REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 135 OF 2017

STEPHEN MARIRA MWANGI.....PLAINTIFF/RESPONDENT

VERSUS

DAVID NJIRI STEPHEN.....1ST DEFENDANT /RESPONDENT

CELTEL KENYA LIMITED.....2ND DEFENDANT/ RESPONDENT

JAMES KARIUKI.....3RD DEFENDANT/APPLICANT

GEORGE KARUKU.....4TH DEFENDANT/APPLICANT

JOSEPH IRUNGU KANGATA.....5TH DEFENDANT/APPLICANT

COUNTY GOVERNMENT OF MURANGA.....6TH DEFENDANT/ RESPONDENT

THE NATIONAL LAND COMMISSION.....7TH DEFENDANT/ RESPONDENT

THE ATTORNEY GENERAL..... 8TH DEFENDANT/ RESPONDENT

RULING

1. The Notice of Motion was filed on the 16/10/2018 under Order 45 of the Civil Procedure Rules, Section 1, 3 and 3A of the Civil Procedure Act and all the other enabling provisions seeking the following orders;

    a. That the judgment entered on the 20/9/18 be stayed pending the hearing and determination of the application.

    b. The honourable Court be pleased to review the judgment entered on the 20/9/18 and rehear the matter.

2. The application is anchored on the grounds that;

    a. the Plaintiff has commenced execution by fencing off the suit land thus evicting the Defendant ahead of the period allowed by the Court.

    b. there is new and important evidence discovered by the Defendant. The new and important evidence could not be adduced as it was not available to the Defendants.

    c. that the Plaintiffs does not hold a good title to the land. It is owned by a third party.

    d. The suit land is not located at the place that the Plaintiff stated.

3. In support of the application the Applicant relied on the affidavit in support of George Karuku sworn on the 12/10/18 in which he deponed *inter-alia* that; the Plaintiff commenced eviction of the Defendants ahead of the time stipulated by the Court. That there is new and important evidence in their possession. That the judgment should be reviewed because the suit land is located at a different location from what the Plaintiff is claiming; the suit land is owned by the Catholic Diocese of Muranga and finally that the suit land is public utility land.

4. Further he deponed that the Defendants are defending public utility land whose documents are in the custody of the 6th and 7th Defendants

whom they sought to be enjoined in the suit. He claims that the said 6th and 7th Defendants have now produced the true facts of the suit land. He averred that the Plaintiff has no land to claim.

5. The Applicant has attached a number of letters marked GK-1 in support of the Supporting Affidavit.

6. The application is opposed. The Respondent stated that the Applicants have no locus to bring the application as they are not the owners of the suit land neither do they have power to declare any land as public utility land. He further charged that the application is a sham for purporting to enjoin the 6th - 8th Defendants after the judgment without first filing a proper application for joinder. That the Court is now functus official in the matter and no joinder can be actualized. In any event the Applicants had withdrawn an application for joinder dated the 22/1/18.

7. Further the Respondent averred that there are no grounds for review that have been adverted before the Court to warrant stay of judgment. No evidence has been adduced to show that the Applicants own the land nor that the suit land is public utility as alleged. It is not true that the suit land is owned by Muranga Catholic Diocese. The parcels are different, the one purported to be for the Catholic Diocese is Muranga Municipality/Block II/462 while the Respondents land is Muranga Municipality/Block 2/462. That the Applicants cannot purport to act for the said Catholic Church.

8. Finally, the Respondent stated that the application for stay of judgment is overtaken by events as all the illegal structures were removed after the expiry of 30 days from the date of judgment as ordered by the Court and therefore there remains nothing to be stayed.

9. Parties elected to file Written Submissions which I have read and considered.

10. The Applicants submitted that the new evidence contained in the correspondences marked GK-1 were obtained after the hearing and judgment and were in the custody of the 6th -8th Defendants. It is their submission that the said evidence was not available to the Applicants before and hence the same could not be adduced. They proffer reasons inter-*alia* for review; the title does not belong to the Respondent; the title is a duplication with that of the Catholic Church (MURANGA MUN/BLOCK II/462) and that the location of the Respondents land is not where the Respondent claims it is.

11. The Respondent submitted that the judgment of the Court was executed following which the Respondent has fenced off the plot and the Applicants have no access to the plot and as such there is nothing to stay.

12. Relying on the case of **Julian Adoyo Ongunga & Anor Vs Francis Kiberenge Bondeva (2016) EKLR** the Respondents submitted that none of the Defendants claim to own the land. Their position is that it belongs to the Catholic Church and yet they have not brought the claim in the capacity of the trustees of the Catholic Church and as such they have no locus to bring any claim on behalf of a party that is capable of suing for itself. In any event the ownership of the land was determined by the Court and that determination has not been varied, set aside or appealed against.

13. The Respondents submitted that the application purports to incorporate the 6th - 8th Defendants without leave of the Court having been sought and obtained thus rendering the application incompetent. Finally, the Court received submissions that the facts and evidence adduced are not sufficient to warrant a review of the judgment by the Court, as the Applicants have not demonstrated discovery of any new and important evidence not at their disposal in the course of the proceedings.

14. The issues for determination are;

a. Whether the Defendant has established grounds for review of judgment.

b. Whether the judgment should be stayed.

c. Whether the 6th - 8th Defendants are properly before the Court.

d. Costs of the application.

15. Order 45 rule 6(2) 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".

16. The operative tone of the above order demands that the application for review must be based on a). the discovery of new and important matter of evidence which after the exercise of due diligence was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made or b). account of some mistake or error apparent on the face of the record or c). any

other sufficient reason.

17. Review is a discretionary remedy and like all discretions must be exercised judiciously and not capriciously. In the case of **Shah Vs Mbogo (1979) EA 116** gives guidelines on the exercise of discretion. It states thus;

> "I have carefully considered in relation to the present application the principles governing the exercise of the Court's discretion to set aside a judgment obtained exparte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

18. When a review is sought on the ground of discovery of new evidence, the evidence must be relevant and of such a character that if it had been given in the suit it might possibly have altered the judgment. In the case of **Brown Vs Dean (1910) AC 373** Lord Loreburn stated that the new evidence must at least be such as is presumably to be believed, and if believed would be conclusive. Before a review is allowed on grounds of a discovery of new evidence, it must be established that the Applicant had acted with due diligence and the existence of the evidence was not within his knowledge. Where a review is sought on the ground of discovery of new evidence but was found that the Applicant had not acted with due diligence, it is not open to the Court to admit evidence on ground of sufficient cause. It is not to be supposed that the discovery of new evidence is by itself sufficient to entitle a party to a review of judgment. The provision relating to review contemplates grounds which would alter or cancel the decree.

19. In the case of Mzee **Wanjie & 93 others –vs- A.K. Sakwa & 3 others [1982-88] 1 KAR 465**, Chesoni, Ag JA enunciated the principles to be followed by a Court before which an application for review is made, where review is based on new and important matters. The following are the principles: -

> a. The Applicant must show that the evidence could not have been obtained with reasonable diligence for use at the trial;
>
> b. The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;
>
> c. The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

20. **In the case of D.J. Lowe & Company Ltd v Banque Indosuez Civil Appl. NAI. 217/98 (UR)** where the Court stated as follows: -

> **"Where such a review application is based on fact of the discovery of fresh evidence the Court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."**

21. What is the new evidence? The Court also referred to the **Black's Law Dictionary 8th Edition**, the word "new" as relates to the context of the application before me is defined as adj. (of a person, animal or thing) recently come into being; 2. (of anything) recently discovered" while the word "compelling" which is derived from the verb to compel" means "to come or bring about by force, threats or overwhelming pressure." In other words, new and compelling evidence is evidence that is being seen for the very first time and it must be overwhelming evidence.

22. The evidence should be compelling, admissible and credible and not merely corroborative, cumulative, collateral or impeaching. Such evidence must not only be favourable to the Applicant but it must be such evidence as is likely to persuade this Court to reach an entirely different decision from the decision already reached by the two appellate Courts. See **James Mwaniki Kamau v Republic [2018] Eklr 10/4/18.**

23. The background of the case is that the Court heard and determined the suit on 20/9/18. Its final orders were as follows;

> a. It is hereby ordered that the Defendants do demolish and remove the illegal structures on the suit land and voluntarily vacate the suit land within the next 30 days. In default the Plaintiff do so demolish and remove the structures at the cost of the Defendants.
>
> b. Further in default of a) above eviction to issue without further orders of the Court in strict compliance with the provisions of the Land Act.
>
> c. The Defendants shall meet the costs of the suit.

24. Aggrieved by the decision of the honourable Court the Applicant filed this application seeking orders for review and staying the judgment on the grounds that there is new and important evidence discovered which could not be adduced at the evidence, secondly that the Plaintiff does not hold good title and thirdly that the suit land is owned by the Catholic Diocese and fourthly that the land is public land and fifthly that the suit land is not located where the Respondent claims to be.

25. The Respondent responded by stating *inter-alia* that the application is an abuse of the process of the Court on account that it introduced new parties without the leave of the Court; the Applicant cannot assert a case for third parties while he has no locus to do so.

26. I have perused the documents that the Applicant is relying on as new and important matters. The letter dated the 3/5/2018 which sought

assistance from the National Land Commission, Muranga claimed that the Applicants have a rightful claim on the land as a public utility for social recreation and informed it that the land had been allocated to the Respondent and the same should be repossessed. On the 22/6/18 the Applicants wrote to Muranga County Government voicing the same complaint that the suit land has been grabbed by the Respondent who wields a fake lease document. Referring to map sheet No 135/1/24/5, that their search indicates that the plot is situate in a different locality from where it is claimed to be and again sought the help of the County to correct the irregularity so that the land would revert to public use.

27. The third letter dated 28/8/18 signed by the District Land Registrar and addressed to the National Land commission stated as follows;

> "MURANGA MUNICIPALITY BLOCK 2/462
>
> The above matter refers.
>
> Please note that according to our records the above parcel number has been duplicated. However the acreage and the location are different as per the district Surveyor".

28. Interestingly, the District Surveyor namely M W W Kibiru penned a letter addressed to the District Land Registrar on the 2/8/2008 as follows;

> "MURANGA MUNICIPALITY BLOCK 2/462 and 463.
>
> The above named parcels of land are surveyed and depicted on the RIM sheet No 150, 135/1/24/5 and FR No 221/68.
>
> The acreage of the said parcels are 1.0 and 0.1417 ha respectively.
>
> The ground position is clear and the beacons are well maintained on the ground".

29. I have also seen a certificate of official search dated the 28/8/18 in respect to MURANGA/MUN/BLOCK II/462, which indicates that the registered owner of the land is the Catholic Diocese of Muranga.

30. It is the Plaintiffs' case that the above documents were in the custody of the 6th - 8th Defendants and therefore were not available to them. I have perused the documents being referred to and it is rather obvious that the documents could have been obtained with a mere request or diligence during the currency of the case. The Applicants have not demonstrated that they sought the documents during the currency of the proceedings and could not find them. The Applicant is seeking to put documents before the Court with the intent to challenge the ownership of the Respondents title. This was the heart of the suit that was determined by the Court. One would have expected the Applicants as part of their presentation of the case to exercise due diligence and avail the documents to the Court. They are now doing it too late in the day.

31. It is the considered view of the Court that even if the evidence was to be credible, in this case the Applicant cannot assert a right on behalf of the Catholic Church. It has been observed by the Court that the title of the Respondent is Muranga /Mun/Block 2/462 while that purported to belong to the Catholic Church is Muranga/Mun/Block II/462. Could these be two different titles? The letter by the District Surveyor seems to be confirming that the suit land is surveyed and depicted on the RIM and that the ground position is clear and beacons are well maintained on the ground.

32. It is the view of the Court that the above evidence is not evidence that can persuade the Court to reach a different decision than the one that it already rendered.

33. The Court finds that the Applicant has not met the grounds of review and therefore there is no justiciable reason to set aside its decision.

34. With respect to the application for stay, the Respondent has stated in the affidavit before Court that execution was carried out. This Court finds and holds that there is nothing for the Court to stay. This prayer is overtaken by events.

35. The Court observes that the Applicant has enjoined the 6th-9th Respondents without seeking the leave of the Court. It has not been demonstrated what the rights or reliefs of these parties are and whether they are necessary or proper parties whose presence is necessary to enable the Court to effectively and completely adjudicate the issues in controversy. No evidence has been led to demonstrate that their personal, pecuniary or property rights or interests have been adversely affected by a Court's decree or decision. Exercising my discretion as righty as I should, I order that the names of the 6th-9th Defendants/Respondents be and are hereby struck out from the suit.

36. The application is not merited. It is dismissed with costs to the 1st -5th Respondents.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 21ST DAY OF MARCH 2019.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Plaintiff/Respondent – Absent

Defendant/Respondent 1 - Absent

Defendant/Applicant 2 - Absent

Defendant/Applicant 3

Defendant/Applicant 4 - Peter Muthoni HB for Njiraini

Defendant/Applicant 5

Defendant/Respondent 6

Defendant/Respondent 7 - Absent

Defendant/Respondent 8