



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 254 OF 2007

JOHN WAMUTI MUHUNGI.....PLAINTIFF

MARGARET WAMBUI WAMUTI suing as the legal Representative

of the Estate of the late JOHN WAMUTI MUHUNGI.....APPLICANT

VERSUS

HOUSING FINANCE COMPANY (K) LTD.....1ST DEFENDANT/RESPONDENT

JOHN GITHUA NJOGU.....2ND DEFENDANT/RESPONDENT

RULING

1. This Ruling relates to a Notice of Motion Application dated 11th November 2015, brought under the provisions of Sections 1A, IB, 3, 3A, and 80 of the Civil Procedure Act, Order 45 Rules 1 and 2 of the Civil Procedure Rules and all other enabling provisions of the Law.

2. The Applicant is seeking for orders:-

i. That this Honourable Court be pleased to review and/or set aside the Ruling and Orders of the Court made on 5th May 2014 dismissing the Application dated 26th March 2013 which sought to revive the suit and also to have Margaret Wambui Wamuti & Julius Kimathi Wamuti substituted as legal representatives of the deceased Plaintiff together with all consequential orders;

ii. That the Honourable Court be pleased to extend the time within which to apply to be made a party to this suit as Plaintiffs in place of the deceased original Plaintiff;

iii. That costs of the Application be provided for.

3. The Application is based on the grounds on the face of it and a supporting Affidavit dated 11th November 2015, sworn by Margaret Wambui Wamuti, the Applicant. She averred that she is the widow of the deceased Plaintiff and therefore well versed with the facts of this matter and competent to swear the Affidavit. That the Plaintiff died on 1st December 2010 and the suit abated at the expiry of one (1) year from the date of his death and therefore the only remedy in law is to apply for revival of the abated suit under Order 24 Rule 7(2) of the Civil Procedure Rules.

4. She deposes that there was delay in filing the Application herein due to several factors including inaction on the part of the Advocates who was handling the case on behalf of the deceased. However, subsequently the Applicants filed an Application dated 26th March 2013, seeking for orders that, the suit be revived and Margaret Wambui Wamuti and Julius Kamithi Wamuti be substituted with the Plaintiff.

5. The Application was based on the grounds that they were not aware of the pendency of the suit and therefore could not take any action, thus the suit abated due to circumstances beyond their control, and when they became aware of the suit, they took steps to revive it as soon as possible. As such they were prevented from continuing with the suit due to the mistakes of their previous advocates,

6. The Application was heard and a ruling delivered on the 5th May 2015, whereby the Court dismissed the same on, the grounds inter alia that:

a) The Applicant had failed to "prove that she was prevented by any sufficient cause from continuing with the suit";

b) *The Applicants were “not very truthful about when they became aware of the suit”;*

c) *The Applicants had “not shown sufficient cause required under Order 24 Rule 7(2) for the revival of the suit”*

d) *The Applicants “took more than fourteen (14) months to make the Application after securing the grant. That is what equity calls indolent”*

7. The Applicant avers that the decision made was wrong in light of the evidence presented to the Court. That the estate of the deceased through his legal representatives is desirous of proceeding with this matter to its conclusion. In the given the circumstances, it is only just and proper that the decision delivered on the 5th May 2015 be reviewed and the suit reinstated.

8. The Application was opposed by the 1st Defendant (herein “the 1st Respondent”) based on the grounds of Opposition filed in Court on 11th April 2017 and a Replying Affidavit dated 22nd June 2015 and sworn by Joseph Lule, an Advocate of the High Court of Kenya and the Legal Manager with the 1st Respondent’s Company.

9. He averred that the Application is frivolous, vexatious, misconceived and an abuse of the process of Court as the Applicant has not demonstrated that:

a) *There is a 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 at the time when the ruling by Justice Ogola was made; or*

b) *There was a mistake or error apparent on the face of the record; or*

c) *The ruling was in breach of any written law; or*

d) *The ruling requires clarification*

10. Further that the Applicant’s reason that the evidence presented to Court was not considered is untenable as the Application was canvassed by way of written submissions before the ruling was delivered on 5th May 2014 dismissing the Application with costs. Therefore the Court took into account all material placed before it hence there was no error on the record. That the fault falls squarely upon the Applicant’s feet, for failing to comprehensively prove her case, if at all some of the evidence was left out.

