REPBUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO. 273 OF 2017

PAUL MAINA KIRUNGUI.....1ST PLAINTIFF /APPLICANT

GRACE WANGUI KIRUNGUI.....2ND PLAINTIFF/APPLICANT

VS

MERCY MUTHONI KIRIGI Sued as administrator of the

Estate of JORAM KIRIGI GACHUNA).....1STDEFENDANT /RESPONDENT

THE LAND REGISTRAR, MURANGA.....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a notice of motion filed by the Applicants on the 26/11/18 seeking the following orders;

    a. That this Court be pleased to review its ruling herein on 31/10/18

    b. That the cost of the application be provided for.

2. The application is based on the grounds that after the ruling was delivered the Applicants found new evidence which after the exercise of due diligence was not within their knowledge and could not be produced by them in time when the order was made. That the application has been brought without any delay

3. The application is supported by the affidavit of the 1st Applicant dated the 19/11/2018. In it the Applicant deponed that they noticed that their Advocate on record then J M Kagwi was not attending Court to prosecute their matter and therefore decided to withdraw instructions and instruct another one. That in December 2017 he received a message from his then Advocate J M Kagwi that the matter would be mentioned on 31/1/18 and that he should engage another Advocate to handle the matter. He went to his Advocates office on the 8/3/18 and withdrew instructions and collected his file. In the file he noted that the last mention notice was dated the 20/12/17 when the matter was to be mentioned on 31/1/18. He argues that there is nothing in the Advocate's file to show that there was a notice to show cause. That the notice to show cause dated the 2/2/18 directing the parties to appear for notice to show cause on 19/3/18 is missing in his file. They contend that they were not aware/notified of the same as they would have advised their Advocate to attend Court for the notice to show cause. He pointed out that it may be the reason why their new Advocate did not allude to it in the NM dated 3/4/18 seeking to reinstate the suit.

4. The application has been resisted by the 1st Respondent vide their Replying Affidavit sworn by Mercy Muthoni Kirigi on the 22/1/19 wherein she deposed that the Notice of Motion is baseless for the following reasons; no new discovery of new matter has been made by the Applicants and therefore the application falls below the requirements of Order 45 Rule 1 of the Civil Procedure Rules; the allegations that the matter was not listed for notice to show cause was raised in the previous application that was determined by the Court and therefore there is nothing new; it is evidence that the plaintiffs were aware that the suit was coming for hearing of notice to show cause on the material date and that may be the reason why their Advocate averred that he attended Court on the 19/3/18.

5. The 2nd Respondent did not challenge the application.

6. The Applicants submitted and reiterated the evidence tendered in the 1st Applicant's supporting affidavit. He submits that there is no notice in the file issued on the 2/2/18 directing them to appear in Court on the 19/3/18 for notice to show cause. That if there was they would have instructed their Advocates to attend Court. *Interalia* that their then Advocates on record did not notify them of the NTSC and if they had they would have in turn advised their present Advocate. It is their submission that the notice to show cause was not known to them and therefore the same could not have been advanced by their counsel at the time the application was prosecuted. They reiterate that the suit did not fall under the ambit of Order 17 Rule 2. That no hardship will be suffered by the Respondent if this application is allowed. They contend

that they were present in Court on the 19/3/18 when their new Advocate was not given any audience by the Court and they themselves were not given a chance to explain the absence of the Advocate on record. Further the matter involves family land and the parties should be given a chance to be heard on merits and that the award of costs shall suffice to compensate the Respondents. They blame their previous Advocate for not attending Court and state that that is the reason why they instructed a new one.

7. The 1st Respondent submitted that the application is an abuse of the process of the Court in that no discovery of new evidence was presented. The single issue raised by the Advocate is that in his own file there is no notice to show cause for 19/3/18. She submitted that according to the affidavit of the Applicant's Advocates, both the 1st Plaintiff and his Advocate were aware of the notice to show cause for 19/3/18. He cannot therefore hold that he was unaware.

