



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 26 OF 2014

STEPHEN MUTHAMIA MARETE.....1ST APPELLANT/APPLICANT

DAVID GATOBU MARETE.....2ND APPELLANT/APPLICANT

JULIUS MURITHI MARETE.....3RD APPELLANT/APPLICANT

VERSUS

MARY NAITORE KINYUA (enjoined as the legal representative of the estate of

PATRICK KINYUA IRINGO (Deceased).....RESPONDENT

RULING

1. Vide the application dated 30.10.2019, the applicants/appellants are seeking a stay of execution, a review as well as the setting aside of the judgment delivered on 20.12.2018 by Judge Mwangi Njoroge. The application is brought under the provisions of Order 22 rule 22, Order 45 rule 1 & Order 51 rule 1 of the Civil Procedure Rules, Section 1A and 1B of the Civil Procedure Act and Article 159 of the Constitution.

2. The application is premised on the grounds set out on the face of the application and in the affidavit of the 1st applicant Stephen Muthamia Marete. The applicants aver that the judgment was based on a wrong observation that the appellants had not filed submissions yet their submissions had been filed way back on 2.10.2017. They also aver that the judgment was delivered without notice.

3. Vide their grounds of opposition filed on 6.7.2020, the respondents contend that the applicants failed to comply with the orders of Judge Njoroge given on 28.6.2018, hence the applicant failed to prosecute the appeal.

4. I have considered all the issues raised herein and the submissions of the parties. Order 45 rule 1 of the Civil Procedure Rules sets out the grounds for review as follows:

“(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; 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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”

5. The Court of Appeal in the case of; **National Bank of Kenya Ltd vs Ndungu Njau Nairobi CA No. 211 of 1996** held that;

“A review may be granted whenever the courts consider that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evidence and should not require a deliberate argument to be established...”

6. In regard to this matter, the applicants base their argument on the point of “*mistake or error apparent on the face of the record*”. A perusal of the file reveals that the matter was scheduled for hearing on 28.6.2018 before a visiting Judge, Justice Mwangi Njoroge. Mr. Gikonyo appeared for the appellant while Mr. Mwititi appeared for the respondent. Directions were then given for the appellants to file and serve submissions within 21 days while the respondent was to file hers thereafter within 21 days. The Deputy Registrar of the court was then to dispatch the file to ELC Kitale where Judge Mwangi Njoroge is based for the writing of the judgment.

7. The averments of the applicants set out in paragraph 5, 6, 14 and 15 in the affidavit of Stephen Muthamia to the effect that the Judge failed to recognize their submissions filed on 2.10.2017 but was able to recognize those of the respondents are not in tandem with the facts set out herein. The appellants’ submissions which were to be recognized by the court were those filed after 26.6.2018, but within a period of 21 days. The appellants failed to comply with the directions given on 28.6.2018 and no plausible explanation has been advanced for that failure.

8. On the issue of failure to notify the applicants regarding the date of delivery of judgment, I find that the applicants have not availed the cause list for the date of 20.12.2018. A cause would enable the court find a basis of determining whether parties had knowledge of the matter or not, since such a cause list is ordinarily dispatched to advocates in advance.

9. All in all, I find that the application has no merits and the same is hereby dismissed with costs to respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 17TH DAY OF FEBRUARY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 19.11.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE