



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MAKUENI**

**ELC SUIT NO.374 OF 2017**

**DIAMOND LAL BHANJI.....PLAINTIFF/APPLICANT**

**VERSUS**

**MARTHA MULEE TAALI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**FAIZA MBULA MULEE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ABDALLA KYALO MULEE.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**ZUENA MULEE.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**NGUI MULEE.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**SAVU MWANAHARUSI MULEE.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

1. The Plaintiff/Applicant moved this court vide his notice of motion application dated 06<sup>th</sup> August, 2020 and filed in court on 10<sup>th</sup> August, 2020 seeking the following orders: -

**1) Spent.**

**2) Spent.**

**3) THAT this Honourable Court be pleased to review its Judgment and consequential order issued on 22/5/2020 and thereafter make a determination.**

**4) THAT the cost of this application be in the cause.**

2. The application is expressed to be brought under Article 159 of the Constitution, Sections 1A, 1B, 3A and 80 of the Civil Procedure Act chapter 21 of the Laws of Kenya, Order 45 Rules, 1, 2, 3 Order 51 of the Civil Procedure Rules.

3. The application is predicated on the grounds on its face and is further supported by the supporting and supplementary affidavits of Diamond Lal Bhanji, the Plaintiff/Applicant herein sworn at Makueni on 06<sup>th</sup> August, 2020 and 18<sup>th</sup> September, 2020.

4. The Defendants/Respondents have opposed the application vide the replying affidavit of Martha Mulee Taali, the 1<sup>st</sup> Defendant/Respondent herein, sworn with the authority of the 2<sup>nd</sup> to 6<sup>th</sup> Defendants/Respondents. The replying affidavit is dated 10<sup>th</sup> September, 2020 and was filed in court on 11<sup>th</sup> September, 2020.

5. The application was canvassed by way of written submissions.

6. The Plaintiff/Applicant submitted that there exists apparent mistakes on the face of the record in the following terms: -

*i) That the 1<sup>st</sup> Defendant/Respondent admitted in evidence that the house of the suit property belonged to Applicant which fact this*

Honourable Court failed to consider in determining this matter by awarding the Applicant cost of constructing the house which fact was not disputed in evidence.

ii) That the Court mistakenly failed to consider the fact that documentary evidence was produced in Court pointing to the fact that the 1<sup>st</sup> Defendant/Respondent herein used to visit bank (KCB) together with the 2<sup>nd</sup> Defendant/Respondent to collect money sent by the Applicant via Western Union which evidence was also not disputed.

iii) That the Court appreciated the fact that the 2<sup>nd</sup> Defendant/Respondent used to work as a Casual Labourer and could have not build the said house which fact the Court did not consider.

iv) There exists documentary evidence pointing to 3<sup>rd</sup> Defendant/Respondent showing the Applicants beacons which fact the 1<sup>st</sup> Defendant/Respondent acknowledged by identifying the face of the 3<sup>rd</sup> Defendant/Respondent which fact this Honourable Court failed to consider.

v) It is clear from the evidence on record that the Applicant was evicted from the suit premises by the Assistant County Commissioner – KIBWEZI hence the Applicant was not in actual possession until his eviction.

vi) No evidence was whatsoever led by the 1<sup>st</sup> Defendant/Respondent or the 2<sup>nd</sup> Defendant/Respondent that they had been gifted the said house by the Applicant which fact this Honourable Court failed to appreciate.

7. The Plaintiff/Applicant went on to quote **section 80 of the Civil Procedure Act** which provides: -

*“80. Any person who consider 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 Judgement to the Court which passed the decree or made the order and the court may make such order thereon as it thinks fit.”*

8. He further quoted **Order 45 Rule 1 of the Civil Procedure Rules** which provides the grounds upon which a decree or order of a Court may be reviewed as follows: -

*“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,*

*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.”*

9. Arising from the above, the Plaintiff/Applicant submitted that an application for review can be brought before a court based on the following grounds: -

*a) Discovery of new and important matter or evidence which was not within the knowledge or reach of the Applicant.*

*b) Mistake or apparent error on the face of the record.*

*c) Any other sufficient reason.*

10. The Plaintiff/Applicant hastened to add that his application is based on the last two grounds provided for under **Order 45 Rule 1 of the Civil Procedure Rules** and urged the Court to consider the issues raised in the application and the supporting affidavit in arriving at a fair decision. He relied on the case of **Khalif Sheikh Adan vs. The Hon. Attorney General [2019] eKLR**.

11. In response to the Plaintiff's/Applicant's submissions, the Counsel for the Defendants/Respondents also cited **Section 80 of the Civil Procedure Act** and **Order 45 of the Civil Procedure Rules** and submitted that there is no new and important matter or evidence that could not be produced by the Plaintiff/Applicant before the judgement was made. The Counsel went on to submit that the issues raised are based on the fact that the Court did not consider the evidence that was before it which would be a ground for appeal in case the Plaintiff/Applicant is aggrieved. The Counsel added that the mistake or error apparent on the face of the record according to the Applicant are not in the Counsel's view present. The Counsel further submitted that an erroneous conclusion of law or evidence is not a ground for review but may be good ground for appeal.

12. The Counsel further submitted that in an application for review, the Court has to consider if there is sufficient reason to warrant the judgement (*emphasis are mine*).

13. The Counsel was also of the view that an Applicant must make an application for review under Order 45 of the Civil Procedure Rules without undue delay. The Counsel added that the Applicant did not attach the decree sought to be reviewed in his application.

14. The Counsel concluded by submitting that the Applicant is out to prevent the Respondents from enjoying the fruits of their judgement and as such the order for stay should not be granted. The Counsel urged the Court to dismiss the application with costs.

15. Even though the Counsel cited several authorities in her submissions, she produced only two namely **Veleo (K) Limited vs. Barclays Bank of Kenya Limited [2008] eKLR** and **Francis Origo & Another vs. Jacob Kumali Mungala [2000] eKLR**.

16. Having read the application together with the replying affidavit and the rival submissions, it is clear that the Plaintiff/Applicant seeks to have the Court review its judgement dated 22<sup>nd</sup> May, 2020 on the ground that it did not consider the documentary evidence that he produced to show that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondents used to visit Kenya Commercial Bank to collect money sent to them by him via Western Union while it was writing its judgement. That being the case, I would agree with the Counsel for the Defendants/Respondents that failure by the Court to consider such evidence cannot be a ground for review but rather a ground for appeal. It is clear that the Plaintiff/Applicant presented all the evidence that he had to the Court and it cannot be said that he discovered a new and important matter or evidence which was not within his knowledge when he presented his evidence in court. It is also clear that the Plaintiff/Applicant has not annexed a copy of the decree so as to warrant the review of the judgement in question. As for the application being presented close to three months after the judgement sought to be reviewed was delivered, I am in agreement with the Respondents' Counsel that although the period does not appear to be unreasonable, the Plaintiff/Applicant ought to have explained why it took him that long before he filed the application. In the absence of any explanation for the delay, I hold that the same was unreasonable.

17. The upshot of the foregoing is that the Plaintiff/Applicant is asking the Court to sit in appeal over its own judgement and this cannot be allowed. In the circumstances, therefore, my finding is that the application has no merits and I hereby proceed to dismiss it with costs to the Defendants/Respondents.

**Signed, Dated and Delivered at Makueni via email this 21<sup>st</sup> day of December, 2020.**

**MBOGO C. G.,**

**JUDGE.**

Mr. Munyao – Court Assistant