8. Order 45 Rule 6(2) provides as follows;

> "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, 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. 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.

10. 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 judgement. The provision relating to review contemplates grounds which would alter or cancel the decree.

11. 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;
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> 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;
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> 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.

12. **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."**

13. What is the new evidence? The Court also referred to the **Blacks 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.

14. 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**

15. In this case the evidence that the Applicants are terming new discovery is that in their own case file retrieved from their previous counsel Messrs. J M Kagwi, the only notice is the mention notice dated 20/12/17 which directed the parties to appear in Court on the 31/1/18. They have annexed this notice to the supporting affidavit of the 1st Applicant as PK1. That perusal of their said case file does not disclose or show

anywhere that the matter was coming up for notice to show cause. That the Notice to show cause dated he 2/2/18 directing parties to appear in Court to show cause why the matter should not be dismissed is missing in their said file. This was their anchor argument in support of the Notice of Motion dated 3/4/18, para 14 of the supporting affidavit of Stephen Walter Kaai wherein he deponed that the matter was coming up for mention for directions and the submissions thereto when they stated that the plaintiffs had not been served with the notice to show cause.

16. For the record the notice to show cause was issued on the 2/2/18 directing parties to attend Court on 19/3/18 and show cause why the suit should not be dismissed. The same was served on the firm of J K Kagwi, Advocates on record for the Applicants then who received the notice on the 22/2/18 and signed by one Elizabeth of that firm. It is to be noted by the Court that the Applicant did not call the said Elizabeth to proof whether or not the notice to show cause was indeed served on the firm pursuant to Order 45 (3) (2). This order provides that the allegation of discovery of new evidence must be strictly proofed by the Applicant.

17. This information is on the Court record which is a public record and it behoved the Applicants and/or their Advocates to have perused the Court file before taking any steps .Had they taken that direction , which a reasonable litigant and an officer of the Court could do before taking up a case , then the plaintiff would not be in a hurry to file his letter indicating that he had withdrawn instructions from the firm of J.M Kagwi in a dead suit .Again, his new Advocates could have come prepared for notice to show cause on 19/3/2018 and probably filed their papers to give them audience .The information was readily available , they did not apply due diligence. If indeed it is true that the current Advocates were in Court (which is doubtful as there is no supporting evidence) then he must have known that the case was coming for notice to show cause. If he appeared in Court without formally filing a Notice appointment, then rightly, he would not have a right to address the Court on behalf of the Applicant given that at that time J M Kagwi was still on record for the Applicant. On what basis then did he allege that the case was for directions? The Notice for mention that he is referring to is dated the 20/12/17 directing parties to appear in Court on 31/1/18. The conclusion is that the Applicants and their counsel were aware of the notice to show cause and that their application is an attempt to mislead the Court.

18. The conduct of the Plaintiff suggests that there had been laxity in prosecuting this case, he was woken up from his long slumber when the suit was dismissed. Their argument that this is a land matter and the Applicants should be heard is untenable. I agree with the dictum of the Court in the case of **Peter Kinyari Kihumba vs Gladys Wanjiru Migwi & Another C.A Civil Application No. NAI 121 of 2005 (6/05NYR) (*unreported*)** Waki J.A, held at page 3 that;

> " With respect, l think the Applicant and his counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended to them. The plea they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation. It is for the reason that it was a land matter that it should have been handled with the sensitivity and diligence that entails such matters. Instead the Applicant and his advises exhibited undesirable nonchalance, which l am not inclined to countenance"

19. The Plaintiff cannot blame his Advocate since the provisions of Order 1 A also gives him responsibility in apt and timeous disposition of cases within the minimal resources of this Court in the case of **Alice Mumbi Nganga vs Danson Chege Nganga & Another (2006) Eklr** the Court stated;

> "This Court has unfettered discretion to set aside any order which was entered *exparte.* This discretion however, has to be exercised judicially. The Applicant must satisfy this Court that she has good reasons why she failed to attend Court when the said application for dismissal was heard and determined in her absence. ……In the first place, she cannot blame her counsel who was then on record for failing to attend Court when the said application was listed for hearing. This Court has ruled in several cases that a civil case once filed, is owned by a litigant not his Advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to Court and say that he was let down by his Advocate when a decision adverse to him is made by the Court due to lack of diligence on the part of his Advocate. I think it has been ruled by the Court of Appeal that where an Advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an Advocate for professional negligence. The mistake of Counsel will not, *perse*, make this Court to exercise its discretion in favour of an aggrieved litigant."

20. The Court in its considered ruling delivered on the 31/10/18 analyzed the Court record including the notice of mention dated the 20/12/17 and the notice to show cause dated 2/2/18 and reached the decision that it did. Bringing up these documents in the guise of new discoveries will not change the decision arrived at by the Court.

21. I have reviewed the matter further to see if there is any other sufficient reason existing that would merit a review of the orders made on the 31/10/18. The failure of his former Counsel to advise of the notice to show cause cannot be said to be any other sufficient reason to warrant granting a review. Where no ground for review exists, as is the case here, I can do no better that to fall back on Order 45 (3) (1) which enjoins this Court to dismiss the application for review in such circumstances.

22. Was the order being sought for review presented before the Court? The Court found that the order being sought to be reviewed was not exhibited as provided for by the rules of the Civil Procedure Rules. The opening words of Order 45 states that any person considering himself aggrieved by an order or a decree from which an appeal is allowed , but from which no appeal has been proffered may file a review. In the case of **Gullamhussein Mulla Jivanji & Another versus Ebrahim Mulla Jivanji & Another 1929-1930 KLR (Vol XII) 41**. The Court of Appeal for Eastern Africa in that case held:

> " Apart from any consideration whether the course adopted by the learned Judge in relation to the ex parte order of the 8th July, 1930, was or was not well founded, the question emerges as to the precise character of the grievance which must be experienced by a person applying for a review of judgment under Order XLII. A person applying for a review under that order must be "aggrieved by a decree or order." The words "decree" and "order" are here used in the sense set out in the definitions in sections 2 of the Civil Procedure Ordinance. Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree his application should be for review of the judgement upon which it is based. But, in my opinion, however aggrieved a person may be at the various expressions contained in a judgement or even at the various rulings embodied therein, unless that person is

> aggrieved at the formal decree or the formal order based upon judgment as a whole, that person cannot under Order XLII appear before the Judge who passed the judgement and argue whether this or that passage in the judgment is tenable or untenable. The ratio *decidendi* expressed in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievance to a party to the suit. In these proceedings no resultant decree on the 29th August, 1930, had yet come into existence. Indeed no attempt to draw up any has yet been made. It is the duty of a party who wishes to appeal against, or apply for review of a decree or order to move the Court to draw up and issue the formal decree or order (underlying mine)".

23. Another gap observed from the Notice of Motion is that the Applicant current Advocate did not comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules which require that when there is a change of Advocate or when a party decides to act in person, after judgment has been passed such change or intention to act in person shall not be effected without the order of the Court upon application with notice to all the parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person. In this case there is no evidence on record to show that the current Advocate sought the leave of the Court nor was there a consent between him and the previous Advocate. This is more so that he filed his notice of appointment after the suit had been dismissed. It is trite that a dismissal is a judgment and any Advocate seeking to come on record should comply with Order 9 Rule 9 which is couched in mandatory terms.

24. Whichever way the Notion of Motion is looked at it is for destined to fail. I would accordingly dismiss the Notion of Motion dated the 26/11/18.

25. The costs shall be borne by the Applicants.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 24TH DAY OF JUNE 2019.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Kebuka Wachira HB for Kaai for the 1st and 2nd Applicants

1st Respondent – Absent/Served

2nd Respondent – Attorney General is absent

Kuiyaki and Njeri, Court Assistants