



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 17 OF 2019

JOHN WANGECHÉ MWANGI.....1ST PLAINTIFF/APPLICANT

JAMES MWANGI WANGONYA

(suing as the legal representatives of the

estate of MWANGI NGOBIA DCD).....2ND PLAINTIFF/APPLICANT

VS

BERNARD GATUI KIRUTHO.....1ST DEFENDANT/RESPONDENT

PETER KAMAU KIRUTHO (suing as the

Legal representatives of the estate of

KIRUTHO KIIRU DCD).....2ND DEFENDANT/RESPONDENT

RULING

1. The Applicants filed the Notice of Motion dated 10/2/2021 seeking the following orders;

a. Spent

b. That this Honorable Court be pleased to review and/ or vary the orders issued on the 16/12/2020 by the Hon. J. G. Kemei J. and order that the Plaintiff's leave to file a Further Affidavit and a Supplementary List of Witness Statement with the desired two witness statements out of time and/ or; in the alternative order that the further Affidavit of John Wageche Mwangi, the Supplementary List of Witness Statement, the further Witness Statement of Simon Kiiru Mwangi and the witness statement of Wanjiku Nelia all dated 8/2/2021 are deemed properly on record.

c. That this Honorable Court be pleased to vacate the orders issued by the Hon. G. Kemei. J. on 16/12/2020 requiring the Plaintiffs to pay Court Adjournment Fees and pay the Defendants' costs for the said 16/12/2020.

d. That in the alternative and without prejudice to the foregoing, this Honorable Court be pleased to review and / or vary the orders issued on 16/12/2020 by the Hon. G. Kemei. J. and order that costs be taxed & paid at the end of the suit/ litigation

e. That this Honorable Court be pleased to issue any other fair, just and appropriate order as the nature and circumstances of the suit dictate

f. That the costs of this Application be provided for.

2. The application is supported by an Affidavit sworn by JOHN WAGECHE MWANGI and the grounds on the face of the application. The Applicants aver that they are indigent and therefore unable to meet the costs subject to the orders of 16/12/2020. That the costs adjudged by the Court as payable by them are punitive. That the 4 days they were directed to file the documents were too little. Further that their delay in procuring the witness statements occasioned by the age and illness of the intended witnesses who reside in the interior of Muranga County. In addition, that their Advocate had a busy schedule of hearings in various Courts leaving him with limited time. The Applicants faults the Defendants for having introduced new evidence at such a time when pleadings had been closed and avers that the application should have been objected vehemently. That in any event the documents that were produced by the Defendants were not new save on change of facts on who the alleged caretaker of the property was. That in the circumstances, their Counsel on record should have been given more time to file

the documents.

3. The Respondents in opposing the application filed a Replying Affidavit sworn by Peter Kamau Kirutho. He stated that the Applicants are keen in delaying the matter to further their continued occupation of the suit land.

4. That the Applicant's Counsel sought for an adjournment on the 16/12/2020 which adjournment was granted with conditions. Granted the said Counsel raised no objection to the granting of the adjournment and the conditions attached thereto. That the Applicants enjoyed the benefit of the adjournment granted to them but chose to elect not to comply with the conditions upon which the adjournment was granted. That the Applicants consented to a hearing date scheduled for the 16/2/2021. However, on the 15/2/2021 a day before the hearing date the Applicants served the Respondents with the instant application with the aim of scuttling the hearing date. That the Applicants had more than 2 months to comply but chose not to.

5. With respect to the plea of indigency, the Respondents contend that this is far from the truth as the Plaintiffs are enjoying the income derived from the tea bushes.

6. In addition, that the Applicants and their Advocate are discourteous to the Court and its orders by showing open disobedience which conduct borders on contempt which is punishable by this Court.

7. On the 3/3/2021 the parties argued the application before me in open Court. The Applicant's Counsel relied on the grounds in the application and authorities cited. That the hearing date of the 2/12/2020 taken by consent was not suitable for him as he was engaged in another matter. That come the 16/12/2020 he sought more time to file further documents. That under Order 50 of the Civil Procedure Rules, the Court has power to enlarge the time to allow the documents on record to be admitted as filed. That the Applicants are indigent and cannot afford to pay costs. He pleaded with the Court to allow the Applicants to pay the costs at the end of the case.

8. That order 45 of the Civil Procedure Rules allows review on discovery of new and important matter.

9. In opposing the application the Respondents Counsel argued that the Court gave clear directions on the 16/12/2020 when it granted an adjournment in favour of the Applicants. That the Applicants chose not to comply with the conditions on which the adjournment was granted within 3 days as ordered by the Court. That the Applicants did not revert to the Court that it had difficulty in complying and for about 60 days persisted in non-compliance and only moved the Court 3 days to the hearing which hearing was taken by consent. That todate costs remain unpaid. That they were aware of the circumstances of their client all along and did nothing to raise any of the issues being raised now. That the conduct of the Applicants is dishonourable to the Court and a danger to the rule of law. That the Applicants have a duty to obey Court orders.

10. In reply the Applicants Counsel sought to dispel the notion that the Applicants disobeyed Court orders and advanced an argument that there are two competing interest abound; that of expediency and gathering evidence for the case. That the delay in getting the witnesses is not deliberate given that some reside in Eldoret.

11. The applicable law in review of Court judgements and or orders is governed by Section 80 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules.

12. Section 80 of the Civil Procedure Act provides: -

“Any person who considers himself aggrieved—

By a decree or order from which an Appeal is allowed by this Act, but from which no Appeal has been preferred; or

By a decree or order from which no Appeal is allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”

13. Order 45 Rule 1 of the Civil Procedure Rules provides as hereunder:

“(1) Any person considering himself aggrieved—

By a decree or order from which an Appeal is allowed, but from which no Appeal has been preferred; or 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.”

14. Review being a discretionary relief is to be exercised judiciously and not in a whimsical and capricious manner. In this case the orders being sought for review were issued by the Court on the 16/12/2020. The Applicants filed the application on the 12/2/2021, a few days shy of 2 months. It is trite that there is no mathematical calculation of determining whether a delay is inordinate or not. However, the standard of reasonableness is applied in each circumstance to arrive at a conclusion if a delay is inordinate or not. In this case the Applicants was granted 3 days to file documents from the 16/12/2020. They did not and despite having set the matter for hearing by consent on the 16/2/2021 waited for about 2 months to bring the application. I find that in the circumstances of the case the delay was inordinate.

15. With respect to the second limb of discovery of new and important matter, it is unfortunate that the Applicants did not lead any evidence by way of affidavit to demonstrate that they discovered new and important matter in this case. The age and or illness of the witnesses and their interior abode must have been in the knowledge of the Applicants or at the very least ought to have known. It is alleged that the Advocate was too busy to find time to attend to the said instructions that is to say to take witness statements and prepare to file the additional documents /witness statements on their behalf. It looks like this is a position that is well accepted by the Applicants in the face of a Court order. Their willingness to indulge their Counsel in noncompliance of Court orders is abhorable to say the least.

16. Is there a mistake or an error on the face of the record /orders issued on the 16/12/2020? I see none. None has been brought to the Courts attention.

17. The centrality of the application is founded on the Court orders issued on the 2/12/2020 which have been stated as follows;

“The application for adjournment is granted on the following grounds; The Plaintiffs are granted leave to file further witness statements (2) and a supplementary affidavit within 3 days from the date hereof; The payment of Court adjournment fees in the sum of Kshs 3500/- before the next hearing date; the Defendant’s Advocates costs for today together with two witness costs subject to assessment by the Deputy Registrar of this Court- payable before the next hearing date.

By consent hearing is fixed for the 16/2/2021.’’

18. Following the said orders the Applicants was granted corresponding leave of 4 days to file additional documents which included witness statements.

19. The record attests that the Respondents on their part did file and serve the documents on 8/12/2020 and according to the Applicants Advocate he was served with the said documents on the 8/12/2020. It therefore means that the Applicants had 4 days upon service to file their documents. They did not.

20. Come the day of the hearing on the 16/12/2020 the Applicants informed the Court that despite service of the 8/12/2020 they had not filed the said documents. The reasons advanced were that “he had not been able to respond.”

21. On the 16/12/2020, the Court exercising its discretion in the Plaintiffs’ favour granted the Applicants 3 days within which to file the documents in addition to payment of Court Adjustment Fees and the Defendants Advocate’s Fees. Effectively the Applicants had to file the documents by the 20/12/2020.

22. The Applicants failed to comply with the orders of the Court aforesated and on the 12/2/2021 moved the Court seeking a review of the orders aforesated on account that the Applicants are indigent; costs awarded against the Applicants are prohibitive. There is no evidence placed before the Court to show that the Applicants are indigent and therefore unable to meet the costs ordered by the Court.

23. The Applicants attributed the delay in filing documents to the time taken to contact the witnesses who are said to be elderly and sickly and live in Murang’a. There is no evidence tendered by the Applicants as to why the Counsel was unable to procure the witness statements from the 16/12/2020 upto and including the 12/2/2021 when they filed the instant application. Equally no effort was demonstrated to show the difficulty that the Applicants had in finding and procuring the said witnesses. The Applicants has a right to elect who to call as witnesses to advance their case. That is their Constitutional right. The Court in recognition of this right and the furtherance of fair trial gave the Applicants not one but the second chance to file additional documents. They failed to do so and the reason given has not been satisfactorily explained.

24. In the end the application is devoid of merit.

25. It is dismissed with costs to the Respondents.

26. **It is so ordered**

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 26TH DAY OF MAY 2021

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ndegwa HB for Olando for the 1st and 2nd Plaintiffs

Mbuthia HB for Ms Mungai for the 1st and 2nd Defendants

Kuiyaki/Alex: Court Assistants