



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 127 OF 2017

JEREMIAH MATOKE.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT

WILLIAM WILHITE AYIENDA.....2ND DEFENDANT

RULING

1. This is a ruling on the application dated **4/6/2021** and filed in court on **10/6/2021**. The application has been brought under **Sections 1A, 1B, 3A & 63(e)** of the **Civil Procedure Act, Order 45 Rule 1** and **2** and **Order 51 Rule 1** of the **Civil Procedure Rules**. The applicant/2nd defendant seeks that the orders that the court be pleased to review vary and or set aside the order made on **21/4/2021** dismissing the application dated **26/2/2021** and that the application dated **26/2/2021** be reinstated for hearing *inter partes*. He also prayed for any other order the court shall deem fit.

2. The application is supported by the affidavit of **Mr. Walter Wanyonyi**, counsel for the applicant sworn on **4/6/2021**. The grounds on the face of the application are that the application dated **26/2/2021** was dismissed for want of prosecution/compliance; that the applicants had fully complied with directions made by the court; that the inadvertence of not placing documents in the file arose from the Registry and that it is in the interest of justice that the application dated **26/2/2021** be reinstated and be heard on merits.

Determination

3. I have considered the subject application. Though an affidavit of service is on the record showing that it was served, it is unopposed. The instant application is however a test of how far this court will go to enforce its orders and discipline in compliance thereof on the part of litigants and advocates. It is clear that where order is not enforced the consequence is that matters become long drawn out duels that consume not only the parties' resources but also the court's precious judicial time by engaging it in reviews of decisions in which applicants could have otherwise influenced the direction of by timely producing relevant evidence or submissions in their actual possession.

4. A review application must be well founded. Based on **Section 80** of the **CPA**, and **Order 45 Rule 1** and **2** of the **Civil Procedure Rules**, the Court has unfettered discretion to make such order as it thinks fit upon sufficient reason being given for a review of its decision. However, the discretion should be exercised judiciously and not capriciously. That 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”.

5. 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.

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

7. 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.”

8. In the case of **Republic -v- Advocates Disciplinary Tribunal Ex parte 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 it 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.” (emphasis mine)

9. In the present case Mr. Wanyonyi in his affidavit would have the court believe that the applicant complied with the directions of this court dated **26/2/2021**, requiring the filing by the applicant herein evidence of service of the application dated **26/2/2021**, before the hearing of that application.

10. That application was to be disposed of by way of written submissions the last of which were to be filed by the respondent after **21 days** from the date of directions.

11. The last date for filing such an affidavit of service was therefore **22/3/2021**. Ruling was scheduled for **21/4/2021**. Mr. Wanyonyi now exhibits in the instant application a copy of an affidavit of service dated **8/3/2021**, and a copy of the receipt dated **9/3/2021**.

12. However the date of the printing out of the receipt which is on its face betrays the fact that it could not have reached the court file before **3/5/2021**. It was printed on that date, **3/5/2021**, long after the ruling date, and it is the only copy in the file. No prior copy was filed.

13. The applicant appears to have forgotten that the business of following up and ensuring that evidence of service and evidence of payment of court fees before the ruling was delivered was his burden. The accounts office is not the ELC Registry. The applicant was supposed to obtain copy of receipt for payment and deliver it to the ELC Registry alongside the Affidavit of Service for filing. He did none of the above. He left it to the Registry staff to forage around seeking documents in support of his compliance with court orders and the date of Ruling came and went while he had not demonstrated to court that he had served the application. The Court of Appeal recently observed as follows regarding court registries:

“In many cases parties do blame court registries for delay in preparing court proceedings. These registries are often overwhelmed with work...” (See George Owuor Okaka -vs- Paul K. Muruga 2021 eKLR).

14. This kind of sloppiness and lack of attention disentitles the applicant from review.

15. As at the time this court gave a ruling there was no evidence of service and no payment on the court record. If they had been filed before the ruling was delivered the date stamp of the court registry would be appearing on the copies now exhibited in the application for review.

16. The court was therefore justified in dismissing the application as those two pieces of information, which were within the applicant’s domain to provide, and which he never did so were not present on the record.

17. Consequently the court fails to find that there is discovery of any new matter or evidence which could not have with diligence produced by the applicant at the time the decision of the court was made or any error on the face of the record, or any other ground analogous to these, upon which its decision to dismiss the application dated **26/2/2021** may be properly impugned.

18. The upshot of the foregoing is that the application dated **4/6/2021** lacks merit and the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 28TH DAY OF JUNE, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.