



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELCA NO. 17 OF 2016**

**JAMES NDONYU NJOGU.....APPELLANT**

**VERSUS**

**MURIUKI MACHARIA.....RESPONDENT**

**RULING**

**A. INTRODUCTION**

1. The material on record indicates that the Appellant was the Plaintiff in *Karatina SRM CC No. 109 of 2004 – James Ndonyu Njogu v Muriuki Macharia*. It would further appear that the said suit was ultimately dismissed for want of prosecution by the trial court by a ruling dated 19<sup>th</sup> October, 2016. The said ruling was made pursuant to the Respondent's application dated 24<sup>th</sup> July, 2015 seeking dismissal of the suit for want of prosecution.

2. Being aggrieved by the said ruling and order, the Appellant filed the instant appeal seeking the setting aside of the dismissal order and reinstatement of his suit for hearing on merit. By a judgment dated and delivered on 21<sup>st</sup> May, 2018 this court dismissed the said appeal on merit and condemned the Appellant to pay costs of the appeal. The costs of the appeal were subsequently taxed in the sum of KShs.83,150.00 of which the Appellant has made part payment.

**B. THE APPELLANT'S APPLICATION**

3. By a notice of motion dated 26<sup>th</sup> January, 2021 expressed to be based upon **Section 80 of the Civil Procedure Act (Cap. 21), Order 45 rule 1 and Order 51 rule 1 of the Civil Procedure Rules (the Rules), Article 159, Sub-Article (2) (d) & (e) of the Constitution of Kenya, Section 68(1) of the Land Registration Act and all other enabling provisions of the law**, the Appellant sought the following orders:-

(a) Spent.

(b) Spent.

(c) *An order of stay of execution arising from the judgment delivered on 21<sup>st</sup> May, 2018.*

(d) *An order to set aside the certificate of costs dated 27<sup>th</sup> February, 2019.*

(e) *Review of the judgment dated 21<sup>st</sup> May, 2018.*

(f) *Stay of execution of the orders arising from the ruling dated 24<sup>th</sup> September, 2020.*

(g) *Costs of the application be provided for.*

4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Appellant on 26<sup>th</sup> January, 2021 and the exhibits thereto. It was contended that the Appellant had discovered new and important matter and evidence which was not available to him at the time judgment was delivered. It was claimed that there were no records in the relevant parcel file at the Nyeri Land Registry to support the transfer of the suit property to the Respondent and that the purported consent of Mathira Land Control Board was a forgery. It was further claimed that his purported signature on the sale agreement was a forgery.

### **C. THE RESPONDENT'S RESPONSE**

5. The Respondent filed a replying affidavit sworn on 7<sup>th</sup> April, 2021 in opposition to the said application. It was contended that the Appellant had failed to satisfy the requirements for review as set out in **Order 45** of the **Rules**. It was disputed that there was discovery of any new or important matter or evidence which could not have been obtained despite the exercise of due diligence. It was contended that the Appellant's claim was all along founded on fraud and forgery and that despite the matter being investigated by the Director of Criminal Investigations the Respondent was not found culpable in any way.

6. In further response, the Respondent contended that he should not be blamed for the alleged loss of documents from the parcel file since he was not the custodian of documents at the lands registry. It was further contended that there was no valid reason to stay the order for payment of costs since the Appellant had already made a part payment of Kshs.5,000/= and had made arrangements to pay the balance. It was further contended that there was undue delay in filing the application for review since judgment was delivered more than 2 years ago.

7. The Appellant filed a further affidavit sworn on 27<sup>th</sup> April, 2021 in reply to the Respondent's replying affidavit. It was contended that the application for review was filed in the first instance on 13<sup>th</sup> December, 2019 but the same was struck out on procedural technicalities. It was further contended that could not file the instant application in 2020 due to the Covid-19 pandemic.

8. The rest of the contents of the further affidavit were merely matters of submissions and the advice received from his advocates which were not of a factual nature.

### **E. DIRECTIONS ON SUBMISSIONS**

9. When the application was listed for hearing on 23<sup>rd</sup> March, 2021 it was directed that the application shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. The record shows that the Appellant filed his submissions on 10<sup>th</sup> May, 2021 whereas the Respondent filed his on 29<sup>th</sup> April, 2021.

