



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCA CASE NO. 5 OF 2018**

**KENNETH LITSWA.....APPELLANT**

**VERSUS**

**MARTIN SHIVERE**

**NATIONAL HOUSING COOP VIHIGA MUNICIPAL COUNCIL.....RESPONDENT**

**RULING**

The application is dated 4<sup>th</sup> December 2019 and is brought under order 45 rule 1 & 2 of the Civil procedure Rules seeking the following orders:-

1. That the orders of this court made on the 5<sup>th</sup> day of November, 2019 dismissing this appeal be reviewed and/or set aside.
2. That this appeal be reinstated, heard and determined on merit.
3. That costs of this application be provided for.

It is supported by the annexed affidavit of Kenneth Litswa Asega and the grounds that there was an error apparent on the face of the record. That the delay in hearing this appeal was due to the delay by the lower court in supplying certified copies of the proceedings and judgment and failure to forward the lower court file to this court. That these facts were not brought before the court when the application to dismiss was heard and they form a discovery of new and important materials. That the lower court file has been forwarded to this court when the appeal has already been dismissed for want of prosecution.

The respondents submitted that the application dated 4<sup>th</sup> December, 2019 is incompetent, vexatious and an abuse of the process of the court. That this application should be dismissed with costs.

This court has considered the application and the submissions therein. 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. However this discretion should be exercised judiciously and not capriciously. In Court of Appeal, Civil Appeal No. 2111 of 1996, National Bank of Kenya Vs Ndungu Njau, the Court of Appeal held that;

*“A review may be granted whenever the court considers 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 an elaborate 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 proceed on an incorrect expansion of the law”.*

The applicant stated that the delay in hearing this appeal was due to the delay by the lower court in supplying certified copies of the proceedings and judgment and failure to forward the lower court file to this court. The applicant has annexed a certificate of delay marked KLA – 1. The records show that the file was forwarded to this court on the 2<sup>nd</sup> December 2019 after the appeal had been dismissed on 5<sup>th</sup> November 2019. I find the application is merited and grant the same. Costs to be in the cause.

It is so ordered.

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

**N.A. MATHEKA**

**JUDGE**