REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1068 OF 2007

JOHN NDIRANGU KAMAU.....PLAINTIFF

VERSUS

ALPHONCE KAMAU KIMANI.....DEFENDANT

RULING

Judgment was entered herein for the plaintiff against the defendant on 3rd July, 2007 in the sum of Kshs. 700,000/- together with costs and interest. On 30th December, 2010, the court issued a prohibitory order attaching two parcels of land owned by the defendant namely, Nyandarua/ Gilgil West/388 and Nyandarua/Gilgil West/389(hereinafter referred to as "the suit properties") in execution of the decree of the court. On 1st August, 2011, the plaintiff filed an application by way of Notice of Motion dated 25th July, 211 seeking an order for the sale of the suit properties and for necessary directions on how the sale was to be conducted. The application was heard by the Deputy Registrar on 4th October, 2017 under Order 49 of the Civil Procedure Rules who granted orders for the sale of the suit properties by public auction. The order by the Deputy Registrar was made in the presence of the advocates both parties. On 23rd February, 2018, the defendant filed an application dated 22nd February, 2018 seeking a stay of the orders of the Deputy Registrar that were made of 4th October, 2017 pending the hearing and determination of an intended appeal against the same. The defendant also sought a further order that the parties to the suit who were all deceased be substituted with their legal representatives.

When the defendant's application came up for hearing on 5th March, 2018, the court made an order substituting the deceased defendant with his legal representatives, Beatrice Gathoni and James Kimani Kamau. The defendant's application dated 22nd February, 2018 was thereafter fixed for hearing on 19th November, 2018 in respect of the prayer for stay that was not dealt with on 5th March, 2018. On 19th November, 2018, the said application was fixed for hearing on 26th June, 2019 because the defendant's advocate was not ready to argue the same. On 26th June, 2019, the defendant's advocate once again asked for adjournment of the application which was opposed by the plaintiff's advocate. The court considered the application for adjournment and found no merit in the same. The court dismissed the application for adjournment and directed the defendant's advocate to proceed with the application. The defendant's advocate told the court that she was unable to argue the application. The court then proceeded to dismiss the application with costs to the plaintiff.

After the dismissal of the defendant's application dated 22nd February, 2018 on 26th June, 2019, the defendant brought an application dated 18th July, 2019 on 19th July, 2019 seeking the reinstatement thereof. The application was opposed by the plaintiff. The application was argued on 3rd February, 2020 and the court reserved the ruling for delivery on 30th July, 2020. While the matter was pending ruling as a foresaid, the plaintiff advertised the suit properties for sale on 26th February, 2020. That prompted the filing of yet another application by the defendant seeking injunction restraining the sale of the suit properties pending a ruling on their application dated 18th July, 2019. The application was brought by way of Notice of Motion dated 17th February, 2020. The application which was opposed by the plaintiff was argued on 25th February, 2020 and the court reserved a ruling for delivery on 30th July, 2020 together with the ruling on the earlier application. In the meantime, the court gave an interim injunction restraining the sale of the suit properties.

From that introduction, I now have before me two applications by the defendant. The defendant's Notice of Motion application dated 18th July, 2019 which seeks an order for the reinstatement of the defendant's earlier application dated 22nd February, 2018 that was dismissed by the court on 26th June, 2018 was brought under Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules. The application that was supported by the affidavit of Dr. John Khaminwa was brought on the ground that when the application dated 22nd February, 2018 came up for hearing on 26th June, 2019, Dr. Khamiwa who was handling the matter was in the Court of Appeal and had asked another advocate Ms. Shummila to hold his brief on the matter. The defendant contended that the application was dismissed without a fair and just hearing and that it would be in the interest of justice that mistakes of an advocate are not visited upon a client. In his affidavit in support of the application, Dr. Khaminwa stated that on 26th June, 2019, he was attending to Court of Appeal Civil Appeal No. 170 of 2016, Rodgers Senaji Mulemi *v* Zefania Ngaira Angwenye and that he had requested Ms. Shummila to hold his brief and have this matter placed aside. Dr. Khaminwa stated that if the court fails to grant the orders sought, there would be great injustice and unwarranted loss to the defendant.

