REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 220 OF 2013

MOHAMED SALIM FAZAL.....PLAINTIFF

VERSUS

1. HORUS LIMITED

2. AHMED SHARIFF

3. ZAINABU M. SHARIFF

4. SETTLEMENT FUND TRUSTEES

5. THE CHIEF LAND REGISTRAR

6. THE REGISTRAR OF TITLES KILIFI

7. THE ATTORNEY GENERAL..... DEFENDANTS

RULING

1. By this Notice of Motion application dated 29th March 2019, Horus Ltd (the 1st Defendant/Applicant) prays for orders:-

> ***1. …….***
>
> ***2. That this Honourable Court be pleased to allow the firm of Mwagambo & Okonjo Advocates to come on record for the 1st Defendant/Applicant.***
>
> ***3. ……***
>
> ***4. That this Honourable Court be pleased to review and/or set aside its Judgment of 12th July 2018 and re-open the case for hearing de novo.***
>
> ***5. That this Honourable Court be pleased to issue any such further orders as to ensure that the ends of justice are not defeated.***
>
> ***6. That this Honourable Court be pleased to grant the Applicant the costs of this application.***

2. The application which is supported by an affidavit sworn by the 1st Defendant's Property Manager Elvis Mkutano Kadzumbo is premised inter alia on the grounds:-

> ***i) That the 1st Defendant is facing the real and imminent threat of being evicted from the suit premises following the Judgment delivered on 12th July 2018 and the subsequent decree issued on 2nd August 2018.***
>
> ***ii) The 1st Defendant was unaware of these proceedings until recently when the Plaintiff sought to enforce the decree.***

iii) Despite instructing the law firm of Omondi & Waweru Advocates to act for it, the 1st Defendant was not aware when the matter came up for hearing or that its witnesses were required to attend Court on 15th November 2016. It was similarly unaware that the Advocates had not filed necessary evidence and/or that the matter came up for Judgment on 19th July 2018.

iv) The 1st Defendant has critical and important pieces of evidence that were not brought to the attention of the Court. The conduct of its Advocates occasioned a complete failure of justice in this suit and there is sufficient reason to review the Judgment to ensure the ends of justice are met.

3. The application is opposed. In his Replying Affidavit sworn and filed herein on 22nd May 2019, Mohamed Salim Fazal (the Plaintiff/Respondent) avers that the application is incurably defective as the 1st Defendant's current Advocates did not seek the leave of this Court before coming on record to file the present application.

4. The Plaintiff further avers that the 1st Defendant never filed any Witness Statements or documents despite the fact that this suit was instituted on 4th December 2013. Upon close of the Plaintiff's case, their Advocates sought an adjournment and leave to file its Witness Statements but the application was disallowed as the Defendant had the opportunity to do so but failed.

5. The Plaintiff further asserts that following the decision of this Court to close the Defence Case when they failed to call their witnesses, the 1st Defendant filed an application seeking a review of the Court's Ruling. That application was dismissed on 15th November 2017 in the absence of the 1st Defendant.

6. The Plaintiff avers that the present application has been overtaken by events as the decree has been executed and a Title Deed issued in the name of the Plaintiff as the proprietor of the suit premises. The Plaintiff asserts that he has since taken possession of the suit premises and he stands to be greatly prejudiced if the application herein is allowed.

7. The Plaintiff further asserts that the 1st Defendant's application is res judicata as the 1st Defendant had made a similar application dated 2nd February 2017 which application was dismissed by this Court.

8. I have perused and considered the application before me and the response thereto. I have equally considered the Written Submissions and authorities placed before me by the Learned Advocates for the parties.

9. The application before me is expressed to be brought under a myriad provisions of the law. A detailed perusal thereof however reveals that the substantive prayer thereof is the one that urges this Court to review and/or set aside its Judgment delivered herein on 12th July 2018 and to re-open this case for hearing de novo.

10. Though not among the provisions cited by the Applicant, Section 80 of the Civil Procedure Acts gives this Court the power to review its decisions as follows:-

"80. 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, thereon as it thinks fit.

