**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 7 OF 2020**

**JOSEPH KEDIMUK LOTUKUMA.....PLAINTIFF**

**VERSUS**

**MAXWEL MWAYA BURUDI.....1ST DEFENDANT**

**MARY MUTHONJA MWAYA.....2ND DEFENDANT**

**JOSHUA MWACHI BURUDI.....3RD DEFENDANT**

**RULING**

1. The background to the instant application is that the plaintiff filed the instant suit on **26/1/2020** alleging fraudulent conduct on the defendants' part and seeking orders *inter alia* a declaration and a permanent injunction. As is the case in many suits an application for a temporary injunction was filed soon thereafter on **29/4/2020**. An interim injunction order was granted on **4/5/2020** pending the hearing and determination of the application and the defendants were directed to file and serve their responses to the application. The 1st defendant filed his replying affidavit on **13/5/2020.** It now appears that the 2nd defendant filed her replying affidavit on **13/5/2020** while the 3rd defendant appears to have filed no reply at all. The ruling was delivered on **18/6/2020** granting a temporary injunction pending the hearing and determination of the main suit; then the instant application was filed on **26/1/2021.**

2. The application dated **22/1/2021** and filed in court on **26/1/2021** has been bought under **Order 45 Rule 1(1) (2) & 3 and Order 51 Rule 1** of the **Civil Procedure Rules**. The applicants/defendants seek the following orders:-

> **1. That this honourable court be pleased to review and set aside the ruling dated 18/6/2020.**
>
> **2. That the honourable court be pleased to put into consideration the applicants' pleadings before it gives its ruling.**
>
> **3. That costs be in the cause.**

3. The application is supported by the affidavit sworn on **22/1/2021** by the counsel for the applicants. I have perused the file record and I have not found any replying affidavit filed by the plaintiff.

4. On **2/2/2021** the court ordered that the application should be disposed of by way of written submissions. The applicants filed their submissions on **2/3/2021.** I have perused the file record and found no submissions filed on behalf of the plaintiff.

5. Having perused the application and the applicant's submissions. I find that the main issue that arises for determination in the present application is whether the ruling dated **18/6/2020** should be reviewed.

**6. Section 80** of the **Civil Procedure Act** 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.**

**7. Order 45 Rule 1** of the **CPR** 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, 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 judgement to the court which passed the decree or made the order without unreasonable delay."**

8. Review of a judgment decree or order is therefore possible only where there is:

> **a. No unreasonable delay in the making of the application for review;**
>
> **b. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made;**
>
> **c. Some mistake or error apparent on the face of the record; or**
>
> **d. Any other sufficient reason.**

9. Has the applicant met these requirements?

10. The impugned ruling was delivered on **18/6/2020**. The application was filed on **26/1/2021**, seven months thereafter. That is inordinate delay, by any standards. However even where delay is lengthy, an adequate explanation thereof may enable the court exercise grant the orders sought.

11. Has the delay been adequately explained?

12. The applicant's counsel avers that the ruling only came to her attention when the matter was mentioned on **16/1/2021**. Unfortunately the applicant's counsel's supporting affidavit is devoid of any explanation as to why the delay occurred. She only states that:

> **"Neither my clients nor myself were aware that the ruling had been delivered until 18/1/2021 when the matter came up for mention before the Judge."**

13. She exhibits a copy of her letter dated **15/7/2020** to the Deputy Registrar of the court requesting that the matter be placed before the Judge for fixing of the ruling date in respect of the application dated **28/4/2020**. Inexplicably, the copy of the letter bears no court stamp and the original of that letter is not in the court record and it is not clear whether the same was ever received by the Deputy Registrar. Counsel for the plaintiff has not responded to the application and it can not be known whether the same reached him.

14. It is not lost on this court that courts resumed operations, though limited, in **July 2020** after the first period of restrictions brought about by the current pandemic, and registries were open and accessible to both counsel and their clerks. It would have been proper for the applicant's counsel to pursue the date by way of a physical attendance at the registry once her letter received no response, in which case a perusal of the file would have disclosed the fact that the ruling had been delivered and an application such as the current one could have been filed without unreasonable delay. In this court's view the replying affidavit has not demonstrated that the applicant or counsel did anything during the period to find out the fate of the application dated **28/4/2020.** Therefore, no adequate explanation has been given for the unreasonable delay.

15. As to whether there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made, the application speaks for itself.

16. The main ground for the application is that this court not able to peruse the pleadings of the defendant since it appears that they were never placed in the court record, an error attributed to the registry staff by the applicant.

17. The most elastic definition of the provision "*discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made"* can not be deemed to include such an error on the part of registry staff. The terms used in the rule are plain and do not require any form of special interpretation. In this court's view, that language implies that the discovery of new matter or evidence would have to be outside of what has been filed in court. The applicants can not be said to have discovered anything new in the current application as all they are relying on in the application is the premise that the court never perused their defence prior to the writing of the ruling. In this court's view, there was therefore no discovery of any new matter or evidence within the meaning of **Order 45 rule 1** as would enable the court grant an order of review.

18. The third question is if there is an error on the face of the record that would enable a review. It appears that the main ground that prompted the instant application is this court's observation that no defence had been filed to the main suit by the defendants and that the 2nd

and the 3rd defendants had failed to file a response to the application.

19. In the impugned ruling, this court observed that the plaintiff had established *prima facie* case against the defendants.

20. The plaintiff's claim in the main suit is that the defendants had prevented him from planting crops on the parcel of land which he had been in possession of since the year **2006** and had threatened him with actual violence. He claimed to have purchased the land from one *Kemadio Alemuluk*, paid for the land and took possession thereof immediately. At the time of purchase the land was registered in the 1st defendant's name but he later transferred the same to the 2nd and 3rd defendants without hiving off the portion purchased by the plaintiff.

21. The defendants were to file their response to the application dated **28/4/2020** within **7 days** from **4/5/2020.** It now appears that both the replying affidavits of the 1st and 2nd defendants were filed on **13/5/2020** and if so, they were clearly out of time. It also appears that the witness statements and the documents of the defendant had been presented at the registry by **13th May 2020** as they appear to bear the court registry stamp on their face.

22. This court nevertheless took note of the contents of the 1st defendant's reply. However, I do not find much difference in terms of content in the two affidavits.

23. The applicant's application refers to omission to refer to "*pleadings*". That term, in the applicant's parlance, can only refer to the defendant's defence filed in the suit. It is the material in the defence, had it been considered, that the defendants now think could have altered their fortunes and made the court rule in their favour in the application for injunction.

24. I do not find any difference in the contents of the two affidavits and the contents of the defence apparently filed on **19th May 2020** which could lead to a conclusion that this court would have arrived at a different conclusion had it perused that defence. Therefore, the fact that this court never perused that defence does not alter the fact that it would nevertheless have arrived at the same conclusion as it did regarding the application dated **28/4/2020**.

25. As I conclude, I must also observe here that even though the court is entitled to refer to pleadings in determining an application for interim injunction, the evidence in support of or in opposition to such an application lies in the supporting and the replying affidavits and their annextures. Pleadings only serve to determine if there is a *prima facie* case. Many an application for injunction have in the past been determined in the absence of a defence. It must be presumed that where a defence is not filed or not seen by the court the evidence in the replying affidavit must be as close as possible to whatever facts would be pleaded in the defence.

26. An observation of this court in its ruling that the defence had not been filed as at the time of the writing of the ruling, though erroneous, would not affect the outcome of the ruling since the response of the 1st defendant, which is in similar terms with the 2nd respondent's response, had been put under consideration by the court.

27. This court also made a merit determination of whether the applicant was in occupation of the suit land for the purpose of disposition of the question as to whether an injunction should issue against the respondents. Such a finding can only be challenged on appeal since it was founded on the court's appreciation of the facts presented by the parties in their affidavits. The expectation on the part of the applicant that the court would have arrived at a different determination had it perused the defence filed by the defendants has no basis.

28. The conclusion of this court is that the error cited by the applicant, though it exists, does not affect the decision on the merits of the application dated **28/4/2020** at all.

29. I do not think that the applicants have effectively brought themselves within the ambit of the grounds for review contemplated by **Order 45 rule 1** above.

30. The upshot of the foregoing is that the application dated **26/1/2020** lacks merit and the same is hereby dismissed with no orders as to costs. The plaintiff shall utilize the first **7 days** from the date hereof to comply if he has not and the defendant shall respond within the remaining **7 days**. This suit shall be mentioned on **24/6/2021** for the issuance of a hearing date.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 10TH DAY OF JUNE, 2021**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE**