



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 113 OF 2018**

**(Formerly Machakos ELC Case No. 17 of 2011)**

**PENINAH NDEGE.....PLAINTIFF**

**VERSUS**

**JOSEPH NYANGAU BOGONKO.....1<sup>ST</sup> DEFENDANT**

**PENWEL N. NYAMWEYA.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Defendants' Notice of Motion application dated the 22<sup>nd</sup> November, 2016 and filed on 24<sup>th</sup> November, 2016. The application is brought pursuant to sections 1A, 1B, 3 and 3A of the Civil Procedure Act as well as Order 40 rules 1& 2, Order 51 rule 1 of the Civil Procedure Rules and all the other enabling provisions of the law. The Applicant seeks to review the Judgement of Justice Kariuki dated the 20<sup>th</sup> February, 2015 as well as the Orders of Justice Gitumbi dated the 28<sup>th</sup> October, 2016 dismissing an application for stay.

The application is premised on the grounds that Justice Kariuki was not gazetted nor appointed as an Environment and Land Court Judge. The Court in its ruling was of the apparent erroneous impression that the Appeal was from lower court where the Memorandum of Appeal is filed as opposed to High Court where only Notice of Appeal is filed. There is a mistake that the 1<sup>st</sup> Respondent did not respond to the allegations that no appeal has been filed yet.

The Application is supported by the affidavit of JOSEPH NYANGAU BOGONKO where he reiterates his averments above.

There seems to be no replying affidavit in the court file to oppose the application but both the

parties filed their respective submissions that I have considered.

**Analysis and Determination**

Upon perusal of the Notice of Motion application dated the 22<sup>nd</sup> November, 2016 and filed on 24<sup>th</sup> November, 2016 including the supporting and submissions herein, the following are the issues for determination:

- Whether the proceedings and Judgment delivered on the 20<sup>th</sup> February, 2015 should be reviewed.
- Whether the Orders dated the 28<sup>th</sup> October, 2016 should be reviewed.

It was the Applicant's contention that the Judge who proceeded to hear the matter and entered judgement was not gazetted to do so. Further, that the Judge who made a ruling dated the 28<sup>th</sup> October, 2016 made an error by failing to consider certain averments in the affidavit. The Applicant has relied on the case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati Vs Republic (2015) eKLR** to support his arguments.

The Respondent submitted that the instant applicant and the one dated the 4<sup>th</sup> March, 2015 where the Judge granted her ruling on 28<sup>th</sup> October, 2016 are similar. She insists the Defendant/ Applicant's remedy is to lodge an appeal and not review. She contends that application has been brought under wrong provisions of the law and that application for review is only brought when some new information has come to the knowledge of the Applicant which information was not available at the time of filing the application. Further, that no new issue has been

raised by the Applicant to be considered by the court.

Section 80 of the Civil Procedure Act provides:—**“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.”**

Further, Order 45, rule 1 (1) of the Civil Procedure Rules provides 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.**’

The Applicant seeks a review of the judgement dated the 20<sup>th</sup> February, 2015 and ruling dated the 28<sup>th</sup> October, 2016 while confirming that he has already lodged a Notice of Appeal. He had relied on the above cited decision of Karisa Chengo and submits that the Judge who delivered the Judgement did not have jurisdiction to do so. The requirements laid down for granting review are explicit in the Civil Procedure Rules and time is of essence. In the instant case, the judgement was delivered in February, 2015 and the applicant never sought its review until several years later. He has not explained the reason for the delay. For a Court to grant an order for review there has to be 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 the Applicant 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. From the materials presented, I am unable to identify any new materials presented to the Court to warrant a review of the judgement and the ruling dated the 28<sup>th</sup> October, 2016. As relates to the Case of Karisa Chengo which clarified the jurisdiction of the superior courts, I note the decision was made in October, 2016 which was over one year after the Judgment had been delivered in this matter, I opine that the trial Judge at that time was allowed vide the High Court Practice Directions to hear and determine land matters. It is my considered view that there was inordinate delay by the Applicant to lodge the instant application seeking to review and set aside the proceedings and Judgement, which delay, has not been explained. Further, he has already lodged an appeal and the decision of Karisa Chengo cannot apply retrospectively after the Judgment had been delivered and parties already applied to execute the Decree.

In the circumstances, I find the application unmerited and proceed to dismiss it with costs.

**Dated signed and delivered in open court at Kajiado this 25<sup>th</sup> February, 2019**

**CHRISTINE OCHIENG**

**JUDGE**