the case of **D.J. Lowe & Company Ltd –vs- Banque Indosuez Civil App. Nairobi 210 of 1998 (UR)** sounded a caution where an application for review is grounded on the discovery of fresh evidence when they observed thus:-

> **"Where such review application is based on fact of the discovery of fresh evidence the court must exercise greatest of case as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show there was no remissness on his part in adducing all possible evidence at the hearing".**

Having reviewed the matter before me I am not persuaded there is a discovery of any new and important evidence that could not have been available at the trial had the plaintiff exercised due diligence. The Land Office was always there and so was **Drumvale Farmers Co-operative Society** and thus the evidence being obtained from them in 2012 was there even in 2007 and before. I would therefore decline to grant a review of the judgment on account of discovery of new and fresh evidence as sought by the Plaintiff/Applicant.

On the issue whether the application was made without unreasonable delay my view is that it was not. Judgment in the matter was rendered on 9th May 2007 and the instant application was made on 9th July 2012 well over 5 years after the judgment was rendered. On an application for review apart from satisfying either of the grounds on which review may be granted under Order 45 Rule 1 an applicant must also demonstrate that the application was brought without unreasonable delay. In the case of **Muyodi –vs- Industrial & Commercial Development Corporation & Ano. (2006) IEA 243** the court held thus:-

> **"For an application for review under Order 45 Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay".**

In the present case the applicant has not in my view explained the delay in bringing the application and specifically why it was only in 2012 that she sought to obtain the evidence that she claims is new evidence. The same evidence existed and was available in 2001 when the suit was filed and without doubt could have been obtained by the time the suit went to trial. It is my considered view that in the circumstances of this matter a delay of 5 years before bringing the application was inordinate and inexcusable and I would equally on this account disallow the applicants application.

The upshot of the foregoing is that I find the application by the applicant dated 9th July 2012 to be devoid of any merit and I accordingly order the same dismissed with costs to the Respondents.

Ruling dated, signed and delivered this……15th……..day of……May…………………2015.

J. M. MUTUNGI

JUDGE

In the presence of:

…………………………………………… for the Plaintiff/Applicant

…………………………………………… for the Defendants/Respondents