REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 147 OF 2014

JOSEPH KIPREPELI LOTUKEI.....PLAINTIFF

VERSUS

STEPHEN TOROITICH KORKOU.....DEFENDANT

RULING

1. The application dated **21/1/2021** filed by the plaintiff seeks the following orders:

(a) spent;

(c) spent;

(c) That the orders given by this court on 17th December 2020 be reviewed, varied and/or set aside;

(d) Costs be provided for.

2. The application is premised on the ground that there is a mistake or error on the face of the record in that the ruling of this court states that the applicant never filed any submissions, while the applicant had filed submissions and the same were not considered by this court while in the process of preparing its ruling.

3. The applicant has annexed a copy of submissions said to have been filed on **26/11/2020** in respect of the application dated **28/10/2020** to his supporting affidavit. A copy of the electronically generated receipt evidencing payment for the filing of those submissions is also attached. I am therefore convinced that the applicant filed submissions in respect of the application dated **28/10/2020.**

4. The background to the instant application is that by an application dated **28/10/2020** the applicant sought an order of leave to file an appeal out of time and that the notice of appeal annexed thereto be deemed as duly filed upon payment of the requisite fees.

5. The respondent's counsel in submissions in opposition to the instant application filed on **8/2/2021** urged that there is inordinate delay in filing the application, that everything was put under consideration in the ruling dated **17/12/2020**; that it was the counsel's mistake in not following up with the registry to ensure that submissions were properly filed in the record and it is not the duty of the trial court to seek documents not in the file record and that according to **Richard Ncharpai Leiyangu vs IEBC and 2 Civil Appeal No. 18 of 2012** others though the court has discretion to grant a review the discretion must be exercised judiciously. He cites the following passage from that case:

"We agree with the noble principles which go further to establish that the court's discretion to set aside ex parte judgment or order for that matter is intended to avid injustice or hardship resulting from an accident , inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to abstract or delay the cause of justice."

6. However, the submission that counsel never followed up with the registry must be taken cautiously, for it is not in all cases that counsel may be held to blame for the non-placing of the filed documents in the record. In view of the electronic filing recently embraced by the Judiciary and all its attendant teething problems and the fact that no proper details have emerged in the application to show what transpired so that the submissions failed to reach the court record this court shall give the applicant's counsel the benefit of doubt.

7. Citing **Hedwig HRT Mitterlerhner Ulrich v Jemdroci Spin [2016] eKLR and Teachers Service Commission V Simon P Kamau & 19 Others** the respondent's counsel also submitted that the applicant has not been vigilant enough from the onset in conducting this matter and the delay of one and a half months in bringing the review application, and the fact that it was lodged only after taxation had been

scheduled, was evidence that the applicant was intent on defeating the ends of justice. Therefore, he states, the application does not meet the threshold of **Order 45** of the **Civil Procedure Rules.**

8. The applicant on the other hand relies on the provisions of **Section 80** of the **Civil Procedure Act** and **Order 45** of the **CPR** and maintains that there was an error on the face of the record. He cites the case of **Khalif Sheikh Adan vs Attorney General [2019] eKLR** where the court cited an Indian decision (Afit Kumar Rath V State of Orisa & Others) thus:

> **"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 can not be claimed or asked for merely for a fresher 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 or law which states in the face without any elaborate argument being needed for tabling it. It may be pointed out that the expressed "any other sufficient reason" used in Order 47 rule 1 means a reason sufficiently analogous to those specified in the rule."**

9. The applicant's counsel therefore submits that the applicant was condemned unheard by the reason that his submissions were not considered before delivery the ruling and that the respondent admits that fact.

10. It is an inescapable fact and indeed it is the correct position that **paragraph 5** of the impugned ruling states that the applicant in that application, who is also the applicant herein never filed submissions. The question that arises is whether given the facts outlined before the orders of this court issued on **17/12/2020** can be reviewed on the ground that there is an error on the face of the record.

11. The respondent states that the submissions would not have had any impact on the decision the court made since the substance of the matter was contained in the supporting and other affidavits. However, as this court has stated before in many other cases previously brought before it, an applicant who has failed to file his submissions on an application as ordered by the court has been deemed as a person who has failed to prosecute his application and that application is liable to dismissal. Indeed, many an application have been dismissed on that account. However, it is clear that filing of submissions having been ordered, and this court having albeit erroneously noted that the applicant's submissions were not filed was of the opinion that it had not been persuaded by the applicant that grounds existed for extension of time. Given the foregoing, the perceived absence of submissions had a notable impact on the court's decision.

12. It is therefore clear that for reason of want of any persuasion brought about by want of submissions on the part of the applicant the applicant's application was dismissed. It has now turned out that the submissions had been filed after all, and the applicant desires the ruling of the court to be reviewed. Does this amount to an error on the face of the record? Clearly, it appears that in this case it is by no fault of the applicant in the instant case that the submissions did not reach the court file yet this court had ordered filing of submissions not idly but as a substitute for oral arguments. Persuasion in the application was therefore expected to be by way of the documents on the record including the submissions which are vital as they cite case law and statute relied on which may not be included in supporting affidavits.

13. The court, in observing that there were no submissions on the record, was stating a fact that was true as at that time. The lack of submissions on record was bound to affect the ability of the court to state that it had been properly persuaded by the applicant. It did indeed state in concluding the ruling that it had not been so persuaded. It is for that reason that this court takes the view that lack of submissions which later turned out to have been filed is an error on the face of the record and also that the same may also be deemed a sufficient reason under **Order 45 1(c)** of the **Civil Procedure Rules.** Therefore the instant application has merit.

14. This court has been asked to review its decision the next question that necessarily arises is whether this court could have arrived at a different finding had it, were it not for that error described herein before, perused and considered the applicant's submissions which have now been proved to have been filed before the ruling was delivered dismissing the application. This determination can only be arrived at by examining the applicant's submissions dated **25/11/2020**.

15. In his submissions filed on **2/12/2020,** the respondent's counsel, citing **Habo Agencies Limited vs Wilfred Odhiambo Musingo [2015] eKLR**, **Pyramid Hauliers Ltd Vs James Omingo Nyaanga & 3 Others [2019] eKLR** and **Andrew Kiplagat Chemaringo Vs Paul Kipkorir Kibet eKLR,** submitted that no material has been placed on record to show that the applicant's former advocate was blameworthy for the delay. Further, it is submitted that no explanation has been given as to why the applicant's former advocate would withhold information regarding the judgment from the applicant; counsel for the respondent raises an interesting point that the advocate has not filed any affidavit to confirm the allegations. He states that the applicant had a duty to follow up on his case with the advocates on the record. In total, he submits that the explanations for delay advanced by the applicant in his affidavits are not sufficient to entitle him to the order of extension sought. However, with all due respect, I do not think that an offending counsel's sworn affidavit confirming such serious allegations against him would be reasonably expected to be on record for no counsel would be inclined to implicate himself in writing for fear of reprisal for professional misconduct! Matters of communication between advocate and client are privileged and I must reject that submission in favour of a more moderate stance, namely, that the applicant should receive a benefit of doubt over that issue.

16. Reverting back to the submissions of the applicant dated **25/11/2020**, it is the case that those submissions have lengthily elaborated on the reasons for the delay in bringing the application and in filing the notice of appeal.

17. It is urged in those submissions that due to the ongoing pandemic litigants were not allowed to access court premises and so they failed to obtain updates on their suits. It is stated that in the instant suit the judgment was delivered on **20th May, 2020** and the applicant was not informed by his former advocate of the same and when he finally came to learn of the same he filed the Notice of Appeal in person without adhering to rules as he is a layman. Later he instructed the current legal firm acting for him and that firm noted the anomaly and hence filed the application for extension of time.

18. The complex procedures of filing documents online were also cited for the delay and the applicant states that he had to obtain the services of a cyber cafe to enable him file the Notice of Appeal. A long rigmarole has been related in the submissions and supporting affidavits, detailing the applicant's dalliance with a court clerk whose only one name is given, who appears to have seriously misled the applicant while he was still acting in person to the extent that his Notice of appeal was not filed in time. The same argument raised that the applicant's former counsel never filed an affidavit implicating himself in the delay has been raised with regard to the court clerk; the respondents counsel avers that there is no affidavit from the court clerk on the record affirming the matters raised against him by the applicant. I reject this argument on the same grounds that I rejected the argument regarding counsel herein above.

