



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 292 OF 1999

MICHAEL MURIUKI NGUBUINI.....PLAINTIFF

VERSUS

EAST AFRICAN BUILDING SOCIETY LIMITED.....DEFENDANT

RULING

By a notice of motion dated 4th July 2014 expressed under the provisions of Section **1A, 1B, 3A** and **80** of the Civil Procedure Act^[1] and Order **45** of the Civil Procedure Rules 2010, the Plaintiff (hereinafter referred to as the applicant) moved this court seeking orders that:-

- i. *That the order made by this honourable court on 22nd October 2008 dismissing this suit be reviewed and or set aside.*
- ii. *That this suit be reinstated for hearing and determination on merit.*
- iii. *That costs hereof be provided for.*

At hearing of this application I sought both counsels' views on whether this case should be handled by the Environment and Land Court. Counsel for Applicant expressed the view that the dispute is purely commercial in nature hence, the matter is properly before this court while counsel for the Respondent held the view that this matter ought to be handled by Environment and Land Court. I looked at the Plaintiff and the prayers in the plaint which are "*for an injunction restraining the defendant from selling the suit premises until an independent valuation is done and a further prayer that an independent valuer be agreed upon by both parties to value the suit property*" and also I looked at the provisions of Section **13** of the Environment and Land Act^[2] and I was satisfied that the dispute herein is substantially commercial in nature and ruled that the application proceeds before me.

The application is grounded on the grounds stated on the face of the application and the annexed affidavit of the applicant annexed thereto and annexures to the said affidavit. Essentially, the applicants grounds are that:-

1. *The purported sale of the suit premises was irregular, illegal and or unlawful since there were subsisting court orders issued on 2.9.2001.*
2. *That prior to the dismissal of this suit there were several attempts to fix the case for hearing.*
3. *That there are errors on the face of the record and or sufficient reasons to enable this court to grant the orders sought.*

The Applicants affidavit provides more grounds which can be summarized as follows:-

- i. *That at the hearing of the application for dismissing this suit for want of prosecution, the*

defendants heavily relied on the fact that the suit Premises was auctioned on 5th February 2004 notwithstanding the fact that there were subsisting restraining orders at the time of the said auction, hence the said sale was irregular since there were court orders in force.

- ii. That the court was greatly influenced by misleading information provided by the defendants.
- iii. That the defendants did not get a fair value of the property.
- iv. That his advocates never gave him a correct picture of the progress in this case and only came to know about it on or about 9TH May 2014 when a stranger came to him and told him that he had information that he was selling the premises, hence the delay in filing the application before the court.
- v. That he collected his file from his former advocates on 17.5.2014 after a lot of struggle.
- vi. That he has always been keen to prosecute this suit and stands to suffer great prejudice if the present allocation is disallowed while the respondent will continue enjoying the fruits of illegality and that the defendants could not pass a proper title and so far no one has ever confronted him claiming ownership of the land.

The respondent filed grounds of objection on 30.9.2014 and cited inordinate delay in filing the application, that the suit and he Respondent are non-existent, the suit property has changed hands, the applicant has not satisfied the provisions of Order 45, that no notice of appeal was filed after the ruling delivered on 22.10.2008, that this court is *functus officio* and lacks jurisdiction.

The Respondent also filed a replying affidavit sworn by a one **Jack Kimathi** the gist of which is that the suit property has since been sold, hence the application has been over taken by events, that the proper procedure was followed during the sale and that the injunction issued on 20.9.2001 had lapsed as at 5.10.2001, that this application was filed after a delay of 7 years which delay has not been explained, that the applicants counsel was fully aware of the dismissal of this suit. Further, the Respondent averred that the application offends the mandatory provisions of Order 45 of the Civil Procedure Rules and that the supplementary affidavit of the applicant dated 4.5.2015 was filed without leave and ought to be disregarded.

