REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 56 OF 2018

MONICAH MWELU GIDEON...APPELLANT

VERSUS

JAMES KIVUVA NDETEI

***(legal representative of the Estate of* KANUU NDETEI *(deceased)*......RESPONDENT**

RULING

1. In the Notice of Motion dated 26th April, 2019, the Appellant has sought for the following orders:

a) That there be a stay of execution of the Judgment and Decree in Machakos CMCC No. 349 of 2013 dated 2nd October, 2014 pending the hearing and determination of this Application and Appeal.

b) That this Honourable Court be pleased to review its Ruling and orders made on 29th March, 2019.

c) That costs of this Application be provided for.

2. According to the Appellant's Affidavit, vide a Ruling dated 29th March, 2019, this court dismissed her Application dated 10th August, 2018; that the Judgment of the lower court was in the custody of her advocates and that it was the fault of their advocate who failed to annex the said Judgment.

3. The Appellant deponed that it is not true that the Decree was executed; that she is an 85 years old widow and that the house on the suit property is the only house she has since she married her late husband 65 years ago.

4. In the Replying Affidavit, the Respondent deponed that the court has already heard and determined a similar Application for stay pending Appeal; that the Decree of the lower court was long executed and that there is nothing to stay in the current proceedings. The Respondent finally deponed that the suit property belonged to a deceased party and her Estate has been shared out to the beneficiaries.

5. In the submissions, the Appellant's advocate submitted that the Appellant has filed the current Application without unreasonable delay; that the Applicant was let down by her former advocates who had the Judgment of the lower court with them but failed to exhibit it and that there is sufficient reason to review the Ruling because the Appellant will suffer substantial loss including being rendered homeless.

6. The Respondent's advocate submitted that the Appellant has not demonstrated what loss she may suffer because she has already been evicted; that the Appellant has not offered any security for the due performance of the Decree and that the Appellant has not met the threshold for setting aside or reviewing the Ruling of the court.

7. Vide the Ruling dated 29th March, 2019, this court dismissed the Appellant's Application dated 10th August, 2018. In the said Application, the Appellant had sought for a stay of execution of the Ruling delivered by the lower court delivered on 7th August, 2018. The Appellant also sought for a stay of her eviction from land known as Konza South Block 2/171 pending the hearing and determination of the Appeal.

8. While dismissing the Appellant's Application, this court observed as follows:

"16. While dismissing the Appellant's Application, this court observed as follows: Having not shown that she is on the suit land,

I find that the Appellant has not proved to the required standards that she will suffer substantial loss unless the order of stay of execution of the Judgment of the lower court is stayed. In any event, the Judgment that authorized the eviction of the Appellant from the suit land has not been exhibited. The Ruling of the lower court of 7th August, 2018 cannot be stayed in exclusion of the said Judgment."

9. The Appellant is seeking for an order reviewing the said Ruling on the grounds that her advocate neglected to annex the Judgment of the lower court and that the Judgment of the lower court has never been executed.

10. Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules sets out the threshold to be met for an Applicant to be granted the equitable remedy of review. Order 45(1) of the Civil Procedure Rules provides as follows:

"1. (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."

11. The Appellant has deponed that her advocate *"let her down"* when he failed to annex the Judgment of the lower court, which Judgment was in his possession. In my view, the issue of the advocate *"letting his client down"*, or his incompetence or negligent in prosecuting a matter on behalf of his client cannot be classified as *"sufficient reason"* in an Application for review.

12. Indeed, the law presumes that a litigant and or his advocate know the substantive and procedural laws of the country. Where an Application is disallowed because of a fundamental lapse on the part of a litigant, an Application for review cannot be invoked to correct such a lapse. Having failed to annex the Judgment of the lower court in his initial Application, the Appellant cannot seek to review the Ruling of the Court just because she has now annexed the copy of the Judgment.

13. Indeed, the Appellant's current Application is seeking to fill the gaps that the court identified in its Ruling of 29th March, 2019. Other than having not annexed the Judgment of the lower court, the court also dismissed the Application for stay of execution of the order of the lower court because the Appellant had not shown that she was still in occupation of the suit property.

14. The plea by the Appellant that she is indeed still in occupation of the suit land is an issue that was considered by the court in the Ruling of 29th March, 2019. That being so, the court will be sitting on its own Appeal, if it was to address the same issue in the current Application.

15. In the circumstances, I find the Application dated 26th April, 2019 to be unmeritorious. The Application is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JANUARY, 2020

O. A. ANGOTE

JUDGE