**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC CASE NO. 141 OF 2013**

**RUTH KWACHIMOI CHELOTI.......................................2ND PLAINTIFF**

**PATRICK MANDU CHELOTI.......................................... 2ND PLAINTIFF**

**VERSUS**

**CHARLES NALIKA CHELOTI.......................................1ST DEFENDANT**

**ALEXANDER MUCHAI ..................................................2ND DEFENDANT**

**R U L I N G**

**Order 45 Rule 1(1)** of the **Civil Procedure Rules** provides that: -

> ***"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."*** Emphasis added.

While **Order 45 Rule 1(1)** of the **Civil Procedure Rules** sets out the rules for review, **Section 80** of the **Civil Procedure Act** provides for the power of review. It is therefore clear from the above that the Court's jurisdiction in an application for review is circumscribed by the following: -

> **1. Discovery of new and important matter or evidence which, even after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced at the time the decree or order was made.**
>
> **2. On account of some mistake or error apparent on the face of the record.**
>
> **3. For any other sufficient reason.**
>
> **4. The application must be filed without un – reasonable delay.**

Discussing the issue of delay in an application for review, the Court of Appeal stated as follows in the case of **FRANCIS ORIGO & ANOTHER V JACOB KUMALI MUNGALA C.A CIVIL APPEAL No 149 of 2001.**

> ***"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 mots importantly, the applicant must make the application for review without unreasonable delay."*** Emphasis added.

By a plaint dated 17th May 2013, the plaintiffs sought against the defendants' various orders in relation to the transfer of a property known as plot **NO 61 A** situated in **WEBUYE TOWN**. The two defendants resisted the claim and filed separate defences.

By an application dated 18th January 2017 **CHARLES NALIKA CHELOTI MUCHAI** (1st defendant herein) sought the following orders: -

**1. The plaintiffs' suit be struck out for being an abuse of the process of the Court.**

**2. The costs of the application be provided for.**

The grounds upon which the said application was premised are not relevant for purposes of this application. What is important however is that the said application came up before **MUKUNYA J** on 20th March 2017. The record shows that **MR SICHANGI** was present holding brief for **MR AMASAKHA** for the plaintiffs while **MR BWONCHIRI** was present for the 1st defendant and **MR ANWAR** for the 2nd defendant. As the application was not opposed, it was allowed as prayed.

I now have before me an application dated 3rd July 2020 by **ALEXANDER MUCHAI** (the 2nd defendant herein) seeking the following orders: -

**1. That this Honourable Court be pleased to review the orders made on the application dated 18th January 2017.**

**2. That consequently to the above, this Honourable Court be pleased to award costs of the suit to the 2nd defendant/applicant herein.**

**3. That costs of this application be provided for.**

That application which is the subject of this ruling is predicated on the grounds set out therein and is also supported by the affidavit of **MR OCHARO KEBIRA** Counsel for the 2nd defendant herein.

The gravamen of the application is that there is an error apparent on the face of the record because under **Section 27** of the **Civil Procedure Act**, costs follow the event and it is in the interest of justice that the 2nd defendant be awarded costs since he incurred expenses in defending this suit.

When the application came up before me on 29th October 2020, **MS RATEMO** for the 2nd defendant informed the Court that the application was not opposed. She therefore sought orders as prayed. However, **MS LUVONGA** for the plaintiffs sought and was allowed three (3) days to file a replying affidavit stating that failure to do so was due to the mistake by Counsel. However, no response was filed by the plaintiffs by 4th November 2020 and I directed that although the application was not opposed, I would deliver a ruling on 10th December 2020. I nonetheless allowed **MR OCHARO** for the 2nd defendant seven (7) days (at his request), to file his submissions. However, no submissions had been filed by 23rd November 2020.

I have considered the application, un – opposed as it is. It is clear to me that what triggered this application dated 3rd July 2020 is that in making the order dated 20th March 2017 striking out the plaintiffs' suit, **MUKUNYA J** did not make any orders as to costs. Under Section 27 of the Civil Procedure Act, costs are at "the discretion of the Court or Judge." It is provided however that costs follow the event unless the Court for good reasons orders otherwise. With regard to the issue of costs, the application dated 18th January 2017 and which resulted in the orders dated 20th March 2017 simply stated thus: -

***"That costs of this application be provided for."***

**MUKUNYA J** in his orders dated 20th March 2017 made no reference as to costs. The Judge made the following order after hearing Counsel for the parties: -

***"This application was served on all the parties. The plaintiff was served on 31st January 2017 over a month ago. This was adequate time to file grounds of opposition and/or a replying affidavit. He has not done that. The application is unopposed. The 2nd defendant has not opposed the same. It is allowed as prayed."***

It is clear from the above orders that whereas the 1st defendant in his application dated 18th January 2017 left it to the Court's discretion to provide by whom and to what extent such costs were to be paid, the Judge made no orders as to costs yet he had been asked to do so. This is not a situation where the Judge exercised his discretion one way or the other on the issue of costs, and which in my view would be a matter for appeal and not review. Rather, this is a case where although the Judge had been asked to provide for costs, he did not do so. That is clearly an error apparent on the face of. In **NYAMOGO & NYAMOGO -V- KOGO 2001 E.A 174**, the Court of Appeal described such an error as follows: -

***"There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record."***

I have no doubt in my mind that there was an apparent error on the face of the record in the failure by the Court to address it's mind to the issue of costs which had been left to it to decide. That is a sufficient ground for review of the orders dated 20th March 2017.

However, the 2nd defendant was required to file the application for review ***"without unreasonable delay."*** The order sought to be reviewed was made on 20th March 2017 and this application was filed on 3rd July 2020 over three (3) years later. No explanation has been made either in the application itself nor in the supporting affidavit by **MR OCHARO KEBIRA** as to why it took three (3) years to file the application, a delay that is clearly unreasonable. What is or is not unreasonable delay will of course be determined by the circumstances of each case. However, any delay must be satisfactorily explained. In **JOHN AGINA .V. ABDULSWAMAD SHARIF ALWI C.A CIVIL APPEAL No 83 of 1992**, the Court stated as follows: -

> ***"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."***

It is instructive to not that the orders sought to be reviewed were made on 20th March 2017 in the presence of Counsel for the 2nd defendant. No attempt has been made as to why it took that long to file this application yet the law requires that the Court be moved without unreasonable delay.

The up – shot of the above is that the Notice of Motion dated 3rd July 2020 is devoid of merit. It is accordingly dismissed with no orders as to costs.

**Boaz N. Olao.**

**J U D G E**

**18th January 2021.**

Ruling dated, signed and delivered at **BUNGOMA** this 18th day of January 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

**Boaz N. Olao.**

**J U D G E**

**18th January 2021.**