At the hearing of the application, the applicants Advocate **Mr. Adere** adopted the grounds on the face of the application and the Applicant's supporting affidavit and drew the courts attention to pages 11 of the application and particularly page 14 which is a document titled particulars of the charged property and pointed out that the dates on the document had been altered suggesting bad motive. He submitted that the said alteration was done to avoid the court order appearing at page 6 of the application. He submitted that the said order had been served upon the respondents and they were fully aware of its existence. Counsel further submitted that then counsel on record failed to set the suit down for hearing. In his submission, the applicants then advocate is to blame and that the Applicant is wholly innocent and that even after the dismissal, the Applicant was not notified by his advocate. Counsel submitted that the Applicant ought not to be punished because of mistakes of his advocate

Mr. Adere also submitted that the applicant had demonstrated "*sufficient grounds*" to warrant the court to allow the application and added that the court should consider the "*overriding objective*" under Sections 1A & 1B of the Civil Procedure Act. He also relied on the provisions of Article 159 (2) (d) of the Constitution of Kenya 2010. Lastly counsel cited several authorities in support of his arguments and prayed that the court ought to exercise its discretion and allow this case to be heard on its merits and added that the applicant is ready to pay costs as a result of the former advocates' failure and or omissions.

On his part the respondents' counsel vehemently opposed the application and urged the court to dismiss it. Learned counsel for the defence **Mr. Mahan** argued *inter alia* that under Order 45 of the Civil Procedure Rules 2010, a person who seeks an order of review should file the application *without unreasonable delay*, that the present application was filed **after 7 years** and that no explanation has been offered for the delay, that the property has since changed hands and title is now in the hands of a third party and there is a need for the court to consider the balance of convenience, further there is no discovery of a new matter or evidence which was not within the knowledge of the applicant, and no new matter has been pleaded as per the rules. Counsel further submitted that there was no error on the record and added 7

years is an inordinate delay.

Regarding the existence of an injunction, defence counsel insisted that an injunction under the rules can only be granted for **14 days** and may be extended for another **14** days with the consent of the Respondent, otherwise after the said period it lapses, hence the *ex-parte* order was never extended and that the application was never heard *inter partes*. Counsel took the view that the applicant ought to have ascertained the position from the court file if his lawyer was not helpful. Counsel also submitted that the court should not punish a party who moved the court properly as required to dismiss a suit for want of prosecution. In his view, the applicant never satisfied the grounds for review as per the rules and that the delay in filing this application is so long that it disentitles the applicant from benefiting from the courts discretion. He noted that the application for dismissal was heard *inter-partes* and dismissed. Counsel relied on the arguments and authorities relied upon by the learned judge in the ruling now the subject of this application.

I have carefully considered the grounds in support of and against the application, the submissions by both counsels (and at this point I must comment both counsels for ably and diligently advancing their arguments and supporting their opposing views with the law and authorities in a scholarly and professional manner and indeed I found both submissions helpful). I have also considered the relevant law and authorities and the peculiar facts of this case. In my considered opinion the key issues that emerge for determination are:-

- i. *Whether the applicant has satisfied the grounds for review.*
- ii. *Whether the alleged failure on the part of the applicant's former advocate constitutes "sufficient reason" to warrant this court to allow this application.*
- iii. *Whether the circumstances of this case are of such a nature as to warrant this court to invoke the overriding objective of the Civil Procedure Act as provided for under Section 1A & 1 B of the Civil Procedure Act.*

It is not in dispute that this suit was filed in October 1999 and that the plaint was accompanied by an application expressed under certificate of urgency. On 18th October 1999 the court granted an *ex-parte* injunction against the defendant. Interestingly that application was never heard *inter partes* nor was the said interim order extended. Further the main suit was never fixed for hearing. On 7th April 2006, the defendant/Respondent moved the court under Order XVI Rule 6 and Order L Rule 1 of the former Civil Procedure Rules (now Order 17 Rule 2 (1) (2), (3) of the Civil Procedure Rules 2010 seeking to have the suit dismissed for want of prosecution *on the grounds that no step had been taken by the plaintiff to prosecute the case as at then for 4 years and 2 months*. It is important to recall that Order XV1 Rule 5 (d) of the former Rules provided that 'if, within three months after-

(a)

(b)

(c)

(d) *the adjournment of the suit generally, the plaintiff, or the court on its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set down the suit for hearing or apply for its dismissal.*

As pointed above the application in question was expressed under Sub-Rule 6 which provided;-

"In any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed; and in such case the plaintiff may, subject to the law of limitation, bring a fresh suit."

