REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL SUIT NO. 229 OF 2011

JULIS MUKAMI KANYOKO.....1ST PLAINTIFF

SIMON NGETA KANYOKO.....2ND PLAINTIFF

PERPETUA WANJIRU KANYOKO.....3RD PLAINTIFF

VERSUS

SAMUEL MUKUA KAMERE.....1ST DEFENDANT

ANNE WAMBUI KAMERE.....2ND DEFENDANT

RULING

The Defendants by a Notice of Motion dated 4th November 2013 expressed to be brought under order 45 Rule 1 & 2 of the Civil Procedure Rules, sections 80, 3 & 3A of the Civil Procedure Act seeks the following orders:-

1. That this Honourable court be pleased to review its order/Ruling given on 3rd July 2013,

2. That the Defence filed by the Defendants on 25th October 2013 be deemed as properly filed,

3. That in the alternative to prayer 2 above, the Defendants be given leave to file a fresh defence within such time as this Honourable court may reasonably deem fit.

4. That the costs of the application be provided for.

The Defendants application is grounded on the grounds set out on the body of the application and on the annexed affidavit of **Wilson K. Gachanja Advocate** and further supporting affidavit by **Samuel Mukua Kamere** (**undated**) but filed in court on 22nd November 2013. The Defendants through the affidavit by **Mr. Gachanja** argue that since the court by its ruling on 3rd July 2013 set aside what was otherwise an irregular interlocutory judgment against the Defendants the court should grant the Defendants leave to file a defence. The Defendants further aver that they have a meritorious defence and annex a copy of the defence filed in court on 25th October 2013 to support their averment and argue that it was an error or oversight on the part of the Defendant's Advocates not to have annexed a draft defence to the earlier

application that the court ruled upon vide its ruling on 3rd July 2013.

The further affidavit sworn by the 1st Defendant in support of the application admits the agreement that the plaintiffs rely on in their claim but aver that the agreement was frustrated and/or rendered impractical by intervening events. Further the further affidavit reiterates what **Mr**. **Gachanja** has deposed in the supporting affidavit in regard to the filing of the application to set aside the interlocutory judgment and the consequent ruling of the court made on 3rd July 2013.

The plaintiffs Respondents oppose the Defendants application and the 1st plaintiff, **Julie Mukami Kanyoro** has filed a replying affidavit sworn on 3rd December 2013 in opposition thereof. The plaintiffs contend the matter raised by the Defendants are **resjudicata** as they are the same matters that the court dealt with and delivered a ruling on 3rd July 2013. The plaintiffs aver that the Defendants are through the application attempting to introduce their defence even though the court expressly declined to grant them leave to file a defence out of time. The plaintiffs further aver the Defendants application for review does not and cannot satisfy the conditions under which a court can review its orders or judgment. It is not demonstrated that there has been a discovery of new matter or evidence that was not available and/or could not be available after exercise of due diligence on the part of the Defendants. The plaintiffs further contend that the Defendants have further not brought the instant application without unreasonable delay.

As per the court's directions the parties filed written submissions. The Defendants/Applicants filed their submissions on 14th March 2014 and the plaintiffs filed theirs on 18th March 2014. The gist and thrust of the Defendants/applicants submissions is that the Defendants have a credible defence and that there are triable issues that render it necessary for the defendants to be permitted to defend the suit. The Defendants further submit that the failure to annex a draft defence to the earlier application was a mistake of counsel that ought not to be visited on the client and further submit that the interlocutory judgment having been set aside no prejudice will be occasioned to the plaintiffs if the Defendant is granted leave to set aside. In response to the plaintiffs claim that the Defendants application raises issues that have already been determined in the previous application and therefore res judicata the defendant states that the court in the earlier application did not consider the issue of filing a defence out of time since no draft defence was annexed. The Defendants argue that the court having set aside the interlocutory judgment paved the way for the filing of the instant application for leave to file a defence out of time.

On the issue of review the Defendants submit that at the time the previous application was heard there was no available defence on the court file and that the defendants now having filed their defence the court is obliged to consider the defence to determine whether it raises triable issues and hence allow the defendants to defend. The defendants argue that under order 45 the court has discretion to consider whether there exists "**any other sufficient reason**" to warrant a review. The submission is that since the defendants have now filed a defence this constitutes" **other sufficient reason**" and the court should exercise its discretion to admit the defence out of time.

On the issue of delay the defendants submit that the delay was occasioned by the irregular entry of interlocutory judgment and it is submitted the plaintiffs would suffer no prejudice if the Defendants are allowed to defend the suit.

The plaintiffs in response submissions submit that the Defendants have habitually acted in flagrant breach of court orders and directions and would thus been underserving of the court's discretion. The plaintiffs further contend that the Defendants application is incompetent for failure to annex the order sought to be reviewed and cites the case of **Nathan Ondego Mdeizi –VS- National Housing Corporation Kisumu HCCC NO. 34 of 2000** (unreported) where **Tanui, Judge** held that a person who applies for review has to be aggrieved by a formal order or decree and not a ruling or judgment Order 45 Rule 1 of the Civil Procedure Rules provides-

1. (i) 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

The plain reading of the above provision is that an applicant for review ought to have and have annexed a formal extracted decree or order in respect to which the review is sought. In essence the court does not review the judgment and/or ruling but the decree and/or order that emanates from the judgment and/or ruling. Thus where an applicant fails to annex the decree and/or order that is sought to be reviewed such an application is defective. In the Defendants present application the order that the Defendants sought to be reviewed was not annexed with the result that the Defendants application was fatally defective. I agree that a formal decree and/or order is a prerequisite before an applicant can bring himself herself within the ambit of Order 45 of the Civil Procedure Rules as relates to review of the decree and/or order.

The Defendants have pegged their application on the fact that they filed their defence on 25th October 2013 since the interlocutory judgment was set aside and there was nothing to bar them from filing the defence. They contend the court did not have the benefit of considering this defence at the time it made the ruling of 3rd July 2013. As I understand, it is the Defendants argument that the now filed defence constitutes "**new and important matter or evidence**". that was not available to the court at the time it made the ruling and therefore the court should take the same into account and review its order/ruling of 3rd July 2013.

With Respect to the Defendants, the court on the 3rd July 2013 in rejecting the Defendants application for extension of time, considered that the Defendants had not explained the delay in filing the defence and the application for extension of time. The court additionally specifically ruled that the Defendants had not provided any basis upon which the court would have exercised its discretion in favour of the defendants since they had not demonstrated they had a good or reasonable defence.

In the said ruling of 3rd July 2013 I expressed myself as follows:-

"whereas I have no hesitation to set aside the Deputy Registrar's order of 2nd August 2011 entering interlocutory judgment I am not persuaded I should exercise my discretion to extend time to the Defendants to file a defence out of time. The Defendants conduct has been dilatory and I am of the view that the delay in bringing the instant application is inordinate and inexcusable. The defendant has not offered any valid reason why no defence was filed within the prescribed period and why it took the defendants over 15 months to bring this application. To compound the matter the defendants have not demonstrated they have a good defence to the plaintiffs claim and hence there is no basis upon which the court can exercise its discretion. The Defendants should have annexed a draft of intended defence to enable the court to consider whether such defence raises any arguable and/or triable issue. The grant of leave to defend cannot be automatic and an applicant must offer a viable explanation for the delay and should satisfy the court he has an arguable defence and one that raises a triable issue".

From the above it is clear the court rejected the Defendants previous application on two grounds. Firstly, that there was inordinate and inexcusable delay in bringing the application and at the same time that the delay in filing the defence was unexplained. Secondly, the court held that the Defendants had not demonstrated they had a good and/or reasonable defence to be allowed to defend. The court specifically declined to grant the defendants leave to file a defence out of time such that the defence filed by the

Defendants on 25th October 2013 was filed against the express orders/directions of the court. The Defendants could not properly file a defence against the express directions of the court and then come back to the same court to ask for extension of time to validate a defence that the court had barred from being filed.

The court in the premises is not persuaded that the filing and annex of the intended defence to the present application would constitute new and important mater or evidence under order 45 Rule 1 of the Civil Procedure rules. My view is that the issues raised by the Defendants in the present application are indeed **res judicata**, the court having considered the same issues and ruled on them in the previous application. The Defendants had the opportunity to annex the defence that they have now annexed to the present application to the previous application. They did not and even if they did it does not follow that the court would have granted them leave to defend the court having held that there was inordinate and inexcusable delay in bringing the previous application. The Defendants as it were are seeking to have a second **"bite of the Cherry**" in bringing the instant application. There is no basis to review the previous orders of this court and in my view the Defendants are attempting to re argue an application that the court has already made a ruling on.

The present application by the Defendants was filed on 4th November 2013 whereas the order they seek to review was made on 3rd July 2013 (**4 months earlier).** With respect I do not think the application has been made without unreasonable delay as envisaged under order 45 Rule 1 and I would equally on that ground have been inclined to disallow the application having regard to the Defendants conduct in this matter. The Defendants have been lax in taking action in this matter including abiding with the directions given by the court. No reason is offered as to why it took the defendants up to 4 months to bring this application when they were fully aware that the previous application to extend time to file their defence had been disallowed.

In the premises, I for all the above reasons dismiss the Defendants Notice of Motion dated 4th November 2013 with costs to the plaintiffs.

Orders accordingly.

Ruling dated, signed and delivered at Nairobi this 22nd day of May 2014.

J.M. MUTUNGI

JUDGE

In presence of:

……. For the Plaintiffs

……. For the Defendants