REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 4 OF 2006

PENTECOSTAL ASSEMBLIES OF GOD.....PLAINTIFF/RESPONDENT

VERSUS

PETER GATHUNGU & OTHERS.....DEFENDANTS/APPLICANTS

RULING

1. By a Notice of Motion dated **24/12/2019,** the Defendants brought the present application under the provisions of **Section 1A, 1B, 3 & 3A** of the **Civil Procedure Act** and filed on **20/1/2020** seeking for the following orders:

> **(1) THAT the judgment of this Honourable court delivered on the 8/7/2011 be reviewed to the effect that the Plaintiff/Respondent is entitled to ¼ and acre and not ½ an acre.**
>
> **(2) THAT costs of the Application be provided for.**

2. The Application is supported by the grounds on the face of the Application and by a supporting affidavit of **Peter G. Kinuthia**. The grounds relied upon are that the 1st Defendant is the owner of **Uns. Residential Plot No. 50-Kitale Municipality** measuring **0.03 Ha**; that the Respondent was allocated **Kitale Municipality Block VI/231** measuring **0.8050 Ha;** that the Respondents' plot encroached to the applicants' plot; that in the judgment of this Court delivered on **8/7/2011,** it was declared that each party should continue to occupy the land they had been occupying before the suit; that it was further stated by the judgment that the Respondent is entitled to **½ an acre** and not **0.8050 Ha** as indicated in their lease; that after the judgment, survey was carried out and it was found that the respondent's true occupation was **¼ acre** and not **½ acre**; that the cancellation of lease has never been done and the Respondent insists on encroaching to applicant's plot and that the ends of justice favour the grant of the orders sought.

3. The Defendants reiterates the grounds in his supporting affidavit dated **24/12/2019.** The Application is also supported by annexures thereto.

4. On the **24/2/2021**, the court directed the parties to argue the application by way of written submissions. However by the time am writing this ruling, none of the parties have filed their submissions.

5. Order 51 rule 14 of the **Civil Procedure Rules** states that:

> **"(1) Any respondent who wishes to oppose any application may file to any one or a combination of the following documents**
>
> **(a) a notice preliminary objection: and/or;**
>
> **(b) replying affidavit; and/or**
>
> **(c) a statement of grounds of opposition;**

6. The respondents herein did not file any of the aforementioned documents to oppose the application before me.

7. The application is unopposed; the Respondent did not file any document in opposition of the application. However, I will ignore that omission and I will deal with the application on its merits.

8. I have considered the application, the affidavit in support and the annexures thereto. In their supporting affidavit, (**Paragraph 11**) the defendants allege that the Director of Survey carried out survey to find the true acreage and it was found that the plaintiff occupies only **¼ an acre** and not **½ an acre** as they had alleged; he annexed correspondences marked "**PGK- 1 (a)-(e)"** in support of the application. I have carefully perused the annexures and in my considered view, I do not see them as being of any probative value in the instant application.

9. From the record, the Plaintiff in its Plaint prayed for orders of eviction against the defendant from the suit land being **Kitale Municipality 6/321** and demolition of their structures and a permanent injunction restraining the defendants from interfering with the suit land together with costs however the court exercised its discretion and ordered that the Plaintiff is entitled to **½ an acre** of the suit land where they have constructed the Church and an order restraining the defendants from interfering the plaintiffs' occupation was issued. That is the judgment that the Applicants are seeking to be reviewed.

10. The issue for determination arising out of the instant application is whether the Applicants have satisfied the conditions precedent for the grant of review orders.

11. Order 45 Rule 1(1) of the **Civil Procedure** Rules 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-**
>
> **(a) by a decree or order from which an appeal is allowed but which no appeal is preferred; or**
>
> **(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of a 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.**

12. The aforesaid rule is based on **Section 80** of the **Civil Procedure Act,** the Court has unfettered discretion to make such order as it thinks fit on sufficient reason being for review of its decision. However, the discretion should be exercised judiciously and not capriciously. The **Section** provides as follows:

> **"Any person who considers 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 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. The conditions for the grant of orders of review therefore are as follows that:

> **(a) There is discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicants knowledge and which could not therefore produce at the time the order was made or,**
>
> **(b) Some mistake or error apparent on the face of the record or,**
>
> **(c) Any other sufficient reason**

14. Further that the application for review must be made without unreasonable delay.

15. Have the applicants satisfied the above conditions to warrant the court to issue orders for review in respect to the judgment dated **8/7/2011?**

16. On the issue of whether there was discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicants' knowledge. The case of ***Republic -v- Advocates Disciplinary Tribunal Exparte Apollo Mboya (2019) eKLR the court*** held that:

> **"For material to qualify to be new and important evidence or matter, it must be of such a nature that could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court."**

17. Similarly in the case of ***Evan Bwire v Andrew Aginda Civil Appeal No. 47 of 2006*** cited in the case of ***Stephen Githua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR*** the Court of Appeal held as follows:

> **"An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case a fresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence."**

18. I have perused the application and the annexures thereto and I have not seen any explanation advanced by the applicants to demonstrate and to convince this court that there is discovery of new evidence to warrant review of the judgment delivered on the **8/7/2011.** The applicants had an opportunity of presenting evidence during the trial to show that the respondent was in occupation of only a quarter acre but they did not adduce it.

19. In my considered view, the applicants have not taken any effort to show the court what new evidence he has discovered after the delivery of the judgment which was not within his knowledge at trial.

20. Is there an error apparent on the face of the record? I have carefully perused the court file and the judgment and I find that whereas the Plaintiff sought for eviction as well as injunction orders against the Defendants from the suit land, the Honourable Judge diligently adjudicated the matter and issued orders for the Plaintiff to occupy the **½ an acre** it is in possession and occupation of and injuncted the defendants from interfering with the Plaintiffs' occupation. The issue of positioning and occupation of the litigants in this suit was extensively deliberated by the Honourable Judge and I do not see any mistake or error apparent on the record in the Judge's, finding because the same was grounded on the evidence that was well articulated by the Honourable Judge.

21. Having found that the applicants have not demonstrated that there was discovery of new evidence, and that there is no error apparent on the record, I now turn to the issue of delay.

22. Upon perusal of the court record, judgment was entered on **8/7/2011** whereas the instant Application was filed on **24/12/2019.** The Application is brought before this court **8 years** later after delivery of judgment. The applicants have not explained the reasons for the delay. Any delay must be explained. In the case of **John Agina v. Abdulswamad Sharif Alwi C.A Civil Appeal No. 83 of 1992** the court stated as follows:

> **"An unexplained delay of two years in making an application for review under Order 44 Rule 1 (now Order 45 rule 1) is not the type of sufficient reason that will earn sympathy from the court."**

23. In my considered view therefore delay of **8 years** which is unexplained amounts to unreasonable delay. The application fails on this ground.

24. Whether the applicants shall suffer irreparable injury or will be highly prejudiced by the judgment is a matter for the Court of Appeal as it is clear that the applicants are dissatisfied with the decision of the court and they can only appeal against the decision**.**

25. In the upshot, the application is devoid of merit and is therefore dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and **delivered** at **Kitale via electronic mail** on this **3rd** day of **May 2021.**

MWANGI NJOROGE

JUDGE, ELC KITALE.