11. While the said Section gives the general power of review, Order 45 Rule 1(1) of the Civil Procedure Rules lays down the jurisdiction and scope of review limiting it to an application being made without undue delay on the following grounds:-

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 by him at the time when the decree was passed or the order made; or

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

c) For any other sufficient reason.

12. The Judgment sought to be reviewed was delivered herein on 12th July 2018. According to the 1st Defendant, it was unaware of these proceedings until recently when the Plaintiff/Decree Holder moved to cut trees and evict the 1st Defendant from the suit property. It is then the 1st Defendant says it instructed its new Advocates who moved to Court, obtained the Judgment and shared the same with them on 8th March 2019.

13. The 1st Defendant avers that it was not aware that this matter came up for hearing and that its witnesses were required to attend Court on the 15th November 2016 when the suit came up for hearing. The 1st Defendant further avers that it was similarly unaware that its previous Advocates- Messrs Omondi & Waweru Advocates failed to file necessary evidence on its behalf and/or that the matter came up for Judgment on 19th July 2018.

14. As it were, an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case afresh. In my view a review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier. The power of review is to be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed to demonstrate.

15. With respect, the argument that the 1st Defendant was unaware when the matter was scheduled for hearing and/or that its previous Advocates on record did not file their evidence in Court cannot in the circumstances of this case amount to new evidence. For material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or to the Court.

16. As it were, this suit was filed in December 2013. From the record, the 1st Defendant entered appearance on 28th October 2014 and took another two (2) years before it filed its Statement of Defence on 15th April 2016.

17. While it now heaps massive blame on its previous Advocates, the 1st Defendant was as a matter of fact aware of the existence of the matter in this Court at least from the date it filed a Memorandum of Appearance on 28th October 2014. I did not see any evidence of any correspondence exchanged between the 1st Defendant and its former Advocates seeking to know the progress of their case.

18. As Kimaru J stated in ***Savings & Loans Ltd –vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCC No. 397 of 2002(Unreported):-***

> ***"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A Litigant has a duty to pursue the prosecution of his or her case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel for the Litigant on account of such advocate's failure to attend Court. It is the duty of the Litigant to constantly check with the advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default Judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant."***

19. Similarly in the matter before me, even though the previous Advocates on record did not file any response to the application before me, it was evident from a review of the record that the 1st Defendant herein has been more than indolent in the prosecution of this suit. To be fair to the former Advocates on record, they made an application before me dated 2nd February 2017 seeking a review of the orders of the Honourable Angote J that closed their case on 15th November 2016. Having reviewed the record herein, this Court in its Ruling of 15th November 2017 observed as follows at Paragraph 17:-

> ***"From the foregoing, the conduct of the 1st Defendant throughout the proceedings do not depict a party who is desirous to have this matter concluded. Indeed it is curious that on all the previous occasions, the 1st Defendant always sought an adjournment on the basis that the 1st Defendant's Directors resided abroad and have not been able to come into the Country to execute appropriate documents…."***

20. Taking the totality of the circumstances herein into consideration, I am convinced that the present application is nothing but an attempt by the 1st Defendant to take a second bite at the cherry. They have not shown any sufficient reason why they did not know that their previous Advocates did not file their evidence or call witnesses since their case was closed in November 2016. Even after Judgment was delivered herein, it took them some nine (9) months before they made the present application.

21. While a review may be permitted under Order 45(1) (1) for any other sufficient reason, such reason must be analogous to those specified in the rule such as new and important matter or error apparent on the face of the record.

22. The 1st Defendant had the opportunity to defend itself by filing documents and calling witnesses. It did not do so and instead chose to engage in delaying tactics. In the premises, I did not find any merit in the application before me.

23. The application dated 29th March 2019 is accordingly dismissed with costs to the Plaintiff/Respondent.

Dated, signed and delivered at Malindi this 13th day of May, 2020.

J.O. OLOLA

JUDGE