Obviously counsel for the Applicant had the **Rule 6** in mind when he argued that the Rule only refers to

the **court** and **not a party**, hence only the court can initiate the dismissal under the said rule. That may be so, but I am fully aware that I am not sitting on an appeal and in any event I cannot do so and I must distinguish grounds for review and grounds for an appeal at the earliest opportunity possible in this ruling. To my mind, whether or not the said application was expressed under the correct provisions of the law or not that is a point of law and a ground of appeal not a ground for review. Indeed this was the holding in the case of **Housing Finance Co of Kenya Ltd vs Prudential Dry Cleaners Ltd**.^[3]

To my mind there are two things I cannot do in an application of this nature. *First* I cannot *fault* or *review* the *judges' exercise of discretion* and *secondly* I cannot *review the decision merely because the judge may have decided the matter on an incorrect procedure or his decision is based on the wrong misapprehension of the law. These two, to my mind are grounds of appeal.* I hold the strong view that a decision made in the exercise of the discretion of the judge cannot be reviewed. This was the holding in **Eastern and Southern African Development Bank vs Africa Green Fields Ltd and others**^[4]. In the said case the court followed the court of appeal decision in the case of **National Bank of Kenya Ltd vs Ndungu Njau**^[5] where the court held:-

“In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose.”

The High Court of Uganda cited the above holding with approval in the case of **Miter Investments Ltd vs East African Portland Cement Company Ltd**.^[6] Also, **Bennet J** was in my humble view correct in **Abasi Belinda vs Fredrick Kangwamu and another**^[7] when he held that:-

“a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal”

Also of useful guidance is the following excerpt from the judgement in the above cited case of **National Bank of Kenya Ltd vs Ndungu Njau**^[8] **Kwach R.O, Akiwumi A. M & Pall G. S, JJA** stated:-

“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-evident and should not require an elaborate argument to be established. It will not be a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

In my view, the use of **Rule 6** in the application in question is a matter of law and procedure and not a valid ground for review.

At this juncture, I find it is necessary to examine the provisions of Section **80** of the Civil Procedure Act and Order **45** Rule **1** of the Civil Procedure Rules, 2010. In my view, the High Court has a power of review, but the said power must be exercised within the framework of section **80** Civil Procedure Act and Order **45** Rule 1.^[9]

Section **80** of the Civil Procedure 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 a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-

45 Rule 1 (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 judgement to the court which passed the decree or made the order without unreasonable delay.”

Section 80 gives the power of review and Order 45 sets out the rules. The rules in my view restrict the grounds for review. In my view, the above rule lays down the jurisdiction and scope of review limiting it to the following grounds; **(a)** discovery of new and important matter or evidence which after due 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 made or; **(b)** on account of some mistake or error apparent on the face of the record, or **(c)** for any other *sufficient reason* and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

Mr. Adere for the applicant strongly argued that the application before the court is premised on “sufficient reason.” The reason offered is that the applicant was failed by his advocate who never gave him progress report on the case. The crucial question to resolve is whether indeed the alleged failure on the part of the advocate constitutes sufficient reason. Discussing what constitutes *“sufficient reason”* in an application for review, the Supreme Court of India in the case of **Ajit Kumar Rath vs State of Orisa & Others**^[10] had this to say:-

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule”

A similar view was held in the case of **Sadar Mohamed vs Charan Signh and Another**^[11] where it was held that:-

“Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter).”

Akiwumi & O’kubasu JJA in the case of **The official Receiver and Liquidator vs Freight**

Forwarders Kenya Limited[12] added that “these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice ‘be limited to the discovery of new and important matters or evidence, or occurring of a mistake or error apparent on the face of the record”

Mulla in the **Code of Civil Procedure**[13] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that ‘the expression sufficient reason’ is wide enough to include misconception of fact or law by a Court or even by an advocate.” This definition only covers misconception of facts of law but not negligence or conduct of an advocate.

Mulla[14] also states that ‘the expression ‘any other sufficient reason’ used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in Order 47, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.[15] These words (i.e. sufficient reason) mean that the reason must be one sufficient to the court to which the application for review is made and they cannot be held to be limited to the discovery of new and important matter or evidence, or the occurring of a mistake or an error apparent on record.[16]

The Court of Appeal of Tanzania in the case of **The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others**[17] discussing what constitutes sufficient cause had this to say:-

“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant” (Emphasis added)

In **Daphene Parry vs Murray Alexander Carson**[18] the court had the following to say:-

‘Though the court should no ‘doubt’ give a liberal interpretation to the words ‘sufficient cause,’ its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time barred, even at the risk of injustice and hardship to the appellant”(Emphasis added)

I also find useful guidance in the decision of **Kwach, Lakha and O’kubasu JJA** in the case of **Tokesi Mambili and others vs Simion Litsanga**[19] delivered on 28th March 2003 where they held as follows:-

- i. *In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)*
- ii. *Where the application is based on sufficient reason it is for the Court to exercise its discretion.*

More relevant to the application before me is the decision of **Shah, Owuor and Waki JJA** delivered on 20.6.2003 in the case of **Zacharia Ogomba Omari and Another vs Otundo Mochache** where the learned judges of the Court of Appeal had this to say:-

- i. *An application for review based on any other sufficient reason which is not analogous to or ejusdem generis with the first two circumstances in Order 44 (Now O. 45) is not available where the reason given is that their advocate was not available at the hearing when his absence amounted to taking the Court for granted.*
- ii. *It must be remembered that even a land dispute must be brought to an end and a land dispute per se is no ground to reopen a case, which is concluded.*

The reason offered by the applicant is that his then advocate never communicated to him on the progress of the case. A look at the court file shows that the applicant filed a replying affidavit to the application that sought to have this suit dismissed. The affidavit is dated 26th May 2008 and was filed on the same day. The applicant was represented in court during the hearing of the said application. The fact that the applicant signed an affidavit in opposition to the said application and was represented in court as aforesaid to me is a confirmation that the applicant was aware that there was indeed an application seeking to have his suit dismissed. It's difficult to comprehend that he never followed up to establish the fate of the said application nor did the applicant attach letters or any correspondence addressed to his advocate requesting for his file just to support or justify his blame on the advocate. In other words, I am not persuaded that the reason offered amounts to 'sufficient reason' within the meaning of the rules cited above nor is it *analogous* or *ejusdem generis* to the other reasons stipulated in Order 45 Rule 1.

In **Savings and Loans Limited vs Susan Wanjiru Muritu**^[20] **Kimaru J** expressed himself thus:-

'Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not her advocate. A litigant has a duty to pursue the prosecution of his or her case.It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal.....She had been indolent andit would be a travesty of justice for the court to exercise its discretion in favour of such a litigant'

My above finding that the grounds offered by the applicant do not amount to sufficient reason is further fortified by the holding in the case of **Evan Bwire vs Andrew Nginda**^[21] where the court held that '*an application for review will only be allowed on very strong grounds' particularly if its effect will amount to re-opening the application or case a fresh.* In other words, I find no material before me to demonstrate that the applicant exercised due diligence in retrieving his file from his former advocates and or a sufficient explanation to show that for seven years he was not able to retrieve his file from his advocates. To order that this case be re-opened where sufficient grounds have not been given would in my view amount to injustice.

This leads me to the next point. The application before me was filed after seven years. One thing is clear in this application. The delay of seven years has not been explained. Other than blaming the lawyer, no convincing explanation has been offered to show why it took seven years to bring the present application to court or engage another advocate. Perhaps, it's important to recall the last sentence of Order 45 Rule 1 (1) (b) which reads '.....may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.'

The logical question that follows is, was the present application made without unreasonable delay? Or is a delay of 7 years reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal circumstances it should not take an applicant 7 years to file an application in court. It would require demonstration of reasonably exceptional circumstances to justify a delay of 7 years. To my mind this is a long period, and indeed unreasonable delay. Such a long delay must be sufficiently explained. In **John Agina vs Abdulswamad Sharif Alwi**,^[22] **Cockar, Akiwumi** and **Tunoi** had this to say:-

'An unexplained delay of two years in making an application for review under Order 44 Rule 1 (now Order 45 Rule 1) is not the type of 'sufficient reason' that will earn sympathy from any court' (Emphasis added).

I also find useful guidance in the decision of **Mwera J** in the case of **Godfrey Ajuang Okumu vs Nicholas Odera Opinya**^[23] where he held *inter alia* that '*an aggrieved party seeking a review of a decree or order on whatever basis must apply without unreasonable delay*' and declined to allow an application for review on grounds that it had taken the applicant in the said case 5 years to file the application.

In the case of **Abdulraham Adam Hassan vs National Bank of Kenya Ltd**,^[24] an unexplained delay of **three months** was found to be unreasonable. Similarly, in the case of **Kenfreight (E.A.) Limited vs Star East Africa Company Limited**^[25] **Onyango Otieno J** (as he then was) found a delay of **three months** to be unreasonable and disallowed an application for review. The court of appeal (**Omolo, O’kubasu & Githinji JJA**) In **Francis Origo & Another vs Jacob Kumali Mungala**^[26] succinctly stated:-

‘In an application for review an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason AND most importantly the applicant must make the application for review without unreasonable delay’ (Emphasis added)

A similar holding was made in the case of **Muyodi vs. Industrial and Commercial Dev. Corp and another**^[27] where the court emphasised the application must be brought to court without unreasonable delay.

I am alive to the fact that the discretion donated to the court under section **80** of the Civil Procedure Act is unfettered, but for the discretion to be exercised in favour of the applicant, the application for review must be based on the grounds specified under Order **45** or on any sufficient reason **but** in either case the application must be made within a reasonable time.

In **Mbogo Gatuiku vs A.G.**^[28], **Mwera J** emphasising on the need to file applications for review without delay stated that ‘even a delay of a day or two calls for an explanation’.

Musinga JA in **Equity Bank vs West Link MBO Limited**^[29] put it correctly when he held that *‘Courts of law exist to administer justice and in so doing they must balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met.’* Thus, there is a need to balance the rights of both parties before the court.

I find that the reason given by the applicant for failing to file the application in time are not excusable and that this is not a proper case for the court to exercise its discretion in favour of the applicant. In this regard, I find useful guidance in the court of appeal decision in the case of **Richard Nchapai Leiyangu vs IEBC & 2 others**^[30] where the court expressed itself as follows:-

“We agree with the noble principles which go further to establish that the courts’ discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice” (Emphasis added)

The other reason offered by the applicant is that as at the time the property in question was auctioned, there was in force an order on an injunction restraining the auction. The court record speaks for itself. The order in question was granted *ex-parte* and was never extended. It was not in force as at the time of the sale and if it was, no contempt proceedings were brought for the alleged breach of the court order nor was there an attempt to seek court intervention to annul the said sale or block the intended transfer or even cancel it. Also, the information relating to the alleged violation of the court order was not new nor has not been shown to be a new discovery to warrant the court to exercise its powers of review. The fact that the applicant alleges to be still in occupation and that the title is in the name of a third party are not grounds for review nor can such issues be resolved in the application before me because they involve rights of third parties not involved in this case.

I strongly hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting his case. The court in the above case of **Richard Nchapai Leiyangu vs IEBC & 2 others** proceeded to state as follows:-

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss

suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”^[31]

However, in the present case, guided by the facts of the case, several authorities cited herein and the relevant provisions of the law, I humbly find that the applicant has not demonstrated that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time nor has he shown that there is some mistake or error apparent on the face of the record nor has he proved that there is any other sufficient reason to warrant the court to exercise its discretion in his favour and as already stated the application for review was not made without unreasonable delay. The upshot is that my answer to issues numbers one and two above are in the negative.

Mr. Adere Counsel for the Applicant passionately urged the court to consider the “*overriding objective*” under Sections **1A & 1B** of the Civil Procedure Act and also the provisions of Article **159 (2) (d)** of the Constitution of Kenya 2010. Before I examine the said provisions I find it fit to recall with approval the words of **Justice Hancox** in **Githere vs Kimungu**^[32] where he stated that “*the relation of rules of practice to the administration of justice is intended to be that of a handmaid rather than a mistress and that the Court should not be too far bound and tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case.*” Commenting on the same subject, the **Hon. Mr. Justice Robert Makaramba**, judge of the High Court Tanzania stated “*the inherited common law adversarial system with its attendant English practice and procedure has always been at the centre of public criticism for contributing to delays in the dispensation of justice together with its attendant procedural technicalities.*”^[33]

Procedural laws refer to rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties.^[34] It was this strictness of having due regard to the rules of civil procedure that occasioned the loss of many legitimate claims by plaintiffs thus denying them access to justice.

The overriding concept however came to cure this. **Michael Howard**^[35] defines the Overriding Objective “*as a principle from the civil procedure rules. The purpose of the overriding objective is for the civil litigation and dispute resolution process to be fair, fast and inexpensive. The principle is that each case should be treated proportionately in relation to size, importance and complexity of the claim and the financial situation of the parties. The courts must consider the overriding objective when they make rulings, give directions and interpret the civil procedure rules.*”

The double O’s in the phrase Overriding Objectives are what coined what is today famously known as the term Oxygen Principle. In **Hunker Trading Company Limited vs Elf Oil Kenya Limited**,^[36] perhaps the first case to be grounded on the new provisions the Appellate Jurisdiction Act (sections **3A** and **3B**), it was held that section **1A** of the Civil Procedure Act came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act. It states “*the overriding objective of this Act and rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.*” The courts duties in performing such mandate under section **1B** of the Civil Procedure Act are:-

- a. *The just determination of the proceedings,*
- b. *The efficient disposal of the business of the Court,*
- c. *The efficient use of the available judicial and administrative resources,*
- d. *The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties,*
- e. *The use of suitable technology.*

Article **159 (2) (b)** of the Kenya Constitution 2010 propounds that in exercising judicial authority, the courts and tribunals shall not delay justice.

Considering the above provisions which introduced the oxygen principle, in **Kamani vs Kenya Anti-Corruption Commission**^[37] the court drew comparisons to the *Wolf reforms* which introduced similar provisions in England in 1998 by way of the Civil Procedure Rules and further considered the English case of **Bigizi vs Bank Leisure**^[38] in which **Lord Woolf** himself talked about the concept of overriding principle objective as follows:-

“Under the {Civil Procedure Rules} the position is fundamentally different. As rule 1.1 makes clear the {rules} is a new procedural code with the overriding objective of enabling the court to deal with cases justly. The problem with the position prior to the introduction of the {rules} was that often the court had to take draconian steps such as striking out the proceedings.....”

In the above cited case of **Kamani vs Kenya Anti-Corruption Commission**^[39] the court had this to say:-

*“It is, accordingly, clear to us that the amendment to section 3 of the Appellate Jurisdiction Act, did not, without more, come in to sweep away the well-known and established principles of law hitherto in place before the said amendment...the notice of appeal is incurably defective and such defect could not in the circumstances we have outlined above, be cured by invocation of section 3A and 3B of the Appellate Jurisdiction Act. This to our understanding means sections 3A and 3B of cap 9 cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate appeals to this court”**(Emphasis added)***

In **Stephen Boro Githia vs Family Finance Building Society & 3 others**^[40] **Nyamu J** had this to say:-

“The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all cobwebs hitherto experienced in the civil process and to wed out as far as practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution disputes in a just, fair and expeditious manner.....the challenge to the courts is to use the new broom of overriding objective to bring cases to finality.....”

In my view the overriding objective was brought to ensure that justice is served to both parties and further where there is a conflict of the Oxygen Rules Principles with the substantive law, the law ought to be interpreted in such a manner that will ensure the administration of justice. In this regard, I stand guided by the above quotation from the case of **Kamani vs Kenya Anti-Corruption Commission**^[41] that the amendments did not come to sweep away the well-known and established principles of law hitherto in place before the said amendment, and that the said amendments cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate conduct of cases. To me the said position represents the correct legal position. I find nothing in the **overriding objective** to suggest that a delay of seven years which has not been sufficiently explained can be excused nor is there anything to suggest that the conditions set out in order 45 for review have been done away with.