11. The reasons advanced are not grounds for review and can only be grounds of appeal as the Court cannot sit on its own decision on Appeal under the guise of review. Further, the current Application dated 11th November 2015 is res judicata, as the Application dated 26th March 2013, which was filed under Order 24 Rule 3(1) and 7(2), was heard and dismissed on merit;

12. The Application was also opposed by the 2nd Defendant (herein “the 2nd Respondent”) vide the grounds of opposition dated 10th April 2017.

a) *That the issues raised for consideration have already been determined by a Court of competent jurisdiction and amount to res judicata.*

b) *That the Applicant’s supporting Affidavit dated 11th November 2015 does not establish sufficient reasons for the delay in filing the Application dated 26th March 2013.*

c) *That the Applicant’s supporting Affidavit dated 11th November 2015 does not establish new evidence not within the Applicant’s knowledge during the hearing and determination of the Application dated 26th March 2013, or any error apparent on the face of the record in the subsequent ruling of E.K.O. Ogola Judge and;*

d) *That the Applicant is guilty of laches as he has brought the Application with inordinate delay.*

13. However, the Applicant filed a further Affidavit dated 12th May 2017, in respond to the grounds of opposition, denying that she is guilty of laches and argued that she has always been concerned about the delays in the matter. That when the Court file could not be traced, she instructed her son Patrick Kanyoro Wamuti to write to the firm that was representing them in the year 2014, that the matter needed to be handled seriously.

14. Subsequently, after instructing the firm of Jeniffer Shamalla & Company Advocates, they made several visits to the Court Registry and thereafter wrote two letters to the Deputy Registrar but the Court file could not be traced. That it took over 8 months from the time the Advocates first wrote to the Deputy Registrar on 12th November 2015, to trace the file and eventually this Application was filed on 12th July 2016.

15. Therefore the grounds of opposition raised by both the 1st and 2nd Respondents are unfounded as they do not take into account the record of proceedings which has inexplicable gaps and clearly indicate that there were unexplained delays; namely the missing file, the Advocates lack of diligently to prosecute issues herein and act in her overall best interest, which led to grave miscarriage of justice to her and the legal representatives of her late husband and Plaintiff in the suit.

16. The Parties disposed of the Application by filing submissions. The Applicants contend that the orders of the Court made on 5th May 2014 dismissing the Application dated 26th March 2014 directly affects them and are in breach, not only of the law, but also of their Constitutional right to a fair hearing guaranteed by Article 50(1) of the Constitution, in so far as it condemned them without giving them an opportunity to be heard.

17. Further that there is sufficient reason for review of the orders of 5th May 2014, to the extent that the ruling obscures their right and interest in family property, to wit; denies them an opportunity to seek reversal of the sale of deceased Plaintiff's property L.R. KIAMBU/THIMBIGUA/1620 to the 2nd Respondent, which took place on 19th April 2006 in a public auction at the behest of the 1st Respondent.

18. It was further argued that the ruling delivered on 5th May 2014 is a blatant violation of rules of natural justice and in particular the audi alteram partem principle, which demands that no person should be condemned unheard. That natural justice lies at the heart of a fair trial, whether criminal or civil, and the Honourable Court is obliged by Constitution of Kenya to respect and uphold the principles of natural justice.

19. The Applicant relied on the case of; *Onyango vs Attorney General (1986-1989) EA 456*, in which Nyarangi, JA (as he then was) held at page 459:

"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly".

That he went on to state at page 460:

"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."

20. Further reliance was placed on the case of; *Mbaki & Others vs Macharia & Another (2005) 2 EA 206*, at page 210, where the Court stated as follows:

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

21. The Applicant invited the Court to refer to the instructive article; "Rights of the Dead by Kirsten Rabe Smolensky; Associate Professor of Law, University of Arizona James E. Rogers College of Law, where it is stated that; death does not necessarily cut off all legal rights of a deceased person who should be treated with dignity.

22. It was further submitted that the rights of a dead are contained in the provisions of the Constitution under Article 2(1) and (5), Article 10, 27(1), 50, 28 and 159.

23. That the dead, although unable to make real-time choices, are capable of being legal right-holders and when these interests are protected by legal rules, the dead are granted de facto legal rights that can be enforced against the living. Hence Order 24 of the Civil Procedure Rules which states that the death of a Plaintiff or Defendant shall not cause the suit to abate if the cause of action survives or continues, thus it takes cognizance of the rights of the dead.

