REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC CASE NO. 10 OF 2020

FORMERLY ELC NO 19 OF 2018 – NYERI

SIMON NDUNGU.....1ST PLAINTIFF/RESPONDENT

JOSEPH WAWERU.....2ND PLAINTIFF/RESPONDENT

VERSUS

KANGATHIA KIUNA.....1ST DEFENDANT

JAMES NDIGA MWAURA.....2ND DEFENDANT/APPLICANT

RULING

1. By a **Notice of Motion Application** dated **14th June, 2019**, the 2nd Defendant/Applicant sought for the following orders;

a) ***Spent***

b) ***A Review of the Ex-parte Judgment of this Honorable Court made on 1st September, 2016.***

c) ***In the alternative and without prejudice to the foregoing this Honorable Court to vary/ or set aside the ex-parte judgment of the Court made on 1st September, 2016.***

d) ***The Court to reopen this matter and the Applicant be granted leave of the Court to comply with Order 11 and file his witness statement and documents in support of his case, and the matter to be heard inter-parties.***

e) ***Costs if this application be awarded to the 2nd Defendant/Applicant.***

2. The application is premised on the **GROUNDS** stated on the face of it and the dispositions by Applicant. It is the Applicant's contention that upon the death of the 1st Defendant, his father, he was substituted. That upon substitution, he was not represented by Counsel and was not served with any hearing notices. He further contended that the 1st Defendant died in **2012**, but prior to his death, the Applicant was not aware of the Court proceedings because of an existing bad blood between the deceased's two houses.

3. The Applicant deponds that the 1st Defendant had in his custody all the documents in support of their case, but he died during the pendency of the suit. That having been enjoined to the proceedings, he was never served with any hearing notices. That the address used for effecting service was the 1st Defendant's address and not his. It was his further contention that the Plaintiffs/Respondents mislead the Court on issues of service thus locking out the 2nd Defendant/Applicant from the seat of justice.

4. The 2nd Defendant/Applicant attributes his failure to comply with the non-availability of documents which were in the 1st Defendant's custody. It is his averments that he resides on the suit property and should the application not be allowed, he will be rendered a vagabond.

5. The 1st Plaintiff/Respondent filed their response vide a Replying Affidavit sworn by **Simon Ndungu** the 1st Plaintiff herein. It is his averments that the Applicant was enjoined to the suit in **2009,** and in **2012,** there was an order substituting the 1st Defendant with the 2nd Defendant. That the Applicant was dully served with the proceedings but failed to attend Court. The Plaintiffs/Respondents in their response rest blame on the Applicant's counsel for lack of proper information surrounding the matter.

6. It was the Respondents' further contention that they never effected service of Court documents via registered post as alleged by the Applicant. That during the pendency of the suit, the 2nd Defendant/Applicant became the registered owner of the suit land and he is therefore liable. It is also his disposition that the orders of stay cannot issue as they have been overtaken by events. That reopening the matter after four years without a justifiable reason would be unjust. The 1st Plaintiff/Respondent deponds on the chronology of events that culminated to the suit.

7. Parties elected to canvas the application by way of written submissions. It is the Applicant's submissions that the suit was between the Plaintiffs /Respondents and his deceased father. That he was substituted after the demise of the 1st Defendant.

8. It is his submissions that he got hold of the documents in support of the suit after the death of the 1st Defendant. That on the strength of the foregoing, this Court should **review** the judgment. The Applicant maintains that he was never served with any notice which resulted in a gross irregularity. Reliance was placed on the cases of (**James Kanyita Ndiritu and Wachira Karani).**

9. The 1st Plaintiff/Respondent maintained in his submissions that he served the 2nd Defendant/Applicant as is evident by the various Affidavits of Service. Further that reopening a 2016, case where **no appeal** has been preferred is denial of the constitutional right specifically **Article 27 (1),(4) & (5)** of the Constitution. That the application is an afterthought and has been overtaken by events since a **Decree** was issued and execution begun.

