



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 3 OF 2007

TIMOTHY MWORIA M'TWARUCHIU.....PLAINTIFF

VERSUS

STEPHEN MUNDIA GICHUKI.....1ST DEFENDANT

LUCY WANGUI MUNDIA..... 2ND DEFENDANT

RULING

1. By an application dated 11.11.2019 the court is asked to review its orders given on 7.12.2018 and admit the suit for hearing. The application is supported by an affidavit sworn on 11.11.2019 and 25.10.2019 by Timothy Moria M'Twaruchiu.
2. The defendants oppose the application through the 1st defendant's affidavit sworn on 30.9.2020 and a preliminary objection dated 13.2.2020.
3. By a plaint dated 24.7.2007 the applicant sued the defendant for eviction from **L.R Ex Lewa Settlement Scheme/394** claiming he was the registered owner of the said property on account of purchase from the 1st defendant.
4. The defendants denied the claim through a joint defence dated 14.2.2007.
5. The matter was listed for hearing on 19.9.2007 and again on 31.8.2007 when there was no appearance or at all. Later on, the case was listed for 16.6.2008, there was no appearance. Again, it was listed for 15.7.2009, the parties were absent. During a further hearing on 15.7.2009, the case was taken out and listed on various dates on 1.12.2009, 28.4.2009, 23.5.2013 after which parties were ordered to comply with Order 11 by 24.7.2013. Once more there was no compliance on 17.3.2014, 12.11.2014, 15.7.2015, 15.3.2016 and 12.5.2017.
6. Eventually, the matter was listed for hearing on 12.6.2017 when the plaintiff did not appear and the suit was dismissed for non-prosecution as well as non-attendance.
7. The plaintiff on 15.10.2018 appeared under a certificate of urgency with an application dated 9.10.2018. The application was heard and determined vide a ruling delivered on 7.12.2018.
8. Parties agreed to canvass the motion through written submissions dated 25.10.2021 and 19.10.2020 respectively.
9. A party seeking review under **Order 45** of the **Civil Procedure Rules** and **Section 80** of the **Civil procedure Act** must demonstrate:-
 - a) **New and important evidence which was not available to him at the time the order was made.**
 - b) **Error on the face of the record.**
 - c) **Other sufficient reasons.**
 - d) **The application must be brought without unreasonable delay.**
10. The court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its orders or decisions.

11. The law therefore grants the applicant rights to seek for review under the referenced Section, more so, since the earlier application was brought under **Order 12 the Civil Procedure Rules**.
12. In the further affidavit sworn on 25.10.2021 the applicant basis his application on the grounds of sufficient reason and submits the court was not furnished with sufficient history of the matter at the time it made the orders and hence in this application he has done so through **Annexures** marked **TMM "1 – 11"** in his supporting affidavit.
13. The court record is clear that there were previous law suits which the plaintiff/applicant mentioned in the plaint. The court record indicates the applicant has had several lawyers representing him hence most of the correspondences attached to the affidavit save for the correspondence with his counsel then on record form part of the court record. It cannot therefore be said the court was not privy to the history of the matter at the time it made the ruling.
14. The application was dismissed on 7.12.2018. It took the applicant over nine months to file the present application. The applicant admits he was notified of the dismissal 3 days after. He has not explained why it took him so long to either appeal or prefer this application so soon thereafter. It can only mean the applicant was not keen in his matter.
15. Regarding the issue that the applicant was not notified by his lawyers over the progress, the duty was also on him to visit the offices of his lawyer to know the progress. He has not demonstrated such efforts to get in touch with his lawyers through other available means except emails.
16. In ***National Bank of Kenya Ltd. -vs- Ndungu Njau [1997] eKLR***, the court held an error or omission must be self-evident and should not require an elaborate argument to be established.
17. The applicant had an opportunity and competent legal representation in the former application to present all the supporting material annexed to this application.
18. In this application, he has not explained what prevented him from presenting the aforesaid correspondences through a further affidavit. He has not stated the correspondence was not in his possession at the time the application was made.
19. As I have indicated in this ruling, there were orders for pretrial compliance. If the history alleged of the matter was necessary, one would wonder why it was not included as part of the applicants' list of documents to be relied upon during the hearing. It cannot therefore be taken as new and important evidence which was not available at the time the court made the orders.
20. The history of this matter was clear in the court record. Having found that the majority of the annexures to the supporting affidavit form part of the court record, I do not think the court would have reached a different decision even if the said annexures were availed at the time.
21. In ***Otieno, Ragot & Co. Advocates –vs- National Bank of Kenya Ltd. [2020] eKLR*** the Court of Appeal held that **Order 45 rule 1** does not excuse every error or mistake even if inadvertent. The court held it excuses only those mistakes and allows a party to introduce documents which it could not lay its hands on even after the exercise of due diligence. Further the court held the discretion cannot be used to help a party who has shown lack of diligent. In this suit the applicant had more than enough time to comply with court orders on pretrial and prosecute his matter. The court cannot be faulted for making the orders for making the orders for the dismissal of the suit.
22. In the premises and guided by the foregoing binding and persuasive decisions, I find the application lacking merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 20TH DAY OF DECEMBER, 2021

In presence of:

No appearance by parties

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE