REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. APPLICATION NO. 31 OF 2018 (O.S.)

1. HUSSEIN SULEIMAN MASILA

2. LILIAN KAVUTI MUSYOKA

3. IBRAHIM LUGUSA ALUDA.....APPLICANTS

VERSUS

KROTONITE ENTERPRISES LIMITED.....RESPONDENT

RULING

1. The application before for determination is the Amended Notice of Motion dated 26th September, 2019 in which the applicants are seeking orders to review and/or set aside the order and ruling issued on 20th May, 2019 and for the applicants to be granted unconditional leave to respond to the replying affidavit of Abdulkarim Saleh Muhsin dated and filed on 7th March 2019. The application is grounded on the grounds in the body of the application and the contents of a supporting affidavit of Hussein Suleiman Masila sworn on 27th September, 2019.

2. In the ruling dated 20th May, 2019, the court allowed the notice of motion application dated 24th December, 2018 by the respondents, set aside the judgment and decree given on 11th May 2018 and all orders consequent thereto and granted leave to the respondent to file their response to the amended Originating Summons within 14 days of the delivery of that ruling. The applicants aver that in that ruling, the court placed reliance on a replying affidavit by Abdulkarim Salim Muhsin dated and filed on 7th March, 2019 which was never served upon the Advocates for the applicants and that the said affidavit raises new issues that would have made the applicants seek leave to respond to had the same been served. That the said replying affidavit raises new and important matters or evidence which, after the exercise of due diligence was not within the applicant's knowledge or could not be produced or be responded to at the time. That the said replying affidavit was filed on 7th March 2019 which was inordinately out of time as per the directions of the court given on 21st September, 2019 and that the same was never served on the applicants' advocates nor brought to their attention when the matter came up on 7th March 2019 for highlighting of written submissions. The applicants aver that if the orders sought in this application are not granted, they will suffer great prejudice as their constitutionally enshrined right to a fair hearing shall have been violated. That the applicants will suffer substantial loss that cannot be compensated by an award of damages. The applicants contend that the application has been made without unreasonable delay and that it is only fair and in the interest of administration of justice that the orders be granted as prayed for in the application.

3. The respondent opposed the application and filed a replying affidavit sworn by Vincent Omollo advocate for the respondent on 13th November, 2020 in which he has deposed that on 7th March 2019, he served upon Mr. D. Obinju Advocate in the court the respondent's submissions as well as the affidavit sworn by Abdulkarim Saleh Muhsin of 6th March 2019. That the parties' interest in this matter will be well served if the applicants' suit is heard on its merits.

4. The application was canvassed by way of written submissions. The applicants filed their submissions on 13th January, 2021 through the firm of Mwanzia & Co Advocates while the respondent filed theirs on 9th March, 2021 through the firm of Kamoti Omollo & Co. Advocates.

5. I have considered the application and the submissions. The central issue for determination is whether the court should review and or set aside the order and ruling issued on 20th May, 2019 and grant the applicants leave to respond to the replying affidavit of Abdulkarim Saleh Muhsin dated 7th March, 2019. The court has power to review its ruling, but the said power must be exercised within the framework of Section 80 of the Civil Procedure Act and Order 45 Rule 1. Section 80 of the Civil Procedure Act provides as follows:

"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; or

b) By decree of 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."

6. Order 45 Rule 1 of the Civil Procedure Rules provides as follows:

"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; 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. "

7. From the forgoing, it is clear that Section 80 gives the power of review while Order 45 sets out the rules. Further, the rules lay down the jurisdiction and scope of review and limit it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by them at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay. It has also been held that any other sufficient reason for purposes of review refers to grounds analogous to the other two.

8. In the present application, the applicants rely on reason of new and important matter or evidence which, after the exercise of due diligence they say was not within their knowledge or could not be produced at the time the ruling order was made. A review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which after exercise of due diligence, was not with his knowledge or could not be produced by him at the time when the decree or order was passed. Therefore, a party seeking review must show that there was no remiss on his part in adducing all possible evidence at the trial.

9. The subject of the ruling dated 20th May, 2019 was the application dated 24th December, 2018 brought inter alia under order 10 rule 11 of the Civil Procedure Rules. The said application sought inter alia, the setting aside of the judgment and all consequential orders thereto. The main reason given by the respondent for setting aside the judgment was that it was never served with the Originating Summons. The summons were served by advertisement in the 'Nairobi Star' which publication the respondent stated was not brought to their notice or attention. The applicant further submit that the court in its ruling placed huge reliance on the respondent's replying affidavit which was deponed by Abdulkarim Saleh Muhsin on 6th March 2019. The said affidavit simply pointed out and clarified error in names, namely Krotonite Enterprises instead of Kryptonite Enterprises Ltd. In my view, the discrepancy in the name did not go to the root of the application to set aside the ex-parte judgment. In any case, an explanation was given for the discrepancy. The main ground advanced, and which the court took into account in setting aside the judgment was that there was no service or no proper service of the summons. It cannot be said that the applicants herein did not understand the nature of the application confronting them. In any case there was a response to the effect that service was effected upon the respondent. The court determined the application on the basis of all the material present before it. Secondly, the issue of error in name which in any case was explained satisfactorily did not go to the root of the application that the court was determining.

10. In the case of **Evan Bwire –v- Andrew Nginda, Civil Appeal No. 103 of 2000, Kisumu; (2000)LLR 8340**, it was held that 'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening of the application or case afresh. In the application herein, I find no grounds at all to warrant the orders sought. The reasons offered are not good enough to warrant the grant of the orders sought herein. I am equally not persuaded the applicants will suffer any prejudice if the orders sought are not granted. This is because the parties' interest in this matter will be served if the applicants suit is heard and decided on its merits.

11. Accordingly, this court finds no merit in the application dated 26th September, 2019. The application is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 24TH DAY OF MAY 2021

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE