



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 314 OF 2017

JOHN NJOROGE WAWERU.....PLAINTIFF

VERSUS

KARIUKI KIRIGE.....1st DEFENDANT

SAMPET KENYA LTD.....2nd DEFENDANT

PHILIP KAMAU KARA.....3rd DEFENDANT

SAMUEL T. KABUE.....4th DEFENDANT

DIRECTOR OF LAND ADJUDICATION

AND SETTLEMENT.....5th DEFENDANT

LAND REGISTRAR.....6th DEFENDANT

FRANCIS CHEGE.....7th DEFENDANT

RULING

1. This suit was commenced by way of a Plaint dated the 28th June 1996 and filed in court on the 12th July 1996. On the 11th July 2002 there was an Interlocutory Judgment was entered against the 1st Defendant herein for failing to enter appearance or to file a defence. Thereafter on the 26th May 2015, the suit was dismissed for want of prosecution pursuant to the provisions of Order 17 Rule 2(1) of the Civil Procedure Rules.

2. Vide an application dated the 3rd September 2015, the Plaintiff Applicant sought for the re-instatement of the suit wherein on the 23rd June 2016, despite the fact that the matter had not been prosecuted for close to thirteen (13) years, the trial judge reinstated the suit giving the Applicant a chance to redeem himself and set down the suit for pre-trial case conference and for hearing within eight (8) months from the date of the order in default to which the suit was to stand dismissed automatically without any reference to the court.

3. The Plaintiff failed to adhere to either the orders of the court within the 8 months as directed or to address the Court on any difficulties he was facing so as to seek further direction for the court to the effect that on the 4th May 2017, the court, having found that the Applicant had failed to comply with the orders issued on the 26th June 2016, dismissed the suit a second time on its own motion.

4. By a Notice of Motion dated 8th May 2017, the Plaintiff sought to have the suit reinstated again. After considering the Plaintiff/Applicant's previous conduct **in the prosecution of this matter** the court warned itself as to whether it would be possible to conduct a fair hearing after the lapse of 21 years since the suit was filed and found that **the delay in the prosecution of the same was a source of prejudice to the Respondent as well as to the fair administration of justice following which vide a ruling of the 20th day of November 2017, dismissed the said application.**

5. Now two years later, the Plaintiff/Applicant has filed yet another application dated the 20th July 2019 pursuant to the provisions of Order 45, Order 12 Rule 7 and Order 51 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act seeking that the court reviews and/or varies its ruling of 20th July 2019 for reason that there was a discovery of new and important evidence.

6. The Application was heard ex-parte on the 11th November 2019, the Respondents having neither filed their response nor appeared

in court on the hearing date despite service. It was the Applicant's submission that their application was supported by the sworn affidavit of John Njoroge Waweru the Plaintiff, the grounds filed in support of the said application to which they sought to adopt.

7. It was thus their submission that they sought for the court to review and/or vary its ruling delivered on the 20th November 2017 dismissing their application dated the 8th May 2017, for reasons that there was a discovery of new and important evidence relating to an invitation vide a letter dated the 8th December 2016 to the Defendants to attend court and fix a hearing date which evidence was not adduced by the Plaintiff's Advocate on record.

8. That at the time of making its ruling the court had stated that there had been nothing on record showing that within the 8 months the Plaintiff been given by the court, he had made any steps to set down the matter for hearing. That the new evidence in form of the said letter showed otherwise to the effect that the Plaintiff had indeed made steps to set down the matter for hearing by inviting the Defendant to fix a hearing date which hearing did not proceed on the date fixed. The Plaintiff asked that the court due review its ruling based on this new piece of evidence and not to shut the doors of justice on him.

9. Order 45 Rule 1 of the Civil Procedure Rules, 2010 under which the application is brought provides 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 review of judgment to the court which passed the decree or made the order without unreasonable delay."

10. Section 80 of the Civil Procedure Act provides as follows:-

Any person who considers himself 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 a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

11. From the above provisions, it is clear that whereas Section 80 of the Civil Procedure Act gives the court the power to review its orders, Order 45 Rule 1 of the Civil Procedure Rules sets out the rules which restrict the grounds upon which an application for review may be made. These grounds include;

i. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made or;

ii. on account of some mistake or error apparent on the face of the record, or

iii. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

12. Since I have set out the necessary conditions that the Applicant needed to satisfy in his application for review, with due respect I am not persuaded that the Applicant herein did satisfy any of the conditions set herein above to warrant this court to review its ruling. From the submissions of the Plaintiff/Applicant, he appears to peg his application for review on the ground of discovery of new and important matter of evidence in that the Defendant had been invited to fix a date for hearing hence this was prove enough that the Plaintiff had taken steps to have the matter prosecuted. In my humble opinion, this line of argument does not fall within the scope of Order 45 Rule 1 cited above and more particularly as enumerated in paragraphs (i), (ii) & (iii) stated herein above.

13. In the decided case of **Ajit Kumar Rath vs State of Orisa & Others on 2 November, 1999 Court at Page 608** the Supreme Court of India had this to say:-

'the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule"

14. Having looked at the reason herein advanced by the Plaintiff/Applicant seeking that this court reviews its ruling of 20th November 2017, the same does not constitute the discovery of new evidence which was not within his knowledge or could not be produced by him at the time of hearing of the Application. It I find that the said application did not meet the threshold set out under Order 45 Rule 1 of the Civil

Procedure Rules and thus this is not a proper case for the court to exercise its discretion in favour of the Applicant. Accordingly, I proceed to dismiss the application dated 29th July 2019 with no costs.

Dated and delivered at Nyahururu this 14th day of January 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE