REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 477 OF 2014

PENINA LYNET OLUMATIA ..... PLAINTIFF/RESPONDENT

VERSUS

LUKAS ORENDE OPAKE ..... 1ST DEFENDANT/APPLICANT

PROTUS OMBAKA SHITUBI ..... DEFENDANT

RULING

Pursuant to Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure rules 2010 and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya seeking the following orders;

1. That service of this application be dispensed within the 1st instance.

2. That further proceedings in this case be stayed pending the hearing of this application inter parties.

3. That this honourable court be pleased to set aside, vary and/or review its orders made on 15th October, 2018.

4. That upon granting of prayer (3) above of this notice of motion, the plaintiff/1st respondent and her witness recalled but limited for their cross-examination and thereafter the 1st defendant/applicant be allowed to testify and call his witnesses for this suit to be heard and determined on merits.

5. That the costs of this application be in the cause.

It is premised upon the following grounds that the non-attendance of the 1st defendant/applicant on 15th October, 2018 when this case was fixed for hearing was not deliberate. That though the said hearing date of 15th October, 2018 was taken by consent on 12th July, 2018 between the Advocates on record for the 1st defendant/applicant and plaintiff/1st respondent, the advocate on record for the 1st defendant/applicant inadvertently failed to advise his client to attend court for hearing and due to a pressing emergency personal issue he was attending to it escaped his mind also to attend himself for the hearing of the said case or instruct another advocate to hold his brief which was a mistake and/or error was by circumstances beyond his control and the said mistake and/or error should not be visited on the 1st defendant/applicant. That this application has been made in good faith and without delay upon discovery that that suit proceeded ex parte on 15th October, 2018. That orders being sought herein are necessary for all the parties to tender their evidence and/or call their witnesses and all the evidence to be tested on cross-examination to reflect the real and all issues in controversy for the hearing and determination of this suit on merit. No prejudice will be caused to the respondents if the orders sought herein are granted. The interests of justice dictate that the 1st defendant/applicant should not be condemned unheard.

The respondent submitted that the application herein lacks merit, it is vexatious, frivolous, a waste of the honourable court's precious time and the same ought to be dismissed with costs. That there is no urgency for the application before court, the applicant having been inordinately delayed to serve the same having been filed in court on the 10th November, 2018 and served upon his counsel on the 2nd March, 2019 a period of five months later and therefore the same ought to be dismissed. That the application herein is a mere after thought brought at the wake of the intended execution of the decree after the judgment in his favour. That the firm of M/s. Gichaba & Company Advocates are not properly on record as acting for the 1st defendant as they are offending the mandatory provisions of Order 9 of the Civil Procedure Rules. That the application is brought in bad faith and it is aimed at aiding the defendants to prolong the due conclusion of this ancient matter and therefore the same ought to be dismissed with costs. That the application before court is further a mere afterthought, brought up by the applicant to portray his counsel and this court in bad light for no reason with devoid of good and reasonable sufficient grounds to secure the intended orders and therefore the same ought to be dismissed with costs. That the applicant's application ought to be dismissed with costs as the applicant wants to hide in court with soiled hands and wants to use this application to shield himself from meeting his contractual obligations that he owes him jointly with his co-defendant. That when this matter came up for hearing on the 12th July, 2018 the same did not

proceed for full hearing as the 2nd defendant had not been served with the hearing notice for that day. That the 1st defendant who is his neighbor who resides on the suit land was present in court on the said date and when their case was being fixed by consent for hearing on the 15th October, 2018 the said date was clearly explained to them and their advocates in a very audible and understanding manner. That the 1st defendant was well aware of the hearing date i.e. the 15th October, 2018 and whether counsel on record wrote to him or not he ought to have attended court for the hearing date herein. That equally the 2nd defendant was served and was well aware of the hearing date for the 15th October, 2018 but also declined to attend court. That it is therefore false and misleading the honourable court for counsel to allege that the 1st defendant failed to attend court because he was not informed or communicated to the hearing date in question and the 1st defendant has not personally denied by any evidence in this court that he was not aware of the hearing date in question. That the date for hearing herein was properly and procedurally fixed by consent as on record and was within the knowledge of all the parties herein and the 1st defendant has not denied it save for his counsel on record.

This court has considered the application and the submissions therein. In the case of Kwame Kariuki & Another Vs. Mohamed Hassan Ali & 4 Others [2014] eKLR, the Court observed that:-

> *"It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal."*

In the case of *Mwihoko Housing Company Limited Vs Equity Building Society [2007] 2 KLR 171* is relevant. It was held, that;

> *"A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;*

> *"An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made…"*

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-*
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> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
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> *(b) by a decree or order from which no appeal is hereby allowed.*
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> *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-*
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> *(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. I see no mistake or error or omission on the part of the court when it found this suit was res judicata. 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 submitted that the non-attendance of the 1st defendant/applicant on 15th October, 2018 when this case was fixed for hearing was not deliberate. That though the said hearing date of 15th October, 2018 was taken by consent on 12th July, 2018 between the Advocates on record for the 1st defendant/applicant and plaintiff/1st respondent, the advocate on record for the 1st defendant/applicant inadvertently failed to advise his client to attend court for hearing and due to a pressing emergency personal issue From the above provisions of the law, authorities cited and facts of this case I find that the applicant has failed to show any mistake or error apparent on the face of record and/or any sufficient reason to enable this court set aside its decision. The application is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH JUNE 2019.

N.A. MATHEKA

JUDGE