Analysis and Determination

10. The Applicant has filed a rather omnibus application seeking four distinct prayers. Judgment in respect of this suit was delivered on **4th October, 2016**, by **Waithaka J.** Execution has not been fully done as there has been myriad of applications. Relevantly, the Court on **5th February, 2019**, issued an order for stay of execution of eviction orders for a period of 30 Days, failure to which forcible eviction would accrue. The order was amended and issued on **6th March, 2019.**

11. The Order meant that the 2nd Defendant/Applicant herein was to have voluntarily given vacant possession as of **6th April, 2019.** An Affidavit of Service by **Peter Karugo** dated **18th March, 2019**, indicates that 2nd Defendant/Applicant was duly served with the Order. The Applicant instead moved this Court for the present Orders, three months after service of the eviction order. It appears therefore that the Applicant was jolted into action by an anticipated eviction.

12. The issues for determination by this Court are;

I. ***Whether the Applicant has satisfied the condition for review.***

II. Whether the judgment of this Court should be varied or set aside.

III. Whether the suit should be reopened.

13. On review, the principle of finality had for a time long been adopted as a means of bringing litigation to an end. Be that as it may, jurisprudence developed and with the right to hearing, Courts are by statute and precedents given power to review their judgments as a means of justice. This authority has to be judiciously exercised as to avoid the miscarriage of justice. **Order 45 Rule 1, provides** (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 a review of judgment to the Court which passed the decree or made the order without unreasonable delay.

This is echoed in **Section 80** of the **Civil Procedure Act**. A party must demonstrate

a. ***No appeal has been preferred***

b. ***There is discovery of new and important evidence***

c. ***That the evidence was not at the time of trial within his knowledge or not available***

d. ***The Applicant exercised due diligence***

e. ***There is a mistake or an error apparent on the face of the judgment.***

14. The Supreme Court in **App No. 32 of 2019; Hussein Khalid and 16 others v Attorney General & 2 others [2020] eKLR** enumerated principles that a Court shall adopt when reviewing its decision as

i. *The Judgment, Ruling, or Order, is obtained, by fraud or deceit;*

ii. *The Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;*

iii. *The Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;*

iv. *The Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision'*.

15. The Orders sought to be reviewed emanated from the Judgment of **Ombwayo J,** that was delivered by **Waithaka J**. This Court has the jurisdiction donated by **Order 45 Rule 2(2)** of the **Civil Procedure Rules** to determine the application.

16. The Applicant contends that he only got hold of the documents after the death of his father. According to him, the documents if adopted will enable the Court to arrive at a different verdict. Essentially, the application falls on the limb that the documents were not available at the time of trial.

17. The 1st Defendant died in **2012,** and there was an Order issued on **22nd October, 2012,** substituting the 1st Defendant with the 2nd Defendant/Applicant. At the hearing of the suit on **18th June, 2013,** the Court noted that the 2nd Defendant/Applicant was dully served. The Applicant has not demonstrated any efforts he made towards obtaining the documents. He only alludes to bad blood between the two families, an allegation which has not been substantiated.

18. The Applicant is mandated to demonstrate the due diligence he employed. This Court has the authority to scrutinize the documents to ascertain the Applicant's contention. ***(See Nairobi CoA App No. 194 of 2017 Alex Ouda Otieno v Orange Democratic Movement Kenya & another [2017] eKLR.*** The documents in my considered opinion are documents that could have been easily obtained by the Applicant. He had the option of moving the Court for discovery of documents at the point he was served, but he sat on his rights.

19. Even if this Court was to find in that the documents were not available, the application for review was brought **three years** after delivery of judgment. No reason whatsoever has been availed, ***See Nairobi HCA No. 433 of 2015 Judiciary of Kenya v Three***

Star Contractors Ltd [2020] eKLR. **Justice delayed is justice denied "is a maxim"** recognized under **Article 159 (2)(b)**, of the Constitution and is entitled to all parties.

20. Importantly, the Applicant in paragraphs 11 all through to 14 seems to fault the Court for, finding that there was proper service. This portrays the 2nd Defendant/Applicant as an indolent party and in the ends the Court finds the prayer for review is gratuitous.