24. Further that Order 24(3) of the Civil Procedure Rules goes on to state that where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant. However, where fraud is pleaded, as is the case herein, time runs from the time the Plaintiff discovers the fraud or could have with reasonable diligence discovered it. Limitation is a matter of law which a Court can raise in limine as it goes to jurisdiction (see *Njue Munge vs Johnson Kyande K. Muchemi & 2 Others (2016) eKLR*).

25. That the Oxford dictionary meaning of the word "sufficient" is adequate or "enough". This means in as much as may be necessary to answer the purpose intended, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that, whenever the Court exercises discretion, it has to be exercised judiciously.

26. The Applicant submitted that despite the fact that the matter had abated they had not been unduly indolent as they had no control of how long it takes to have the letters of administration. While the Advocate they had by omission or commission acted outside the Applicant's instructions. The Court has the discretion to consider these important issues and if the court did not have notice of these important issues which affected the outcome of the Application then the Court is kindly invited to grant a review by Article 159 2(d) of the Constitution of Kenya 2010 (Judicial Authority) which provides that: "Justice shall be administered without undue regard to procedural technicalities."

27. Reference was made to the cases of; *Richard Ncharpileiyagu vs Independent Electoral and Boundaries Commission & Others, Abdurahman Abid vs Safi Petroleum Products & 6 Others, Nairobi Civil Application No. NAI 173 of 2010*, and *Richard Nchapi Leiyegu vs Independent Electoral and Boundaries Commission & 2 Others Civil Appeal NO. 18 of 2013*.

28. The Applicant continued to submit that equity recognizes other interests in the nature of personal rights which can be enforced only against the person creating the right. Whether they are termed "equitable interests" or "mere equities" or "rights in personam", they exist and they exist because an equitable remedy exists to enforce the rights.

29. That, Section 18 of the Limitation of Actions Act, subject to Section 20(1) therefore, the Act applies to equitable interests in land....and accordingly a right to action to recover the land....accrues to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land. Sub-section 18(4) provides that where land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale, not being a person solely and absolutely entitled thereto, a right of action to recover the land accrues during such possession to any person in whom the land is vested as trustees or to any other person entitled to a beneficial interest in the land or the proceeds of sale. Reference was made to the case of; Peter Mbiru Michuki vs Samuel Mugo Michuki (2014) eKLR.

30. The Applicant reiterated that it's Advocate's failure to properly and professionally advise the Applicant's mother about the need to include only members of the family within Kenya, in order to save time, instead the Advocate's advice for inclusion of a family member overseas in the USA, contributed to the suit to abate as communication was difficult due to the time between Kenya and USA.

31. That in the case of; Craig vs Kansee (1943) 1 All Er 108 it was held that failure to serve process where service of process was required results in the order made based upon that process to be irregular. Therefore in the exercise of its inherent jurisdiction, the Court was entitled to set it aside without the need for an appeal. Further that a person who is affected by an order of the Court which can properly be described as a nullity, is entitled ex debito justitiae to have it set aside. There is an inherent jurisdiction to set aside a determination made where there has been a failure to observe the principle that a person against whom a charge or claim is made must be given a reasonable opportunity of appearing and presenting his or her case.

32. That, the Court held in the case of; Isaacs vs Robertson (1984) 3 All ER 140 that; if (an order) is irregular it can be set aside by the Court that made it on application to that court under the rules of Court dealing expressly with setting aside orders for irregularity.

33. Finally in Wangulu Enterprises Limited vs Abdallah Said Kugotwa & 6 Others Civil Appeal No. 9 of 2014 a suit that had been dismissed was reinstated by this Court and in allowing the appeal, the Court stated:

From the foregoing we find that the learned Judge misdirected himself in exercising his discretion by declining to reinstate the appellant's suit thereby denying the appellant the right to be heard. Further, disallowing this appeal would go against the spirit of the overriding objectives and also the provision of Article 159 of the Constitution.

34. The Applicant further invited the Court to make reference to a synopsis titled, "The Frontiers of the Doctrine of ex debito justitiae" chapter 4, which analyses Rupa Ashok Hurra vs Ashok Hurra AIR 2002 SC 1771, establishing a principle of law that every Court has inherent power to act ex debito justitiae to do that real and substantive justice for the administration of which alone it exists or to prevent abuse of the Court. That the concept is referred to as a debt of justice; as a matter of the legal right in accordance with the requirement of justice; of right; as a matter of right.