19. What remains uncontroverted is that while the impugned judgment was delivered on **20/5/2020,** the applicant overshot his period of entitlement of **14** days by a surplus of only **6** days and filed a Notice of Appeal on **9/6/2020** and served it on **7/7/2020** upon the defendant's counsel. The application for extension of time to file the Notice of Appeal was filed on **28/10/2020** after a period of about **5** months from the date of delivery of the impugned judgment. That delay in lodging the application has been adequately explained by the applicant and I agree with the explanation given in the affidavits and I also accept the applicant's counsel's submission that in the described circumstances, the delay was merely inadvertent and not deliberate.

20. As to the delay in filing the present application, this court notes that it having been admittedly filed only one and a half months from the date of issue of the order sought to be reviewed, the delay not in any way inordinate.

21. Regarding the arguability of the appeal this court needs not delve into the issue as that is a matter for the Court of Appeal's substantive determination when the substantive appeal is filed.

22. Lastly, it was submitted that the respondent would suffer no prejudice if the order extending time was granted. It is not disputed that the applicant has moved out of the suit premises, but that issue is only relevant to stay of execution proceedings and not extension of time to appeal which is the theme here. It is trite that even where the decree has been settled a litigant would be entitled to lodge an appeal.

23. I agree with the applicant's submission that granting the applicant an extension of time to appeal would not prejudice the respondent who is now admittedly in possession of the suit premises. Further it is the right of any person aggrieved to appeal to the next level and this is the yearning of the applicant.

24. The issue of representation was also raised by the respondents counsel; citing a decision whose reference he never gave in full, he stated that **Order 9 Rule 9** of the **Civil Procedure Rules** is meant to protect advocates from being sacked without notice after judgment and that since the applicant's advocate never sought the court's order adopting the consent dated **7/10/2020** for it to be properly on the record, he is not properly on record. It is also stated that there is no notice of change and notice of appointment of advocate.

25. Order 9 rule 9 provides as follows:

> **"9.Change to be effected by order of court or consent of parties [Order 9, rule 9.]**
>
> **When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-**
>
> **(a) upon an application with notice to all the parties; or**
>
> **(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."**

26. From the disjunctive construction of the above provisions of **Order 9 rule 9(a)** and **Order 9 rule 9 (b)** this court finds that a consent signed between the incoming and the outgoing advocates is sufficient to effect the change of advocates.

27. Regarding the filing of the notice of change and the notice of appointment of advocates, this court must, in view of the expression of intention to have a new advocate on the record contained in the consent under discussion as herein above consider the unfiled notices as formalities or technicalities that the applicant's counsel, who does not deny the allegation, omitted to perform. They are not fatal to the application. The court is bound to defer to the provisions of **Article 159(2) (d)** of the **Constitution.** They provide that justice shall be administered without undue regard to technicalities. The advocate may even at this stage, be compelled to file the omitted documents without any prejudice being occasioned to the respondent.

28. Given the foregoing observations it is clear that had this court accessed the submissions of the applicant before the ruling and considered the explanations therein in conjunction with the statements made in the supporting affidavits, it would have arrived at a different finding, namely, that the application for extension of time had merit.

29. The upshot of the foregoing is that this court must grant **Prayer No. (3)** of the instant application.

30. Consequently the orders of the court dated **17/12/2020** dismissing the application dated **28/10/2020** are hereby reviewed and set aside and substituted with an order allowing the said application and granting the applicant herein an extension of time of **14 days** within which to file and serve a notice of appeal.

31. The Notice of Appeal dated **2/6/2020** shall be deemed as properly filed from the time of and upon the payment of the appropriate filing fees and it shall be served upon the respondent within **14 days** of this order. In addition the applicant's counsel shall file and serve the

appropriate notice of change and notice of appointment, also within **14 days.**

32. The order awarding the respondent the costs of the application dated **28/10/2020** is hereby vacated and it is hereby ordered that the costs of the instant application and the costs of the application dated **28/10/2020** shall be costs in the appeal.

It is so ordered.

Dated, signed and **delivered at Kitale via electronic mail** on this **11th** day of **February, 2021.**

MWANGI NJOROGE

JUDGE, ELC, KITALE.