REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

ELC CASE NO. 72 B OF 2019

PHILIP KIPROTICH TUITOEK.....PLAINTIFF

VERSUS

EDNA JEBIWOTT KIPLAGAT.....1ST DEFENDANT

THE LAND REGISTRAR, UASIN GISHU COUNTY.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING

This ruling is in respect of an application dated 3rd June 2020 by the 1st defendant/applicant seeking for the following orders:

a) Spent.

b) Spent.

c) THAT there be an order of temporary injunction restraining the plaintiff by himself, his servants, agents or anybody acting on his behalf from alienating, disposing off, transferring or dealing in any other way with the land parcel number SERGOIT/KULJI BLOCK 1 (NGOCHOl)/22 pending the hearing of the application inter parties.

d) THAT this honorable court be pleased to review and/or set aside its ruling of 26th May, 2020.

e) THAT the ex-parte Judgment herein be set aside and the first defendant be granted leave to file a defence herein.

f) THAT the costs of this application be provided for.

Counsel agreed to canvass the application vide written submissions which were duly filed.

APPLICANT'S CASE

Counsel for the applicant relied on 17 grounds listed on the face of the application and the Supporting Affidavit of EDNA JEBIWOTT KIPLAGAT.It was counsel's submission that the applicant made an application dated 15th April, 2020 seeking to set aside an ex-parte judgement entered against her and all consequential orders which application was dismissed vide a ruling dated 26th May, 2020. That at the time of the hearing of the application the applicant could not access certain documents that were relevant to the application which the applicant has since gotten necessitating this application for review and setting aside the ex-parte judgment.

Counsel listed the following issues for determination by the court:

a) Whether there was discovery of new evidence that could not be produced by the 1st defendant at the time when the order to the application dated 15th April, 2020 was made.

b) Whether there was an error apparent on the face of the ruling dated 26th May, 2020.

c) Whether the 1st defendant/applicant has an arguable defence and should therefore be granted leave to file a defence herein.

d) Whether this application was made without undue delay?

e) Who should pay the costs of this application?

On the first issue as to whether there was discovery of new evidence that could not be produced by the 1st defendant at the time when the order to the application dated 15th April, 2020 was made, counsel relied on Order 45(1) of the Civil Procedure Rules, 2010, which provides that for an application for review to be granted there must be 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; On account of some mistake or error apparent on the face of the record, or for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.

Mr. Kitiwa also cited the case of **Tokeshi Imbuka Mambili & 2 others v Joseph Onzeke Sambwa & another [2004] eKLR** ***(Civil Appeal 90 of 2001 – Kisumu)*** where the court held that

> *"Hence in order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason. In the application before the superior court the appellants failed to prove discovery of new and important matter or mistake on the face of the record."*

Counsel submitted that the 1st defendant/applicant has since been able to access crucial documents to prove that she was never served with summons to enter appearance and plaint or any other documents relating to this suit on 28th May, 2019 as alleged or at all. That the 1st defendant was in the United States of America and was in fact travelling on the very date from Denver international to Orlando International Airport and on 29th May, 2019, and participated in a competition in Orlando and returned to Denver International airport on 2nd of June 2019. The applicant has annexed her appearance confirmation marked EJK 3, Air ticket marked EJK 4 and extracts of her passport marked EJK 5.

Counsel further submitted that the applicant has also annexed extracts from her passport marked EJK 1 and EJK 2 to prove that she left Kenya on 12th March 2019 and arrived in the United States of America on 13th March 2019 where she stayed until 8th August 2019 without coming back to Kenya.

That the date of the alleged service of summons on 28th May, 2019, the 1st defendant was in the United States of America and there was no way she would have been served personally in Kenya as alleged by the plaintiff and as per annexure marked PKTI to the replying affidavit dated 23rd June, 2020. Further that the affidavit of service by one Sego Kipchirchir Abraham is false.

Counsel therefore submitted that the applicant has clearly demonstrated that she was not able to access and produce the documents to prove that she was never served with any documents relating to this suit as alleged or at all during the hearing of the application dated 15th April, 2020 despite due diligence and has satisfied the condition for review of the ruling dated 26th May, 2020.

On the issue as whether there was an error apparent on the face of the ruling dated 26th May 2020, counsel relied on the provisions of Order 45 (1) of the Civil Procedure Rules and the case of **Republic.v Principal Secretary, Ministry of Internal Security & another Ex Parte Schon Noorani & another [2020] eKLR** while citing the case of **Attorney General & Others versus Boniface Byanyima,** the court held that**:**

> *"mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record."*

Counsel submitted that the applicant has demonstrated that there was an error apparent on the face of the record and hence the applicant should be allowed to filed a defence and hear the matter de novo. Counsel therefore urged the court to allow the application as prayed as it was filed without undue delay.

RESPONDENT'S CASE

Counsel for the plaintiff/respondent relied on the replying affidavit and submitted that no new evidence has been discovered as documents sought to be relied on are either computer generated or identity documents that were in the possession of the Applicant at the time of making the earlier application considering the applicant was in Kenya going by the Affidavit she swore in Eldoret in support of the Application dated 15th April, 2020 and further that no error is apparent on the face of the record as there is no evidence of fraud as alleged.

Counsel further relied on the provisions of Order 45 (1) of the Civil Procedure Rules and which rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Counsel listed the following issues for determination:

a) Whether the application has met the legal conditions for review.

b) Whether the ex-parte Judgment should be set aside and the 1st Defendant be granted leave to file a defence.

c) Whether the Defendant's application has met conditions for a review.

Counsel submitted that the Applicant has not met the conditions required for a review and cited the case of **David Wepukhulu Kasambula & another v Robert Sundwa Wangolo [2018] eKLR** where the court reiterated the provisions of order 45 (1) of the Civil Procedure Rules and held that a party seeking review must prove the following grounds:

"It is clear therefore that a party seeking a review of judgment must prove the following grounds:

1. *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 at the time the decree or order was passed.*

2. *A mistake or error apparent on the face of the record.*

3. *Any other sufficient reason.*

4. *The Applicant must move to Court without Lin-reasonable delay.*

Counsel also submitted that the Applicant has neither demonstrated nor proved that the alleged grounds are new matters or evidence that could not be obtained despite the exercise of due diligence. It was counsel's submission that the documents that the applicant seeks to rely on are mainly computer generated documents which can be accessed from anywhere in the world regardless of the COVID-19 Pandemic and that she had copies of her passport which is a fundamental travel document

Counsel also submitted that it is common knowledge that flight bookings are done online and that Exhibit Marked EJK 2 (a) shows clearly that it has been extracted from a yahoo.com email address. The other exhibit EJK 2(a) is an article published online on the Women's running website www.womensrunning.com. Exhibit EJK2(b) shows that the email was forwarded to the Applicant's Gmail address on the 19th June, 2019 and therefore it is something that was in the possession of the Applicant.

Mr. Kibii submitted that nothing prevented the applicant from seeking leave from court to file a supplementary affidavit and introduce the new evidence after noticing that the same was not filed with the supporting affidavit to the application. That the issues sought to be addressed in the current application were raised in the Plaintiff/Respondent's Replying Affidavit and no plausible explanation has been given as to why she failed to seek leave to file a Supplementary affidavit after being served with the Plaintiff's Replying affidavit and the current application can only be concluded as an afterthought and which lacks merit.

Counsel relied on the case of **Fanikiwa Limited v Joseph Komen & 3 others [2018] eKLR** where the court held that:

"The applicant has not demonstrated 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.

...In a nutshell, the applicant has not satisfied this court that he is entitled to a review of the judgment made by this court. The application is dismissed with costs."

Mr. Kibii submitted that the applicant invited the court to look at the jurats of all Affidavits filed by the Applicant in this suit including the application for setting aside dated 15th April, 2020 indicate that the Applicant swore her Supporting Affidavits before Advocate Duke Ornwenga in Eldoret. The only possible assumption to the depositions in the Affidavit is therefore that the 1st Defendant was in Eldoret at the time of filing of the application for setting aside and as such she could access the documents sought to be relied on in the Application for review at the time of filing the setting aside application.

