



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELCA CASE NO. 7 OF 2019**

**FRANCIS LUCAS NAMWIBA.....APPELLANT**

**VERSUS**

**KEVIN MARTIN WAFULA**

**VICTOR KANENJE WAFULA.....RESPONDENTS**

**RULING**

The application is dated 10<sup>th</sup> June 2020 seeking the following orders;

1. That this honourable court be pleased to review its orders made and/ or delivered on 23<sup>rd</sup> July 2019 and the same be set aside and the appeal be reinstated for hearing
2. That the costs of this application be provided for.

It is grounded upon the annexed affidavit of Francis Lucas Namwiba and the grounds that the court erred in striking out the appeal when the appeal was not in relation to the trial court's judgement but refusal by the trial court to set aside its judgement. That no leave to file the present appeal was needed. That the present appeal was filed in time.

The respondent submits that the application dated 19<sup>th</sup> June 2019 sought to stay execution of a decree dated 5<sup>th</sup> April 2019. At the time the application was filed there was already a lapse of 30 days the period of which an appeal ought to be lodged in the High Court.

This court has considered the application and the submissions therein. In the application dated 19<sup>th</sup> June, 2019 the court was of the view the preliminary issue to be determined is whether this appeal was filed out of time without the leave of the court and if so whether the same is fatal. The court found in the instant case the said judgement in Mumias Senior Principal Magistrate's Court ELC No 8 of 2018 to be appealed against was delivered on the 4<sup>th</sup> January 2019 and the appeal filed on the 27<sup>th</sup> March 2019. No leave of the court was sought. The court found that the appeal was filed outside the thirty days provided for without leave of court. *Having found so the court found that they was no need to go into the merits and demerits of granting a stay. The court considered the preliminary objection. Be that as it may I find that the appeal was on the ruling to set aside the exparte judgement. The ruling was delivered on 12<sup>th</sup> March 2019 and reasons given on 19<sup>th</sup> March 2019, the appeal was filed on the 27<sup>th</sup> March 2019.*

Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

*“(1). 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

*(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being*

*respondent, he can present to the appellate court the case on which he applies for the review.”*

The aforesaid 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.*

Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. I find that there was an error on the face of the record and leave to appeal on the ruling was not necessary. I find that the application is merited and I grant the same. Costs to be on the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28<sup>TH</sup> SEPTEMBER 2020.**

**N.A. MATHEKA**

**JUDGE**