Section 3A of the Civil Procedure Act^[42] provides that ‘Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.’ To me, re-opening a case after seven years of unexplained delay and without the party tabling good grounds for review would be an abuse of the court process.

In **Abdulrahman Abdi vs Safi Petroleum Products Ltd & 6 others**^[43] the court stated:-

“The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party”

I have no doubt in my mind that the Oxygen principle has come to revolutionize our civil procedure and tailor it to fit the contemporary society where access to justice and equality is the crux, but in my view the court has to consider the peculiar facts of each case and as observed in the above judgement, weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party. In this regard and having considered all the facts of this case I am persuaded that the scales of justice tilt in favour of the Respondent. Having so found as herein above stated, I find that issue number three is answered in the negative.

In conclusion I find that this is not a proper case for this court to exercise its discretion in favour of the applicant and that the application before me does not satisfy the grounds for review.

Accordingly, the application dated 04.07.2014 is hereby dismissed with costs to the defendant/Respondent.

Orders accordingly

Right of appeal 28 days

Dated at Nyeri this 21st day of October 2015

John M. Mativo

Judge

[1] Cap 21, Laws of Kenya

[2] Chapter 12A, Laws of Kenya

[3] {2002} 2KLR 162

[4]{2002} 2E.A. 377

[5]{1996} KLR 469 (CAK) at Page 381

[6] High Court of Kampala Misc App No. 534 of 2012

[7] {1963}E.A 557, also see Chittaley & Rao in the Codev of Civil Procedure, 4th Edition, Vol 3, Page 3227.

[8] Supra note 4

[9] See Sinha J in Union of India vs B. Valluvan, AIR 2007 SC 210; (2006) 8 SCC 686

[10] 9 Supreme Court Cases 596 at Page 608

[11] {1963}EA 557

[12] Civil Appeal No. 235 of 1997; {1997} LLR 7356

[13] Sir Dinshah Fardunji Mulla, The Code of Civil Procedure, 18th Edition, Reprint 2012, at Page 1147, paragraph 10 Civil Appeal No. 90 of 2001; {2001} LLR 6937 (cak)

[14] Supra, paragraph 17, page 3672

[15]

[16] Supra note 9 above

[17] Civil Appeal No. 147 of 2006 (Munuo JA, Msoffe JA and Kileo JJA)

[18] {1963} E.A. 546

[19]

[20] HCCC No. 397 of 2002, Milimani

[21] Civil Appeal No. 103 of 2000, Kisumu ; {2000} LLR 8340

[22] Civil Appeal No. 83 of 1992; {1992} LLR 5734 (CAK)

[23] Kisumu High Court Civil Case No. 337 of 1996

[24] Kisumu High Court Civil Case No. 446 of 2001

[25] {2002} 2 KLR 783

[26] Civil Appeal No. 149 of 2001; {201} LLR 4720, {2005} 2 KLR 307

[27] {2006} 1EA 243 (CAK)

[28] HCCC 1983 of 1980, High Court, Nairobi.

[29] Civil App No. 78 of 2011

[30] Civil Appeal No. 18 of 2013

[31] Supra

[32] {1975-1985} E.A 101

[33] Ho. Mr. Justice Robert V. Makaramba, “Breaking the Mould; Addressing the Practical and Legal Challenges of Justice Delivery in Tanzania: Experience from the Bench, TLS, February 2012 in Arusha, Page 7

[34] Elizabeth A M, Oxford Dictionary of Law, Oxford University Press, London, 2001 at Page 1241

[35] Howard Michael, Civil Litigation and Dispute resolution: Vocabulary Series, Legal English Books Publishers, 2013

[36] {2010} eKLR

[37] Ibid

[\[38\]](#) PLC {1999} 1 WLR 1926

[\[39\]](#) Supra note 35

[\[40\]](#) Civil Application No. Nai 263 of 2009

[\[41\]](#) Supra note 35

[\[42\]](#) Cap 21, Laws of Kenya

[\[43\]](#)[2011] eKLR