The defendant's application dated 18th July, 2019 was opposed by the plaintiff through grounds of opposition dated 30th September, 2019. The plaintiff contended that the application was misconceived and lacked merit because the court was *functus officio* having rendered a decision on the defendant's application dated 22nd February, 2018 on 26th June, 2019. The plaintiff contended further that the issues raised in support of the application were *res judicata* being the same issues that were raised by the defendant on 26th June, 2019 and on which the court had made a determination. The plaintiff contended further that the grounds put forward by the defendant did not warrant the grant of the orders sought.

The defendant's application dated 18th July, 2019 was heard on 3rd February, 2020 when Ms. Shummila appeared for the defendant/applicant and Mr. Thiga appeared for the plaintiff/respondent. Mr. Shummila submitted that when the application dated 22nd February, 2018 came up for hearing on 26th June, 2019, she had very limited instructions and as such she was not in a position to argue the same. She submitted that a mistake of an advocate should not be visited upon his client. Ms. Shummila submitted that the application dated 22nd February, 2018 which was dismissed by the court raised weighty issues.

In his submissions in reply, Mr. Thiga argued that the grounds put forward by the defendant in support of the present application were raised before the court on 26th June, 2019, were considered and overruled before the court dismissed the defendant's application dated 22nd February, 2018. Mr. Thiga submitted further that there was no evidence that Ms. Shummila had limited instructions when she appeared before the court on 26th June, 2019. He submitted that the court's discretion can only be exercised for the ends of justice to be met and that in this particular case, injustice will be meted out to the plaintiff if the discretion is exercised in favour of granting the application. Mr. Thiga pointed out that judgment was made in this suit in favour of the plaintiff in 2007 and that the same had remained unsatisfied since then although there was no appeal against the same. Mr. Thiga argued that the various applications that have been made by the defendant were all intended to delay the execution of the said judgment.

I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the plaintiff and the submissions by counsels. The issue that I have been called upon to determine is whether I should set aside the orders that were made herein on 26th June, 2019 dismissing the defendant's application dated 22nd February, 2018 so that the application can be heard a fresh. Although it has not come out clearly from the rules under which the application has been brought, the defendant's application is seeking a review of the orders that were made by the court on 26th June, 2019. The court's power to review its own orders is provided for in section 80 of the Civil Procedure Act 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. "

Order 45 of the Civil Procedure Rules lists specific grounds upon which an application for review can be made as follows:

> 1. Where there is a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed or order made.
>
> 2. Where there is a mistake or error apparent on the face of the record.
>
> 3. For any other sufficient reason.

In Francis Origo & another *v* Jacob Kumali Mungala Eldoret CA No. 149 of 2001, [2005]eKLR the court stated as follows:

> **"…it is clear that an applicant has 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 that 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 for review without unreasonable delay.**

Similarly, in Kenya Power & Lighting Company Limited *v* Benzene Holdings Limited t/a Wyco Paints Nairobi CA 132 of 2014, [2016]eKLR the requirements for review were set out as follows:

> **"To qualify for a review there are stringent requirements to be met. For instance the applicant must demonstrate that as a matter of right he can appeal but has not exercised that option; that no appeal lies from the decree with which he is dissatisfied; or that he has discovered a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced when the order was made; or that there is a mistake or error apparent on the face of the record; or that there are sufficient reasons to warrant the review. It is also a requirement that the application for review must be brought without unreasonable delay."**

In John Kamau Ruhangi *v* Kenya Reinsurance Corporation, Civil Appeal No. 208 of 2006,[2012]eKLR the court stated that:

> **"It is important to bear in mind that Order 44 Rule 1 of the Civil Procedure Rules sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground of review. All these are grounds of appeal."**

