

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 6 of 1997

DORCAS WAIRIMU MURIITHI.....APPLICANT/PLAINTIFF

VERSUS

JOHN KABUTHA.....RESPONDENT/DEFENDANT

RULING

Pursuant to the provisions of *Order XLIV rule 1* of the Civil Procedure Rules, **DORCAS WAIRIMU MURIITHI**, the applicant herein, took out the Motion dated 19th March 2010 in which she applied for an order of review to set aside the order made on 19th January 2010. The Motion is supported by the Applicant's affidavit sworn on 24th March 2010.

JOHN KABUTHA, the Respondent herein filed a replying affidavit to oppose the Motion.

The facts leading to the filing of this Motion is short and largely undisputed. The Applicant herein filed this suit in which she sought for the Respondent to be evicted from the parcel of land known as **L.R. NO. AGUTHI/MUNG'URIA/201**. The suit was heard by the Hon. Mr. Justice Makhandia who on 30th November 2009 found the case in favour of the Applicant. In fact the honourable judge gave the Respondent 45 days to voluntarily vacate the land failure to which he would be forcefully evicted. By an application dated 9th December 2009, the Respondent applied for an order of stay of the execution of the judgment pending the hearing and the determination of an appeal he had filed in the Court of Appeal to challenge the judgment. The application came up for interpartes hearing before the Hon. Mr. Justice Makhandia on 19th January 2010. The record shows that the Respondent was represented by **Mr. Mahan**, learned advocate, while Mwangi, learned advocate, appeared as holding brief for M/S Mukuha, learned advocate for the Applicant. The Applicant's advocate indicated to the Court that she had no further instructions whether to oppose or concede to the application. The Hon. Judge proceeded to allow the application as unopposed.

The Applicant is now before Court seeking to set aside the orders by an order of review. It is her submission that there is new and important matter which was not put to the attention of the Court at the time when the application came up for hearing. The Applicant has stated that she had not received the letter from her advocate inviting her to her office to give her instructions to oppose the application for stay. The Applicant has stated that she had serious grounds to resist the application but she could not do so because there was a breakdown of communication between her and her advocate.

The Respondent on the other hand has stated that the Motion does not meet the requirements of *Order XLIV rule 1*. The Respondent deponed that the Applicant and her daughter Nancy Wanjiku were both present in court on 19th January 2010 when court made the order.

I have considered the rival submissions. The principles to be considered in an application for review are well settled. Some of the matters to be considered include:

- (i) A discovery of a new and important matter or evidence which after due diligence was not

within the knowledge of the Applicant.

- (ii) There is mistake or error apparent on record.
- (iii) Any other sufficient reason.

The Applicant herein seems to suggest that she had a communication breakdown with her advocate which made her fail to give instructions to her advocate to oppose the application for stay. The Applicant herein does not deny the allegation that she was in court on 19th January 2010. It is therefore obvious that she knew what was before court. Even if she did not know, it is presumed she came to know or ought to have known that an order of stay was given to the Respondent on 19th January 2010 to last until the appeal before the Court of Appeal is heard and finalized. Having known the existence of the order, the Applicant waited until 31st March 2010 to file the current Motion. I am convinced the application was filed as an after thought. I am convinced that the Motion does not meet the threshold set for applications for review. Whatever the Applicant has said was not within her knowledge in my view is nothing new. She was in court hence she has herself to blame. In any case even if the order is granted, I doubt whether she will be able to surmount the application for stay. It is obvious that if the order for stay of execution is denied, the resultant effect, is the eviction of the Respondent from the land in dispute before the appeal is heard and determined. That cannot be allowed.

In the end, I see no merit in the Motion. It is dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 23rd day of July 2010.

J. K. SERGON

JUDGE

In open court in the presence of Miss Mukuha for applicant no appearance for Mahan.