35. However the 1st Respondent in response submitted that the powers of the Court to review its orders or decree are provided for under Section 80 of the Civil Procedure Act and order 45 Rule 1 of the Civil Procedure Rules.

36. The case of; Jeremiah Muku Methodist Church of Kenya Registered Trustees & Another (2009) eKLR stated that;

"the three conditions for applying for a review of either the decree or order of court may be summarized from the above rule 1(1) of Order XLIV of the Civil Procedure Rules as – Firstly the 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 the decree was passed or the order was made; secondly; on account of some mistake or error apparent on the face of the record, or thirdly; any other sufficient reason".

37. That in the instant case, the Applicant has based her grounds of review of the orders made on 5th May 2014 under the second condition. This is captured under Ground (j) which states;

"J. there is a mistake or error apparent on the face of the record. It is necessary to correct an apparent error or omission on the part of the court."

38. Further, the Court of Appeal in the case of; National Bank of Kenya Ltd vs Ndungu Njau Nairobi CA No. 211 of 1996 held;

"A review may be granted whenever the courts consider that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evidence and should not require a deliberate argument to be established. It will not be 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 preceded on an incorrect expression of the law."

39. That similarly, the Court stated in the case of; Draft and Develop Engineers Ltd vs National Water Conservation and Pipeline Corporation, Civil Case No. 11 of 2011 that;

"an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature and it must be left to be determined judicially on the factors 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 along drawn process of reasoning or 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 also possible.”

40. That in Wanjiru Gikonyo & 2 Others vs National Assembly of Kenya & 4 Others (2016) eKLR, the Court held that:

“...an error stated to be apparent on the face of the record must be such as can be seen by one who runs and reads, that is an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions.”

41. The Respondent submitted that from grounds (I) to (s) relied on in support of the Application, it is apparent that the basis for review is that the Learned Judge failed to use his discretion to revive the abated suit. That the Court should not have considered technicalities to dispense with the matter.

42. That by relying on the grounds cited for extension of time within which to apply to be made a party to the suit, the Applicant seems to re-argue the Application which has since been heard on merit and a ruling delivered after both parties were heard through written submissions and all matters of evidence fully taken into account. Therefore the present application therefore is res judicata.

43. The cases of; Mburu Kinyua vs Gachini Tuti (1978) KLR, (1976-80) 1 KLR 790 and Churanji Lal & Co vs Bhaijee (1932) 14 KLR 28, were cited where the Court held that:

“the law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of anew litigation, and I should be allowed to commence a new.”

44. The 2nd Respondent submitted that the Applicant was required to establish that she discovered new evidence which was not within her knowledge at the time of filing the Application dated 26th March 2013, and there was an error apparent on the face of the record or any other sufficient reason. Reliance was placed on the case of; Muyodi vs Industrial and Commercial Development Corporation & Another (2006) I EA 243, where it was held:

“It is incumbent upon the Applicant if his application for review under Order XLIV Rule 1 of the Civil Procedure Rules were to succeed to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at the time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the Application without unreasonable delay.”

45. The 2nd Respondent submits that the Applicant has not shown that there was any new evidence which they discovered after Hon. Justice Ogola delivered his ruling on the application dated 26th March 2013. They have not stated that any such information has been acquired from whom or by which means. That the Applicant’s contention that the deceased’s former Advocates failed to take appropriate steps does not satisfy the criteria set out under Order 45 Rule 1 of the Civil Procedure Rules. The Court of Appeal in; Pancras T. Swai vs Kenya Breweries Limited CA No. 275 of 2010 (2014) EKLR held that discovery of new matter or evidence relates to issues of facts which may emerge from evidence. Discovery of evidence does not arise from matters of law.

46. That the allegations by the Applicant that she failed to apply for substitution in time because her Advocate did not take appropriate steps does not match the test of an issue of fact. It is an issue of law. Order 24 Rule 3 of the Civil Procedure Rules provide for the abatement of suits where the Plaintiffs dies therefore the Applicant cannot plead that she was not aware of the law applicable since ignorance of the law is no defence. Secondly, she had an advocate on record to guide her through the process and as held by, Ibrahim SCJ in; Yusuf Gitau Abdallah vs The Building Centre (K) Ltd and 4 Others SC Petition No. 27 of 2014 (2014) EKLR at paragraph 19 a Court is bound by law and a party cannot be excused on the pretext that he or she did not know the law.

47. That the Court of Appeal in; Nyamogo vs Nyamogo (2001) EA 174 held that an error apparent on the face of the record on a point of law does not reasonably have two opinions. The court further held that an error which was established through a long drawn process of reasoning or on points where there can be two or more opinions cannot be said to be an error apparent on the face of the record.

48. It was submitted that the reasons advanced by the Applicant ought to have been made during the hearing of the Application dated 26th March 2013. Further, at the time of filing the Application dated 26th March 2013, she was well aware that the court file had been missing and ought to have brought that to the attention of the Court.

49. That the Application raises issues which are barred by Section 7 of the Civil Procedure Act on the ground that they amount to res judicata. Reference was made to the case of; John Florence Maritime Services Limited and Another vs Cabinet Secretary For Transport and Infrastructure and 3 Others CA No. 42 of 2014(2015) EKLR cited with approval the decision of the Court in Henderson vs Henderson (1843) 67 ER 33 where the Court held that parties are required to bring the whole case for determination by the Court and that they will not be permitted to re-open the cases on the basis of negligence, inadvertence or even accident on their part.

50. That the exercise of the inherent power of this Honourable Court to correct an error ex debito justitiae ought not to be exercised in a whimsical manner. An error should be corrected ex debito justitiae if the error was made in breach of the principles of natural justice.

(See Baneree J in the Rupa Ashop Hurra vs Ashok Hurra and Another (IBID) cites with approval the decision of Lord Denning MR in A/S Cathrineholm vs Norequipment Trading Limited (1972) 2 ALL ER 538 where the Lord Denning MR stated that a judgment should be set aside ex debito justitiae only where the judgment is irregular.

51. Finally, in the case of; Desmond Boi and Willis Oloo t/a Institute of Applied Sciences and Research vs Mbichi Mboroki Chairman Business Premises and Rent Tribunal and Another HC Petition No. 320 of 2016 (2016) EKLR quoted with approval the dictum of Lord Diplock in Isaacs vs Robertson (1984) 3 ALL ER 140 where the Lord Judge stated that a party has a right to have an order set aside ex debito justitiae if the order was obtained in violation of the rules of natural justice

52. Therefore, the Applicant cannot purport to use the provisions of Article 159 of the Constitution and Section 3A of the Civil Procedure Act to subvert clear provisions of procedure under Order 24 of the Civil Procedure Rules. The Court of Appeal case of; Kakuta Maimai Hamisi vs Peris Pesi Tobiko and 2 Others CA No. 154 of 2013 (2013) eKLR was relied on where it was held that Article 159(2) of the Constitution is not a panacea that cures all ills, misdeeds or defaults of litigation. Further the case of; Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 Others CA No. 290 of 2012 held that it is a misconception for parties to rely on Article 159 of the Constitution and section 1A and 1B of the Civil Procedure Act to avoid compliance with rules of procedure.

53. At the conclusion of the arguments by the parties and considering the submissions relied on, I note that this matter is brought under the provisions of order 45 of the Civil Procedure Rules, which states as follows:-

Order 45 Rule 1 Application for Review of Decree or Order

(1) *Any person considering himself aggrieved:*

(a) *By a decree or an 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 important matter of evidence which after the exercise of due diligence was not within his knowledge or would 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."

54. It follows from these provisions that for an applicant to succeed in an Application seeking to review of an order of the Court, the Applicant must prove any of and/or all of the three requirements:

a) *discovery of new important matter of evidence, not within his knowledge , at the time when the decree was passed or the order made;*

b) *on account of some mistake or error apparent on the face of the record; or*

c) *for any other sufficient cause*

55. I have considered the grounds relied on in support of this Application and I note that the Applicant avers at ground (j), that;

"There is a mistake or an error apparent on the face of the record. It is necessary to correct an apparent error or omission on the part of the Court."

