REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 215 OF 2013

FESTUS ANENE ANENE.....PLAINTIFF/RESPONDENT

VERSUS

WILFRED MAKOMERE KULATI

JOHN AMBALE AMIMO.....DEFENDANTS/RESPONDENTS

JOYCE OMINA OMWENYO.....THIRD PARTY/APPLICANT

RULING

The application is dated 27th August 2019 and is brought under Rule 3 of part 1 of the Rules of Court under the Judicature Act (Cap 8) as amended by the Rules of Court (Amendment 6) (No. 3) Rules, 1969 (L.N. No. 3 of 1969) seeking the following orders;

1. That this application be heard during the vacation period.

2. That there be a stay of execution of judgment herein pending the hearing of this application inter-parties.

3. That this honourable court be pleased to set aside judgment entered on the 7th May, 2019 in favour of the plaintiff until hearing and determination of this suit.

1. 4. That the 3rd party herein be given leave to substitute the 1st defendant in this matter.

5. That the costs be in the cause.

It is based on the annexed affidavit of Joyce Omina Omwenyo and on grounds that the applicant herein is the only child of the late Wilfred Makomere Kulati the 1st defendant who died on 21st May, 2013. That she was never informed of the matter since she is married in Kitale Trans Nzoia County. That the 3rd party/applicant learnt that the said case existed after judgment and that there was an issuance of an eviction order on L.P. No. Marama/Shibembe/109. That the 2nd defendant and his counsel M/s Akwala & Co. Advocates after the death of the 1st defendant never engaged the 3rd party/applicant herein to take over the matter where the father had left. That the applicant's father is a beneficiary of land parcel No. Marama/Shibembe/109 for a portion measuring approximately 0.8 acres. That the 1st defendant did not contribute in any way or defend his part since he passed on before commencement of the suit. That the 3rd party's application raises weighty issues which should be heard and decided on merit. That the 3rd party/applicant has immense interest to defend this suit on the part of his dead father and be heard on merit. That no prejudice shall be occasioned to the plaintiff at all.

The respondent submitted that the 1st defendant (who died) in the course of this trial and who was the father of the applicant) and the 2nd defendant were represented by the same counsel and if the 2nd applicant is the one who informed the applicant about the result in this case as the applicant states at paragraph 4 of her supporting affidavit sworn on 9th August, 2019 the 2nd defendant had, undoubtedly, also informed the applicant that the case was proceeding despite the death of the applicant's father. That the judgment sought to be set aside cannot have been delivered on 7th May, 2019 and then the applicant goes to obtain a limited grant of letters of administration and litem purely for the purpose of setting aside the judgment. That the applicant would lack legal standing to obtain the orders sought in this application bearing in mind that the case against her late father, whose estate the applicant purports to represent, had abated in the course of the proceedings in this case. That the applicant is prosecuting the interests of the 2nd defendant in this case since the 2nd defendant has not lodged an appeal within time and this application is, therefore, a disguised appeal. That the applicant is not entitled to the orders sought since the orders of this honourable court as made on 7th May, 2019 were to the effect that the 2nd defendant, his agents, servants or personal representatives vacate

from the parcel of land known as Marama/Shibembe/1348 yet the applicant does not stay on this land and is obviously not among the servants and or agents or personal representatives of the 2nd defendant as stated in the judgment of this honourable court as delivered on 7th May, 2019. That collusion between the 2nd defendant, the 1st defendant and the applicant in this case is to prejudice the interest of the respondent in this case. That this application is brought in bad faith, it is an afterthought, lacks merit, an abuse of the court process and ought to be dismissed with costs.

This court has considered the application and the submissions therein. It is based on the annexed affidavit of Joyce Omina Omwenyo and on grounds that the applicant herein is the only child of the late Wilfred Makomere Kulati the 1st defendant who died on 21st May, 2013. That she was never informed of this matter since she is married in Kitale Trans Nzoia County. That the 3rd party/applicant learnt that the said case existed after judgment and that there was an issuance of an eviction order on L.P. No. Marama/Shibembe/109. **In the case of Kwame Kariuki & Another Vs. Mohamed Hassan Ali & 4 Others [2014] eKLR,** the Court observed that:-

> "It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal."

In the case of *Mwihoko Housing Company Limited Vs Equity Building Society [2007] 2 KLR 171* is relevant. It was held, that;

> "A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;
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> "An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made…"

Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

> "(1). Any person considering himself aggrieved-
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is hereby allowed.
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> 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.
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> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states as follows:

> "Any person *who considers himself aggrieved*-
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) 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.

Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However this discretion should be exercised judiciously and not capriciously. I see no mistake or error or omission on the part of the court proceeded to conclude the matter in the absence of the 1st defendant whose counsel opted to do so as the suit had abated against the 1st defendant. In Court of Appeal, *Civil Appeal No. 2111 of 1996, National Bank of Kenya Vs Ndungu Njau,* the Court of Appeal held that;

> "A review may be granted whenever the court considers 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 an elaborate argument to be established. It will not be

sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law".

From the above provisions of the law, authorities cited and facts of this case I find that the applicant has failed to show any mistake or error apparent on the face of record and/or any sufficient reason to enable this court set aside its decision. The suit has also abated against the 1st defendant who died way back in 2013 and the applicant cannot now substitute him. The application is not merited and I dismiss with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT ON 5TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE