



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 252 OF 2017**

**FRANK DONATH.....PLAINTIFF**

**VERSUS**

**LYDIA GACHUKI MURIUNGI.....DEFENDANT**

**RULING**

1. I have before me for determination a Notice of Motion application dated 15<sup>th</sup> May 2019. By the said application Lydia Gachuki Muriungi (the Defendant) prays that this Court does review its orders of 14<sup>th</sup> March 2019 and set aside the same.

2. The application which is supported by an affidavit sworn by the said Defendant is premised on the grounds that:

***a) The orders of 14<sup>th</sup> March 2019 were made on account of some mistake or error apparent on the face of the record as the Court was under the view that the Defendant did not file a response to the application yet a Replying Affidavit had been filed on 14<sup>th</sup> April 2018;***

***b) The Defendant has obtained evidence that was not in her possession at the time of the hearing, a Title Deed which shows that she is a joint owner of the suit property with the Plaintiffs; and***

***c) There are sufficient reasons from the Replying Affidavit that the Court did not consider in its previous Ruling.***

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 27<sup>th</sup> June 2019, Frank Donath (the Plaintiff) avers that the Defendant filed the said Replying Affidavit extraordinarily late and after the parties had come to highlight their submissions in Court on 21<sup>st</sup> March 2018.

4. The Plaintiff further avers that the Defendant has not come to Court with clean hands and asserts that the Title Deed attached to the present application is nothing but a forgery as the same was obtained at a time when the Plaintiff had lost his passport and had lodged a complaint thereon with the Police.

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

6. The Defendant herein urges this Court to review its orders issued herein on 14<sup>th</sup> March 2019 and to set aside the same. Order 45 Rule 1 of the Civil Procedure Rules pursuant to which the application is brought provides for review 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 the Judgment to the Court which passed the decree or made the order without unreasonable delay.”***

7. A clear reading of the above provisions reveals that the review mandate of the Court is limited to 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 record; or***

***c) For any other sufficient reason.***

8. The main ground upon which the Defendant makes her application before me is her contention that there was a mistake or error apparent on the face of the record as at the time of delivering the Ruling dated 14<sup>th</sup> March 2019, the Court was under the wrong impression that the Defendant had not filed a Replying Affidavit or any response to the Plaintiff's application.

9. A perusal of the said Ruling indeed reveals at paragraph 9 thereof that the Court proceeded on the basis that the Defendant did not file a response to the Plaintiff's application dated 21<sup>st</sup> December 2017 and that his assertions were therefore uncontroverted.

10. From the application and the record presently before me, it is evident that the Defendant filed a Replying Affidavit to that application on 4<sup>th</sup> April 2018. The reasons for the failure to consider that Affidavit are however quite evident from the same record. When the application had first come before me for hearing inter partes on 8<sup>th</sup> February 2018, the Defendant's Advocates had requested for and were granted 14 days within which to file a response.

11. That request was granted given the urgency and the parties were then asked to file and exchange submissions upon the service of the Replying Affidavit and/or expiry of the 14 days and to come to Court for the highlighting of the same on 21<sup>st</sup> March 2018.

12. On the said 21<sup>st</sup> March 2018 however when the matter came up for submissions, Mr. Aboubakar, Learned Counsel for the Defendant told the Court they had needed to sort out the issue of representation and hence they had neither filed their response nor submissions as earlier directed. Counsel then requested to be granted three (3) days to file the response and submissions. Upon that request, Counsel was granted three days within which to file and serve their response as well as submissions.

13. As it turned out the Replying Affidavit was not filed within the given time and was apparently filed without the leave of the Court some two weeks later on 4<sup>th</sup> April 2018. Accordingly, I did not find any basis for the contention that there was an error or omission to consider the same.

14. The second limb on which the application is brought before me is that the Defendant has since obtained evidence that was not previously in her possession to the effect that she is a joint owner of the suit property with the Plaintiff. I did not however think that the question of ownership is one that could just dawn upon a party when she could not explain the process she had undertaken to become such a joint owner, more so when the very question of ownership is the subject matter of the dispute before the Court.

15. As the Court of Appeal stated in ***Stephen Githua Kimani –vs- Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKRL:***

*“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”*

16. In the premises, I did not find merit in the application before me. The same is accordingly dismissed with costs.

**Dated, signed and delivered at Malindi this 10<sup>th</sup> day of July, 2020.**

**J.O. OLOLA**

**JUDGE**