REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 17 & 3 OF 2001

NANCY WANJERI…….....…..……PETITIONER

HOUSING FINANCE LTD.....1ST RESPONDENTS

KENYA BUILDING SOCIETY LTD.....2ND RESPONDENTS

TAIFA AUCTIONEERS.....3RD RESPONDENTS

CHRISTOPHER AVISA.....4TH RESPONDENTS

KCB LTD, CLEOPHAS OGUTU & OTHERS.....5TH RESPONDENTS

-VERSUS-

MICHAEL MUNGAI.....DEFENDANT/APPLICANT

RULING

1. This application is brought by a Chamber Summons dated 2nd January, 2014 and is taken out under **Sections 1A-3B, Order 7 Rules 9,10 & 11, Sections 80, 94, 99 & 100** of the Old Cap 21, Order 45 of the New Civil Procedure Rules as read with the penal code, Cap. 281 **Sections 38 & 84, Section 43 & others of cap 282, Sections 108, 109, 143** and others of the old cap 300, articles 40, 47, 50(1) and 165 of the Constitution of Kenya together with any other enabling powers of law and statute.

2. The Applicant seeks the following orders, which I set out herein verbatim, that:-

a. ……(Spent)

b. That the Honourable Court review and or correct the apparent errors, mistakes and omissions marked A-2V of the Rulings and orders that were delivered by Hon. Justice Musyoka on 14th June, 2013.

c. That the Honourable Court order the Chief Registrar of Lands Nairobi to rectify the register in regard to the fraudulent, illegal, unlawful, void and null certificates of lease for the suit property (L.R. No. Nairobi/Block 111/530), that were irregularly issued to Christoper Avisa, and Cleophas Ogutu and others without the consent or the authority of the court and the owner (Defendant/Applicant (decree holder).

d. That the Honourable Court order the Chief Registrar of Lands Nairobi, to re-issue a certificate of title on L.R.Nairobi/Block111/530 to the Defendant/Applicant (decree holder).

e. That the Hon. Court grant the Defendant/Applicant (Decree holder) the costs of this application and any other relief that the Hon. Court deems fit to grant the Defendant/Applicant (Decree holder) against the Respondents.

3. The application is predicated upon the grounds as set out in the application. It is further supported by the annexed affidavit of Michael Mungai sworn on the even date.

4. I note that the application has been brought under various laws namely **Sections 1A-3B, Order 7 Rules 9,10 & 11, Sections 80, 94, 99 & 100** of the Old Cap 21, Order 45 of the New Civil Procedure Rules as read with the penal code, Cap. 281 **Sections 38 & 84, Section 43** & others of cap 282**, Sections 108, 109, 143** and others of the old cap 300, articles 40, 47, 50(1) and 165 of the Constitution of Kenya, some of which have no nexus to the prayers sought. As such one would be forgiven for considering this application as an omnibus application. In *Rajput vs. Barclays Bank of Kenya Ltd and three Others* [2004] 2 KLR 393, the court expressed itself as follows:-

> *"There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught it, there will be one or two edible crabs, or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, it is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court need to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out."*

5. I will endeavor to apply my mind to the principles governing the review of an Order, which in my view is the main issue in this application. The issue for consideration is whether the applicant has satisfied the conditions for granting review as set out under Order 45 Rule 1(a) and (b) of the Civil Procedure Rules which provides thus:

> *"1. (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,*
>
> *c. 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."*

6. The parameters from which such an application for review are to be set out as stated above are that there should be discovery of new and important evidence, an error apparent on the face of the record or for any other sufficient reason. In *Francis Origo and another vs. Jacob Kumali Munagala* [2005] eKLR, the Court of Appeal held:

> *"From the foregoing, 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…"*

7. Further, the Court of Appeal in *National Bank of Kenya Limited vs Njau* [1996] LLR 469 [CAK] delivered itself thus:

> *"A review may be granted wherever 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 evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law.*
>
> *Misconstruing a statute or other provision of law cannot be a ground for review.*
>
> *In the instant case the matters in dispute had been fully canvassed before the learned judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion in law, it could be a good ground for appeal but not for review. Otherwise, we agree, that the learned Judge would be sitting in appeal on his own judgment, which is not permissible in law."*

8. The applicant in this application has failed to satisfy the court that there is discovery of a new and important matter or evidence which after 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 made on an account of some mistake or error apparent on the face of the record or any other sufficient reason. Obviously, the applicant herein has failed to adequately establish that there are appropriate grounds to warrant review. He has not met the conditions for review as set out under Order 45 Rule 1(a) and (b) of the Civil Procedure Rules.

9. It is imperative to consider whether the instant Application was made without undue delay. Indeed, it is noted that the impugned ruling was delivered on 14th June 2013. Nevertheless, the application for review was filed on 2nd January, 2014, almost (seven) 7 months after the said Ruling was delivered. In the circumstances, my considered view is that a delay of almost seven (7) months is unconscionable and offends the said Order 45 of the Civil Procedure Rules which provides that an application for review be made without unreasonable delay.

10. In the instant case the applicant did not make his application timeously. He also failed to explain what occasioned the delay. In the absence of any reasonable explanation proffered as to why it took the Applicant almost seven months to make the instant application, this court will be restrained to exercise its jurisdiction in view of the Applicant's unreasonable delay. In *Africa Credit Finance Ltd vs. Safari Image Ltd and 2 others*, where Hewett J. said that -

> *"Even though there was an error apparent on the face of the record, and also that there was a new and important matter which the defendant could not with due diligence have put before the court, but that the review jurisdiction under the Civil Procedure Rules cannot be exercised in view of the Defendant's delay."*

Further, in the case of *Panalpina (E.A.) Ltd vs.Ngae* (1999) LLR 2370 (HCK), Waki J. (as he then was) sadi as follows:

> *"First the question of delay. Order 44 rule 1 Civil Procedure Rules requires in peremptory language that an application for review be made "without unreasonable delay."'*

11. The order sought to be reviewed here was made on 23rd September 1998. The application for review was filed on 16th July 1999, about 10 months later. Plenty of water had gone under the bridge in the matter, as it were, within that period. The affidavit in support of that application made no allusion to the period expired before the application was filed and did not explain it.

12. In MUTHONI NDUATI vs WANYOIKE KAMAU & 5 OTHERS [2004] eKLR Ochieng J rendered himself thus:

> *"In conclusion, I hold that the applicant has failed to satisfy me that the error complained of, (if indeed it is an error) is such as would be properly described as an error apparent on the face of the record. I also find that the Defendant has been guilty of unreasonable delay before filing the application Thus even if I were wrong on the question as to whether the error complained about could be properly described as an error apparent on the face of the record, I would still come to the conclusion that I would be unable to review the Judgment because of the inordinate delay in bringing the application".*

13. I need not say more. The application dated 2nd January 2014 is without merit. It is available for dismissal and I hereby dismiss it.

DATED, SIGNED and DELIVERED at NAIROBI this 14th DAY OF March, 2014.

W. MUSYOKA

JUDGE