**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 1706 of 1996**

**JAMES HERBERTS ODHIAMBO.....1ST DEFENDANT/APPLICANT**

**VERSUS**

**FAR EAST CHINESE**

**MEDICAL CENTRE.....PLAINTIFF/1ST RESPONDENT**

**SHELTER INVESTMENT.....2ND DEFENDANT/2ND RESPONDENT**

**RULING**

By notice of motion dated 10.09.03 stated to be brought under rule 3 (1), (2) and (3) of the High Court (Practice and Procedure) Rules under the Judicature Act, Cap. 8; Order L rule 1; Order XLIV rule 1 (a) of the Civil Procedure Rules; and section 80 (a) of the Civil Procedure Act, Cap.21, the 1st defendant applied for the following orders:-

1. That service of this application be dispensed with in the first instance and the same be heard ex-parte.

2. That leave be granted for the instant application to be heard during the (then) current vacation.

3. That this honourable court do issue a temporary prohibitory order against the plaintiff and 2nd defendant jointly and severally stopping them from disposing of or otherwise dealing with the subject property mainly the 1st defendant's matrimonial home being L.R. Nairobi Block 125/848 situate at Imara Daima Estate within Nairobi, pending the hearing of the main application for review of this honourable court's judgment delivered on 30.08.96.

4. That this honourable court do review and set aside the judgment delivered in this case on 30.08.96 and other consequential orders issued thereafter.

5. (This was wrongly numbered 4) That the court do find that the (1st ) defendant/applicant is the rightful owner of the suit premises which todate is still registered in his name.

6. (This was wrongly numbered 5 ) That the respondents be condemned to pay the costs of this application.

The grounds upon which the application is based are numerous (15 in all) but I deem only the

following aspects as sufficient to lay a requisite basis for considering the application in context:-

a) That there is an error on the face of the record of the court's judgment entered on 30.08.96.

b) That the 1st defendant/applicant subsequently discovered new and pertinent issues and that documentary evidence tendered in court by the plaintiff to prove that the said 1st defendant/applicant had been loaned the amount claimed in the plaint was evidence that could only support a previous loan which the 1st defendant had taken from the plaintiff and which loan had already been paid in full as at the time of filing of this suit.

c) That in obtaining the ex-parte judgment, the plaintiff misled the court by relying on letters purportedly written by the applicant while the said applicant had no knowledge of the said letters.

d) That the suit should have been preferred against one Michael Herbert Oderah (applicant's brother) whose signature and Identity Card No. appear on the letter acknowledging payment from the plaintiff.

e) That the court was led to believe that the decretal amount claimed was received by the applicant on behalf of a business known as Benalco Art Works & Designs purportedly owned by the applicant while in actual fact the applicant had no knowledge of the existence of any business going by that name.

f) That the orders obtained by the plaintiff for sale of L.R. No.125/848 (suit premises) were obtained fraudulently as documents of ownership produced in court were not valid.

g) That the applicant was not served with any orders of vacant possession by the 2nd defendant/2nd respondent; that the applicant was irregularly evicted on 08.05.03 from the suit premises; that in the process the applicant lost property worth Khs. 6 million, was rendered homeless and forced to live as a squatter with his family.

h) That considering the weight of the suit and repercussions that were to follow thereafter, the court ought to have considered the 1st defendant's/applicant's defence which had been filed albeit late.

i) That the 2nd defendant who purportedly bought the suit premises in 1997 had advertised it for sale and the applicant would suffer irreparable damage if the suit premises were sold to an innocent third party without knowledge of the fraudulent transaction involving its acquisition from the 1st defendant.

j) That it is necessary that the court reviews its judgment made on 30.08.96 to enable parties canvass pertinent issues going to the very root of this case.

k) That the court should issue restraining orders restraining its agents and/or servants from advertising, offering for sale/or disposing of the suit premises pending the hearing of the substantive application for review.

The application is supported by the applicant's affidavit sworn on 09.09.03.

Hearing of the application first came up before me on 11.03.08 whereat the 1st defendant/applicant was represented by learned counsel, Mr D.O. Owang while the 2nd defendant/2nd respondent described as purchaser was represented by learned counsel, Mr T.N. Okwemwa. There was no appearance for the plaintiff/1st respondent.

Counsel for 1st defendant/applicant informed the court that because of the passage of time, prayers 1, 2 and 3 had been overtaken by events/spent and that he was pursuing prayer 4 for review and setting aside of the court's judgment delivered on 30.08.96. He also informed the court that the plaintiff/1st respondent had been served but had not appeared.

A photocopy of the judgment sought to be reviewed appears as Exhibit 'JH 0 – 2' annexed to the 1st defendant's/applicant's affidavit sworn on 09.09.03 in support of the application under consideration. Apart from one word apparently obliterated owing to passage of time, the judgment reads as follows:

'**30.8.96.**

**JUDGMENT**

**Defendant JAMES HERBERTS ODHIAMBO having been duly served and having failed to file defence and on the application of the advocate for the plaintiff I enter judgment as prayed save as to costs which shall be party and party costs without ... thereon.'**

The court record indicates that the judgment was signed by Senior Deputy Registrar on 02.09.96. This court sought clarification from 1st defendant's/applicant's counsel on why the judgment has been ascribed to Githinji, J (as he then was) and on 21.05.08 1st defendant's/applicant's counsel clarified that he ascribed the judgment to Githinji, J because subsequent applications went before him. As the learned Judge appears to have treated the judgment as valid, he is deemed to have adopted it, so it has correctly been ascribed to him.

Applicant's counsel pointed out that the amount of the judgment is Kshs.1,030,000/= plus interest. He stated that it was the applicant's case that he subsequently discovered that documentary evidence to support the plaintiff's claim against him shows it is the applicant's brother, Michael Herbert Oderah who was loaned the money in question by the plaintiff and that one such document is a letter dated 29.03.95 annexed as 'JH 0 5' to the applicant's affidavit sworn on 09.09.03 in support of his present application. The letter indicates it was addressed to Mr Yang by Michael Herbert Oderah expressing gratitude for assistance of Kshs.500,000/= and offering to pay interest of 25% (Kshs.125,000) every month. Applicant's counsel stated this letter to constitute new evidence and that the plaintiff's suit should have been preferred against his brother, Michael Herbert Oderah, not against him. Applicant's counsel said that any moneys received from the plaintiff were fully paid through security of the applicant's motor vehicle Reg. No.KRJ736 left with the plaintiff and never returned to the applicant.

Applicant's counsel pointed out that the applicant attempted to appeal against the interlocutory judgment of 30.08.96 through Court of Appeal Civil Application No. NAI 43 of 2002 but that the latter application was disallowed and that, therefore, the only recourse the applicant had was to file the present application seeking review of the default judgment. It was applicant's counsel's contention that the applicant did not file appeal, such as to deny him an opportunity by virtue of Order XLIV rule 1 to seek review of the default judgment of 30.08.96. Applicant's counsel submitted that the applicant could apply, as he has done, for review of the judgment of 30.08.96 and that if the court finds the instant application merited and sets aside the judgment, all subsequent orders including the vesting order issued on 18.07.02 will also have to be set aside.

It was applicant's counsel's contention that his present application brings in new issues not originally brought out in the plaint filed on 12.07.96, e.g. the issue of breakages of artworks, etc amounting to loss valued at Kshs.4 million; plus the averment that the 2nd defendant/2nd respondent (purchaser) was not a party to the original suit and that, therefore, issues between him and the applicant have not been dealt with substantially and determined. Applicant's counsel also submitted that *res judicata* is of limited application where default judgment has been given and that it does not apply in the present case.

Applicant's counsel relied on the following precedents:-

a) Halsbury's Laws of England, Vol.16 paragraph 1533 and cited the passage stating:

'Estoppel based on a default judgment must be very carefully limited; a defendant is only estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment.'

b) Nguyai -vs- Ngunanyu [1985] KLR 606 (High Court) and cited the following portion of holding 2, namely:

'2. The doctrine of *res judicata* could not apply against the plaintiff and the 1st defendant as the 1st defendant had not been a party to the previous suit and therefore the issues between him and the plaintiff were neither investigated nor resolved in that suit.'

c) Adolf Gitonga Wakahihia & 4 others -vs- Mwangi Thiongo (1982 – 88) I KAR 1028 to make the point at holding 1 that it was manifest that not all the parties were given a proper opportunity of being heard at the arbitration proceedings, which led to holding 2 allowing the parties' appeal.

Regarding delay in bringing the present application, applicant's counsel said there was no inordinate delay. In support of this contention, counsel cited paragraph 26 of applicant's affidavit sworn on 09.09.03 averring that the applicant's two wives lodged objection proceedings dated 04.07.97 in the High Court against the sale of the suit property, and that their objection application was determined on 06.04.01 when it was dismissed. Applicant's counsel also cited paragraphs 27, 28 and 29 of the same applicant's affidavit to make the points that immediately after the applicant's two wives' objection application was dismissed on 06.04.01 he filed Court of Appeal Civil Application No. NAI 409 of 2001 praying for stay of his eviction from the suit properly and that at the hearing of that application, on 06.02.02, the Court of Appeal Judges advised him to first appeal against the default judgment of 30.0896; that thereafter he filed Court of Appeal Civil Application No. NAI 43 of 2002 for extension of time to file appeal against the default judgment of 30.08.96 but that his application was dismissed in October, 2002; and that the applicant filed a second reference to a full Bench of the Court of Appeal for extension of time within which to file and serve the record of appeal but that this application was likewise dismissed on 06.12.02.

It was applicant's counsel's contention that the applicant has suffered substantial loss, to the tune if Kshs.6 million, and he (applicant's counsel) urged that the present application be allowed.

As noted earlier, there was no appearance for plaintiff/1st respondent when the application under consideration came up for hearing before me on 11.03.08. There was also no appearance for the plaintiff/1st respondent subsequently. At the resumed hearing on 15.04.08, this court enquired why there was no participation of the plaintiff/1st respondent in the proceedings herein. Counsel for 1st defendant/applicant informed the court that the plaintiff/1st respondent had participated in the proceedings in this matter until 19.10.05 but not thereafter. Subsequently, Waweru Gatonye & Co. Advocates who had previously acted for plaintiff/1st respondent filed chamber summons application dated 10.05.06 but filed it on 25.03.08 seeking leave to withdraw from acting for the plaintiff/1st respondent for lack of further instructions from their said client who, they said, had relocated to China.

Submissions of counsel for 2nd defendant/2nd respondent (purchaser) were basically as follows. He relied on the replying affidavit of Steven Muregi Chege sworn on 25.09.03. Counsel for 2nd defendant/2nd respondent submitted that since the applicant elected to appeal to the Court of Appeal against the judgment of 30.08.96, he cannot again come to the High Court with an application for review. The 2nd respondent's counsel pointed out that the applicant had previously filed notice of motion application dated 25.02.02 filed on 01.03.02 in the Court of Appeal seeking extension of time to file and serve notice of appeal and record of appeal against the whole judgment of 30.08.96. According to 2nd respondent's counsel, the present application is *res judicata*. Counsel contended that the review orders sought would have to be based on errors on the face of the record (see ground 1) while the errors alluded to were not specified in the present application. Counsel also contended that no new evidence had been brought to this court's notice which (evidence) was previously not within the knowledge of the applicant. In this regard, the 2nd respondent's counsel pointed out that the letter dated 29.03.95 annexed as 'JH 0 5' to the applicant's affidavit sworn on 09.09.03 in support of his present application is the same as 'JH 0 2' annexed to the applicant's previous affidavit sworn on 25.02.02 in support of his Court of Appeal Civil Application No. NAI 43 of 2002 vide which he had sought extension of time to file notice of appeal against the default judgment entered against him on 30.08.96.

The 2nd respondent's counsel contended that the present application is an abuse of the court process. In the said counsel's view, the applicant has exhausted remedies available to him and he cannot go round to re-open his case. The 2nd respondent's counsel pointed out that the judgment of 30.08.96 has been executed, that the suit property vested absolutely in the 2nd respondent and that the orders sought vide the present application cannot be enforced. The 2nd respondent's counsel added the applicant's advocates received Kshs.272,144/50 being balance of proceeds of sale of the suit property through the (current) 2nd respondent's advocates' letter dated 27.05.97 and that the applicant cannot now question the legality of the sale. The 2nd respondent's counsel also said that a vesting order given by consent on 01.10.02 was in the process of being registered.

The 2nd defendant's/2nd respondent's counsel urged that litigation must come to an end and that the notice of motion application dated 10.09.03 be dismissed with costs to the 2nd defendant/2nd respondent.

In reply, the 1st defendant's/applicant's counsel said the applicant's affidavit sworn on 09.09.03 raises serious issues of fact which have not been controverted by the 2nd respondent. Applicant's counsel submitted that the current application was properly brought under Order XLIV. He said the applicant had not at the time he filed the present application preferred an appeal; that an appeal in the Court of Appeal is considered to have been filed when notice of appeal has been filed and that no notice of appeal has been filed in this case. Applicant's counsel repeated that *res judicata* does not apply in this case and reiterated that the notice of motion dated 10.09.03 be allowed as prayed.

I have given due consideration to the rival cases and arguments of the parties plus the precedents cited.

The substantive legal provisions applicable to the application are order XLIV rule 1. 1(a) of the Civil Procedure Rules and section 80 (a) of the Civil procedure Act. Order XLIV rule 1. 1(a), so far as relevant, provides:

'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; ...

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 ... 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.'

Section 80 (a) is in similar vein and provides:

'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; ...

may apply for a review of judgment to the court which passed the decree which made the order and the court may make such order thereon as it thinks fit.'

The applicant herein picked on two of the ingredients contained in order XLIV rule 1. 1 (a) as the pivot of his application, i.e. <u>error apparent on the face of the record</u> and <u>discovery of new evidence</u>.

As to error apparent on the face to the record, he did not specify the error he had in mind. There is no

dispute that the applicant as defendant in the plaint filed on 12.07.96 did not file defence within the prescribed period. Indeed he acknowledged vide ground 10 of his application now under consideration that his defence (as 1st defendant) was filed late. The judgment in question was entered against him on 30.08.96 in default of any defence from him . So where is the error in the court entering such judgment? I cannot see the error alluded to, whether real or apparent. This ground has no merit and must fail.