21. On the prayer to **vary** or **set aside,** the Court finds the discretion to **vary** or **set aside ex-parte judgment** must be judiciously exercised as to avoid the miscarriage of justice. It is also meant to avoid injustice resulting from excusable mistakes but not to aid an individual's intention to delay justice. (See **Shah Vs Mbogo**)

22. The principles that will guide this Court were settled in **Nairobi Court of Appeal, App No. 27 of 1982:- PITHON WAWERU MAINA V THUKU MUGIRIA [1983] eKLR** to wit*;*

a. *Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just ... The main concern of the Court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C & E.*

b. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.

c. Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge, in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA 93.

23. The 2nd Defendant/Applicant maintains that he was not served with the pleadings and was enjoined to the suit in **2012,** after the death of his father. However, the Court record indicates that he was a party to the suit prior to **2012,** and upon the death of his father, he substituted him. The reason the Court settled on him was because the suit land was transferred to him during the pendency of the suit.

24. There is a Memorandum of Appearance and a statement of Defence by the Defendants dated 6th May, 2009. The various Affidavits of Service by Peter Karugo point towards personal service of all the pleadings and notices. The Applicant deponds that the address of service used to effect service was not his. The Court finds that the Applicant is being economical with the truth. The Court has had a chance to go through most of the Affidavits of Service and undoubtedly, all the services were done personally.

25. As if to depart from the previous contestations, paragraph 9 of the Affidavit in support of the Notice of Motion, the Applicant seems to

admit that he was served. All through, there is no valid explanation for non-attendance. The Court in its judgment on pg 8 notes that the Applicant was duly served. I totally agree with the learned Judge. The Affidavit of Service dated **4th June, 2013,** indicates the Applicant was served on **4th June, 2013,** but he failed to attend Court. No reason whatsoever has been given for non-attendance. If indeed he did not have the documents as claimed, he had the right to attend Court and inform Court of such. The Applicant has not bothered to demonstrate that the Defence as filed raises any triable issues. The Court of Appeal in **Kisumu App No. 15 of 2010; - Amayi Okumu Kasiaka & 2 others v Moses Okware Opari & another [2013] eKLR** puts the burden on the Applicant and held, it is trite law that once the Judgment is regular, before it is set aside, the Applicant ought to show merits of the defence". Even though, there is a Statement of the Defence dated **6th May 2009**, by the Applicant, in my considered opinion, it was analyzed by the trial Court and determining at this stage whether it raised any triable issues may result in sitting on an Appeal. The Applicant avers that he will be rendered vagabond. However, he has not attached any photographic evidence to at least demonstrate this. I do not find any miscarriage of justice or hardship that he would be occasioned.

26. While the right to be heard is constitutionally guaranteed, the principles of judicial authority enlisted in **Article 159(2**), provides, that justice shall not be delayed. The 2nd Defendant/Applicant has not advanced any explanation for the delay of **three years,** before filing the instant Application. Though inordinate delay is excusable, it must be sufficiently explained. To this end, I find this prayer must fall.

27. On whether to **reopen** the case, having found that the judgment need not be set aside, I do not see any reason to **re-open** the case. It will serve no purpose to do so. I do not see the prejudice that the Applicant will suffer, and the Plaintiffs/Respondents have not benefited from the fruits of the judgment five years later. Justice is a double edged sword; the Applicant had an opportunity to defend his suit but thwarted it. He has been an indolent party and the equity aids a vigilant party not an indolent one.

28. Having now carefully considered the instant **Notice of Motion Application** dated **14th June 2019,** by the **1st** Defendant/Applicant the Court finds it is **not merited** and consequently, the said Application **is dismissed** entirely with costs to the Plaintiffs/Respondents.

29. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MURANG'A THIS 30TH DAY OF NOVEMBER 2021.

L. GACHERU

JUDGE

In the presence of;

Alex Mugo - Court Assistant

N/A thought served for the 1st Plaintiff/Respondent

N/A though served for the 2nd Plaintiff/Respondent

N/A though served for the 1st Defendant

N/A though served for the 2nd Defendant/Applicant

L. GACHERU

JUDGE