### **F. THE ISSUES FOR DETERMINATION**

10. The court has perused the Appellant's notice of motion dated 26<sup>th</sup> January, 2021, the Respondent's replying affidavit sworn on 7<sup>th</sup> April, 2021, the Appellant's further affidavit sworn on 27<sup>th</sup> April, 2021 as well as the material on record. The court is of the opinion that the following issues arise for determination:

- (a) Whether the Appellant has made out a case for review of the judgment and decree dated 21<sup>st</sup> May, 2018.*
- (b) Whether the Appellant is entitled to an order for stay of execution of the decree dated 21<sup>st</sup> May, 2018.*
- (c) Whether the Appellant is entitled to a setting aside of the certificate of costs dated 27<sup>th</sup> February, 2019.*
- (d) Whether the Appellant is entitled to a stay of execution of the orders arising from the ruling dated 24<sup>th</sup> September, 2020.*
- (e) Whether the Appellant has made out a case for the grant of an order of inhibition to prevent any dealings with the suit property.*
- (f) Who shall bear costs of the application.*

### **G. ANALYSIS AND DETERMINATION**

#### **(a) Whether the Appellant has made out a case for review of the judgment and decree dated 21<sup>st</sup> May, 2018**

11. The court has considered the submissions and material on record on this issue. Whereas the Appellant contended that he had satisfied the requirements for review as set out in **Order 45** of the **Rules**, the Respondent contended otherwise. The court is aware that it is not dealing with an application for reinstatement of the Appellant's suit but an application for review of a decree which affirmed the trial court's order dismissing the Appellant's suit for want of prosecution under **Order 17 rule 2** of the **Rules**.

12. The legal provisions governing review of an order or decree are set out in **Order 45 of the Rules**. **Order 45 rule 1** thereof stipulates as follows:

**“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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

13. The said principles for the grant of an application for review were reiterated in the case of **Origo & Another v Mungala [2005] eKLR** whereby the Court of Appeal held that:

**“From the foregoing, it is clear that an applicant has to show that there is discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the Applicant must make the application without unreasonable delay...”**

14. The material on record indicates that the application for review was essentially based upon the alleged discovery of new or important evidence which was not available to the Appellant at the time the appeal was heard. The Appellant contended that he had since discovered that the parcel file for the suit property at the Nyeri Land registry was missing and that the purported consent of Mathira Land Control Board was a forgery.

15. The court is of the opinion that there is no evidence before court to demonstrate that the Appellant could not establish those matters from the concerned public authorities after the exercise of due diligence. The Appellant had filed suit before the trial court way back in 2004 and there is no evidence on record to demonstrate that he diligently sought to obtain the evidence he claimed to have recently acquired from the concerned public authorities.

16. The court is further of the opinion that even if it were to be assumed in favour of the Appellant that he had discovered new evidence which could not have been obtained at the time the appeal was heard, such evidence would not be admissible at the appellate stage with respect to a suit which was dismissed for want of prosecution. The Appellant's suit was not dismissed for lack of sufficient evidence but for want of prosecution. The only thing which could have saved the Appellant's suit before both the trial court and this court is a reasonable and satisfactory explanation for the delay in prosecuting his suit. The court, therefore, finds and holds that the alleged discovery of new or important evidence has absolutely no bearing on the instant application for review.

17. There is another reason why the Appellant's application for review ought to fail. There is no doubt from the material on record that the application was not filed without undue delay as required by **Order 45 of the Rules**. When the Appellant's initial attempt to seek review in 2019 ran into technical challenges, the Appellant went into slumber for about 1 year before filing the instant application in February, 2021. There was absolutely no effort made to move the court in 2020. The explanation given by the Appellant that he could not take steps due to Covid-19 pandemic is not a credible and satisfactory explanation. The court is aware that although the Judiciary scaled down operations with effect from March, 2020 urgent applications could still be filed and handled through online platforms. In fact, there were numerous applications which were filed, prosecuted and determined between March, 2020 and February, 2021.

18. The court is thus not satisfied that the Appellant has satisfied the grounds for the grant of an application for review. The court is also not satisfied that the instant application was filed without unreasonable delay. The court is further of the opinion that the Appellant has not rendered a credible and satisfactory explanation for the delay in filing the instant application for review. Accordingly, the first issue is answered in the negative.

**(b) Issues (b), (c), (d) and (e)**

19. The court is of the opinion that the rest of the issues identified above were dependent upon the successful determination of the prayer for review. Since the prayer for review has failed, there is no legal basis upon which those prayers may be granted. Accordingly, the above issues are all answered in the negative.

**(f) Who shall bear costs of the application**

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful party should not be awarded costs of the application. Accordingly, the Respondent shall be awarded costs of the application to be borne by the Appellant.

**H. CONCLUSION AND DISPOSAL**

21. The upshot of the foregoing is that the court finds no merit in the Appellant's notice of motion dated 26<sup>th</sup> January, 2021. Accordingly the court makes the following orders for its disposal:

*(a) The Appellant's notice of motion dated 26<sup>th</sup> January, 2021 be and is hereby dismissed in its entirety.*

*(b) The Respondent is hereby awarded costs of the application to be borne by the Appellant.*

It is so ordered.

Ruling dated and signed in chambers at Nyeri and delivered via Microsoft Teams platform this 3<sup>rd</sup> day of June 2021.

**In the presence of:**

Mr. Wachira holding brief for Mr. Kwenjera for the Appellant

Ms Gatheru holding brief for Mr. Mahan for the Respondent

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**Y. M. ANGIMA**

**ELC JUDGE**