With regard to discovery by the applicant of new and important matter or evidence, the applicant cited letter dated 29.03.95 ostensibly addressed to Mr Yang by Michael Herbert Oderah whom the applicant has described as his brother. The applicant annexed a photocopy of that letter as exhibit 'JHO 5' to support his present application dated 10.09.03 and sought to persuade this court to take it as new evidence. But the replying affidavit of Steven Muregi Chege sworn on 25.09.03 reveals vide paragraph 7 that annexure 'JH0 5' to the affidavit of the applicant sworn on 09.09.03 in support of his present application is actually the same as annexure 'JHO 2' to the same applicant's previous notice of motion application dated 25.02.02 filed in the Court of Appeal under Civil Application No. NAI 43 of 2002 seeking extension of time to file and serve notice of appeal and record of appeal against the judgment of Githinji, J (as he then was). The applicant herein deponed vide paragraph 3 of his affidavit sworn on 25.02.02 in support of his previous notice of motion application of that date that the said letter of 25.03.95, 'JHO 2', had been written by his late brother Michael Herbert Oderah and that he (applicant) had no knowledge about the letter. It will be recalled that this letter records Michael Herbert Oderah as having expressed gratitude for assistance of Kshs.500,000/= and offered to pay 25% interest every month. The applicant did not specify in his previous affidavit sworn on 25.02.02 as to when he became aware of the existence of the letter of 29.03.95 ('JHO 2'). Assuming the Kshs.500,000/= referred to in the letter has relevance to the sum claimed in the plaint in this case, the 1st defendant/applicant herein must have become aware of its existence latest by 25.02.02 when he swore the affidavit of that date. Why did he wait until 10.09.03, i.e. 1½ years later before filing the present application and supporting it with letter 'JHO 5' purporting it to be new evidence? In other words, the said letter to which he later assigned the exhibit No.'JHO 5' annexed to his present application was not as at 10.09.03 new evidence as contended by the applicant in his present application.

The plaintiff who is the 1st respondent to the present application made various averments forming the basis of the claim he lodged against the then only defendant who is now the 1st defendant/applicant. Those averments were not challenged or controverted because the said defendant failed to file defence within the stipulated period. The applicant acknowledged that his intended defence was filed late and that the High Court found it raised no triable issues. The applicant applied to the Court of Appeal for extention of time to file notice of appeal and record of appeal against the default judgment but the application was dismissed. In my humble view the spirit of Order XLIV rule 1. 1(a) is to provide appeal or review as alternative remedies . You either take the appellate route or the review route but not both. What the applicant did was to adopt the appellate route. He took the overt step of seeking extension of time to file notice of appeal but got stuck when his application was dismissed. Then he seems to have recalled that once upon a time he had the option of review, but which he failed to exercise because he had opted to pursue the appellate route. The present application appears to be an after-thought, to revert to and take advantage of an abandoned option. I hold that after the applicant's application for extension of time to file notice of appeal was dismissed, his chosen option of appeal ceased to be 'allowed' under Order XLIV rule 1. 1(a) and that the applicant ceased to be entitled to the alternative remedy of review.

It is significant that when the applicant's application to the Court of Appeal for extension of time to file notice of appeal was dismissed, he did not resort to the present application for review immediately. Instead he seems to have waited for his two wives' objection proceedings intended to challenge the sale of the suit property on grounds that they had interest in the same to run their course. It is after the wives' application also failed that the applicant took recourse to the present application, thereby losing valuable time.

The applicant has engaged in a series of expensive experiments. Previous experiments have so far come to a dead end. He blames the failures principally on various advocates who acted for him at one time or another.

This court has been informed that the default judgment entered against the applicant has been executed, that the suit property has changed hands an got vested in the 2nd defendant/2nd respondent (purchaser) absolutely. The present application was filed on 10.09.03, i.e. some 7 years after the judgment the applicant seeks to have reviewed was passed, on 30.08.96. The application came late in the day and the suit property is reported to have vested in the hands of innocent third-party purchasers. Opening the judgment to review, even were that proper, which I don't think it is in the circumstances of this case, would open a can of worms. As far as this court is concerned, this litigation must come to an end. If the applicant feels he has a genuine and valid case against any of his advocates, it is up to him to seek suitable remedy or remedies against them.

The notice of motion application dated 10.09.03 is hereby dismissed.

Although costs normally follow the event, the applicant seems to have lost an opportunity to profer any defence, whether meritorious or otherwise, principally on account of procedural omissions, flaws or mis-steps. I order that the parties shall bear their own respective costs.

Orders accordingly.

Delivered at Nairobi this 10th day of June, 2008.

**B.P. KUBO**

**JUDGE**