Review as a remedy is discretionary. It is trite that the court's discretionary power must be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained by the court in Patriotic Guards Ltd. *v* James Kipchirchir Sambu [2018] eKLR as follows:

> **"It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."**

It is on the foregoing principles that the defendant's application falls for consideration. When the defendant's application dated 22nd February, 2018 came up for hearing on 26th June, 2019, the advocate who appeared for the defendant, Ms. Shummila sought adjournment of the same on the ground that Dr. Khaminwa who was handling the matter was in the Court of Appeal. The application for adjournment was opposed by the plaintiff. The court considered the application for adjournment and dismissed the same. Ms. Shummila thereafter informed the court that she was not ready to proceed with the application because her file had already been taken back to the office. The defendant's application for adjournment having been dismissed and the defendant being not ready to argue the application, the court was left with no alternative but to dismiss the application. The present application that was also argued by Ms. Shummila was brought on the ground that when the application dated 22nd February, 2018 came up on 26th June, 2019, Dr. Khaminwa who was handling the matter was in the Court of Appeal.

I am in agreement with the plaintiff's advocate that this cannot be a ground for review of the orders made on 26th June, 2019. That is the same ground upon which the adjournment was sought and refused by the court resulting in the dismissal of the application dated 22nd February, 2018. The fact that Dr. Khaminwa was in the Court of Appeal on 26th June, 2019 is therefore not a new matter that the defendant has just discovered. It cannot therefore be a ground for review.

As I have indicated earlier, a review order can be granted also for sufficient reasons. Has the defendant given sufficient reasons to warrant a review of the orders made on 26th June, 2019? I do not think so. The hearing date of 26th February, 2019 was given in court in the presence of Dr. Khaminwa after he sought adjournment. Dr. Khaminwa was expected to be ready to proceed with the application on 26th June, 2019 and if he was not in a position to do so, to instruct another advocate in his firm to deal with the application. I am of the view that the fact that an advocate is appearing in another court without more is not a sufficient reason to adjourn a case. The other ground that was put forward by the defendant in support of the supplication was that the application dated 22nd February 2018 was dismissed without a fair and just hearing and that the said application raised weighty issues. I find no merit in these grounds. The defendant was given an opportunity to argue his application which opportunity he failed to utilize. He cannot therefore be heard to say that the dismissal of his application was unfair and unjust. On the weight of the issues raised in the application dated 22nd February, 2018, I have noted that the application sought stay of the orders that were made by the Deputy Registrar on 4th October, 2017 for the sale of the suit properties in execution of the decree of this court made on 3rd July, 2007. I have noted from the record that the order was made in the presence of the advocates for both parties and that no objection was raised by the defendant to the order. I have also observed that the decree of the court made on 3rd July, 2007; more than 13 years ago was not appealed and to date the same has not been satisfied and that the defendant has not demonstrated any intention of satisfying the same. I am not persuaded that the said application raises weighty issues as claimed by the defendant. For the foregoing reasons, I am not satisfied that sufficient reasons have been given to warrant the grant of the review sought.

The upshot of the foregoing is that the defendant's application dated 18th July, 2019 is not for granting. The disposal of that application takes me to the defendant's second application dated 17th February, 2020. The orders sought in that application were to be granted pending the ruling on the defendant's application dated 18th July, 2019 today. I am of the view that the application has been overtaken by events and as such it is not necessary to render any ruling in respect thereof.

For the foregoing reasons, I find no merit in the defendant's Notice of Motion application dated 18th July, 2019. The application is dismissed with costs to the plaintiff. The orders granted on 25th February, 2020 in the defendant's application dated 17th February, 2020 are discharged.

Delivered and Dated at Nairobi this 30th Day of July 2020

S. OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Thiga for the Plaintiff

Ms. Wekesa h/b for Dr. Khaminwa for the Defendant

Ms. C. Nyokabi-Court Assistant