56. Apparently, the Applicant does not state clearly what amounts to a mistake and/or an error, in the ruling, although in a nutshell, she states under paragraphs (k), (l), (m) and (r) that:-

a. the Court ought to have considered that, what the Applicant was seeking for in the impugned Application was essentially the extension of time to apply to be made a party to the suit, a move that would have had the effect of reviving the abated suit;

b. the Court ought not to have allowed the prescriptions of procedure and form to trump the primary objective, of dispensing substantive justice to the parties, despite clear provisions of Article 159 of the Constitution of Kenya; and

c. the Court mistakenly fettered its discretion and failed to consider and exercise inherent jurisdiction by reviving the suit and allowing the applicants to canvass their case and be heard on merit.

57. It therefore follows that, the Application is based on the account of some mistake or error apparent on the face of the record. The parties have submitted heavily on what constitutes a mistake or an error apparent on the face of the record. In a nutshell, it is error that must be self-evident and such as can be seen by anyone who runs and reads. It is an obvious and patent mistake. In other words, it must be Res ipsa loquitor.

58. Indeed the power of the Court to review an order or a decree is entirely discretionary and is not prescribed by any rules or restrictions. However, the Court will not review a matter merely to re-run the previous hearing on the same material. It will be necessary to demonstrate a change of circumstances or a misleading of the Judge in the first instance.

59. In the case of; Lloyds vs Ager-Hansen (2003) EW HC, it was held the Applicant must either show some material change of circumstances or that the Judge who made the order was misled either innocently or otherwise.

60. I have gone through the ruling delivered by the Honourable Judge on 5th May 2014, and I note that, it details out the three prayers sought for by the Applicant therein, which were basically: the revival of the suit and the substitution of Margaret Wambui Wamuti and Julius Kimiti Wamuti to be substituted with the Plaintiff and costs. It is therefore not correct, when the Applicants argue that the Court “ought to have considered that, what the Applicant was seeking for in the impugned Application was the extension of time to apply to be made a party to the suit.”

61. At paragraph (8) of the ruling, the Court drew out the issue for determination being: “whether or not the suit having abated, and if there were enough grounds given by the Applicant for revival of the same. After making reference to the provisions of Order 24 rule 3(1) and 7(2), the Court determined the issue at paragraph (11) and (12) thereof and concluded that the Applicant took more than 14 months to make the Application after securing the grant, and that a Court of equity does not give relief to the indolent Applicant.

62. In the given circumstances I am not able to see any error in this ruling and despite the arguments by the Applicant that the Court allowed the prescriptions of procedure and form to trump the primary objective of dispensing substantive justice, that argument is unsubstantiated and is not evident of the record. Even then, I do not think that the failure by the Court, if that were the case, to consider substantive justice amounts to a mistake or an error apparent on the face of a record.

63. A further argument advanced is that, the Court mistakenly fettered its discretion and failed to consider and exercise inherent jurisdiction by reviving the suit and allowing the applicant to canvass their case and be heard on merit. With outmost due respect, to the Applicant and these submissions, I do not understand how the exercise of the discretion of the Court can amount to a mistake or an error apparent on the face of the record.

64. In my considered opinion, the grounds relied on by the Applicant, the Affidavit in support of the application and the lengthy and elaborate submissions by the Applicant, which discussed the following matters;

- a) What rights does any of the deceased have as contained under Article 2(1), 27(1), 50, and 28 of the Constitution of Kenya;
- b) Does statute of limitation supersede the right of deceased plaintiff and of the deceased plaintiff’s legal representatives;
- c) Did the beneficiaries hold a legal or equitable interest in the land;

Indicates that the matters raised are factual in nature and call for evidence to be adduced to prove the same. They are matters that were not within the knowledge of the Applicant at the time the impugned Application was heard and determined. Neither do they amount to a mistake or an error apparent on the face of the record.

65. It is clear therefore clear from the arguments by the Applicant, that they are aggrieved by the findings and/or the decisions of the Court. I find that this should be a matter for Appeal and not for review. In that regard, I find that the Applicant has not met the threshold for grant of the orders for review and/or setting aside of the orders made by the Court on 5th May 2014, dismissing their Application dated 26th March 2013.

66. In conclusion, I find that this Application has no merit and I dismiss it with costs to the Respondents.

Dated, delivered and signed this 5th day of June 2018, at Nairobi

G.L. NZIOKA

JUDGE

In the presence of:

Ms Gulenywa holding brief for J. Shamallafor the Applicants

No appearance.....for the Respondents

Fred.....Court Assistant