Further that the argument at paragraph 11 of the applicant's supporting affidavit that she was held up in the United States and could not access her documents is therefore without basis unless the Applicant wishes to distance herself from appearing in Eldoret before Advocate Omwenga to execute the supporting affidavit in Eldoret which would make the application filed on 15th April, 2020 fatally defective.

The Plaintiff states that the Defendant in basing her review application on the discovery of new evidence, and it being apparent that the documents were always available and within her reach both in hard copy and in electronic form is clear indication that the prayer to review the court's ruling should fail.

Counsel also relied on the case of **KTK Advocates v Baringo County Government [2018] eKLR_** where the court held that:-

"The applicant has not demonstrated that the alleged grounds are new matters or evidence that could not be obtained despite the exercise of due diligence. He did not explain that the alleged evidence or material was not available and could not be procured at the time of the hearing"

Counsel submitted further that the other factor the court ought to consider before granting review is whether there was a mistake or error apparent on the face of the record of the court. That the applicant has not proved that there was an error on the part of the court. Further that an incorrect interpretation of the law, or the taking of an erroneous view of the law on a debatable point does not amount to an "error on the face of the record". That it should be noted that the extracts of the passports annexed to the applicant's supporting affidavit to the current application are partially redacted and the question would be what is the intention behind the partial disclosure of specific stamps meant to fit the Applicant's narrative that she was not in the country at the time of service as a passport could not be edited unlike the online extracts that do not bear any redacted information.

With regards to whether the ex parte judgment being set aside, Counsel submitted that in making its ruling, the court considered the merits of the draft defence and against the evidence earlier tendered by the Plaintiff to show there was a transaction between the parties and made a finding that the Defence had no merit. Counsel therefore urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The background of this case is that the matter proceeded and a judgment was delivered in favour of the plaintiff/respondent. The defendant filed an application for setting aside and stay of execution which was dismissed as rightly captured in the application. The defendant filed another suit in respect of the same subject matter after the application for stay of execution had been dismissed but the same was also dismissed as it was an abuse of the court process.

The issues for determination is whether the applicant has met the threshold for review on the ground that there has been discovery of new evidence and whether the application should be reviewed and the judgment set aside.

In the case of **Rosemary Wanjiru Njiraini v Officer in Charge of Station Mo/o Police Station & another [2019] eKLR** it was held:

"An application for review is not one aimed at allowing a party to fill in gaps in her evidence which may have led to the said party losing the suit. It is incumbent upon every party to present and table all their evidence at the trial, for a trial is only done once. A party is not allowed to present half its evidence, and after losing the case, seek a review, so that it can now present the other half of its evidence, when all along this evidence was available and could have been presented during the trial of the case. If that were allowed, parties would litigate in piecemeal ad infinitum and there would be no end to litigation leading to a total breakdown of the judicial process."

From the averments by the applicant in her affidavits, it is evident that she bases her application for review on the fact that she has discovered documents like her passport which has always been in her custody being a fundamental travel document. The affidavits relied on were also sworn in Eldoret. There is no indication that the applicant appeared before a notary abroad to notorize the affidavit for filing in Eldoret.

The applicant has also not proved that there was any error apparent of the face of the record. In the case of Moses **Kipkolum Kogo v Nyamogo & Nyamogo Advocates [2004] eKLR** in discussing what constitutes an error on the face of the record, the court rendered itself as follows:-

"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

Further in the Indian Supreme Court made a pertinent observation that

is it has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions.

I find that the applicant has not shown the error if any, is so manifest and clear that no court would permit such an error to remain on record. In the case of **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR** the court held;

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review".

I have considered the application, the affidavits and the submission of counsel and find that the application lacks merit and is therefore dismissed with costs. The applicant has other avenues for redress but not through the current application.

DATED and ***DELIVERED*** at ***ELDORET*** this ***15TH DAY*** OF ***October, 2020***

DR. M. A. ODENY

JUDGE