



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO 537 OF 2005**

**WAAS ENTERPRISES LIMITED.....PLAINTIFF**

**=VERSUS=**

**CITY COUNCIL OF NAIROBI.....1ST DEFENDANT**

**FELISTERS NJAMBI MWAI.....2ND DEFENDANT**

**RULING**

1. On 31/7/2015, the 2nd defendant, Felisters Njambi Mwai (the **applicant**), brought a notice of motion dated 30/7/2015 seeking a review of the judgment rendered in this suit on 26/9/2014 by Gitumbi J. The Learned Judge was transferred to the Judiciary Training Institute (JTI) early this year. Consequently, the Court Registry listed the application before me on 30/1/2018. The application was subsequently heard on 23/5/2018.

2. The application is expressed to have been brought under Articles 25 and 159 of the Constitution of Kenya, Section 1, 1B, 3A and 80 of the Civil Procedure Act and Orders 45 and 51 of the Civil Procedure Rules. The application is premised on the following grounds;

- a. The court proceeded to hear this case civil case 537 of 2005 while there was another case pending as between the same parties seeking similar orders, the other case being Civil Case 993 of 2001.**
- b. The 1st respondent withheld a material fact being that the matter was sub judice and as such there was a high danger that the court would be embarrassed in rendering conflicting decisions in the matter.**
- c. The applicant was not allowed to give her side of the story when the matter was heard due to the mistake of her advocate as such the Advocates mistake should not be extended and/or used to punish her.**
- d. The applicant has sufficient evidence and other sufficient cause/reason that if the court considers would alter the determination that was reached at in this matter.**
- e. That the 1st respondent and 2nd respondent would not in any way be prejudiced if the applicant gives her evidence as it would only be in furtherance of the parties Bill of Rights to a fair trial at Article 25 of the Constitution and the spirit and letter of the Constitution and rules of natural justice.**
- f. It is just and fair that this honourable court do review its decision of 26th September 2014 and afford the applicant a chance to tender her evidence.**

3. In his oral submissions before this court, counsel for the applicant submitted that there was an error on the part of the advocate who handled the matter on behalf of the applicant in that he neither called the applicant as a witness nor filed a bundle of documents. Consequently, the case proceeded without the applicant adducing any evidence in court. As a result, a very important piece of evidence was not placed before the court. That piece of evidence relates to the existence of a similar suit.

4. The plaintiff opposes the application through a replying affidavit sworn on 18/4/2017 by Mathew Njoroge Kabetu. The position of the plaintiff is that the alleged other suit was Nairobi HCCC No 993 of 2001 and the same was dismissed long before this matter was set down for trial, and that the applicant's attempt to refer to the court file was declined by the court during trial. Secondly, the plaintiff contends that the parties in that other suit were not the same as the parties in this suit.

5. I have considered the application together with the parties' rival affidavits and submissions. I have also considered the legal framework and the jurisprudential principles which guide our courts when exercising the jurisdiction to review a judgment.

6. The procedural framework on review of a judgment is contained in Order 45 rule 1 of the Civil Procedure Rules which provides 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**

**c. 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 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.**

**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.**

7. The above procedural framework is anchored on Section 80 of the Civil Procedure Act which 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 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.**

8. When exercising review jurisdiction under Section 80 of the Civil Procedure Act and Order 45(1) of the Civil Procedure Rules, the court is obligated to have due regard to the principle of finality of litigation and to the underpinning public policy considerations that inform that principle. In this regard, the court is required to carefully interrogate the grounds upon which it is invited to review its judgment, to ensure that it does not sit as an appellate court against its own decisions.

9. In the present application, it is contended that the applicant's advocate failed to call a particular witness. It is further contended that the applicant's advocate failed to file certain documents as exhibits. Consequently, an important part of evidence was left out. That piece of evidence happens to be the record of a related suit which had been dismissed without a hearing on merits.

10. I have considered the grounds upon which the review is sought. In my view, those grounds do not fall within the purview of Order 45 (1) of the Civil Procedure Rules. There is no evidence of discovery of new and important matter or evidence which was not available during trial. There is no evidence of mistake or error apparent on the face of the record. Similarly, there is no good reason why the regular judgment should be reviewed other than by way of an appeal to the Court of Appeal. If failure by the litigant to lead evidence were to be construed as a ground for review, there may never be an end to any litigation because losing litigants will be trooping back to the same court to have a second bite at the cherry. That will undermine public policy on finality in judicial adjudication.

11. Besides the foregoing, I have carefully looked at the proceedings before the trial judge. Mr Kuria, the then counsel for the applicant, invited the court to look at the court file relating to HCCC 993 of 2001. Both the plaintiff's and the 1st defendant's advocates submitted on the issue. Thereafter, the court (Gitumbi J) made the following ruling against which no appeal was lodged:

**"I have considered the rival arguments as to whether or not to recall the archived file for Case No HCCC 993 of 2001. I have not been given a valid reason as to why I should recall that file and peruse the same. I do not therefore see the benefit that perusing that file will grant to this court. Accordingly, I decline the application and rule that the hearing of the present suit will proceed"**

12. It is therefore clear from the court record that the trial court considered the matter of what the applicant has called an important piece of evidence. The court rendered itself on the matter and no appeal has been lodged against the decision of the court. To raise the same issue as a ground for review of the subsequent judgment under Order 45(1) of the Civil Procedure Rules is, in my view, an abuse of the court process.

13. In light of the foregoing, I am not satisfied that the applicant has met the criteria for review of a regular judgment rendered after a substantive *inter partes* hearing conducted in the presence of parties' duly appointed advocates. Consequently, the notice of motion dated 30/7/2015 is dismissed for lack of merit. The 2nd defendant shall bear costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

June Nafula - Court Clerk