REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 106 OF 2015

LAURENT TENDWA LIPWAMO.....PLAINTIFF/RESPONDENT

VERSUS

BON SHILOYA IKOHA.....DEFENDANT/APPLICANT

RULING

The application is dated 10th April 2019 and is brought under Section 80 of the Civil Procedure Act seeking the following orders;

1. That the honourable court be pleased to review its orders made on 21st February, 2018 dismissing this suit and specifically provide for costs to the applicant/defendant.

2. That the costs of this application be provided for.

This application is based on the grounds that upon the applicant/defendant being served with the pleadings in this case the applicant/defendant instructed Counsel who filed papers in response and has always attended court. That the plaintiff/respondent's case was dismissed on 21st February, 2018 because even after the plaintiff/respondent had been given the last chance the plaintiff/respondent was not ready to proceed with his case. That on 21st February, 2018 when the case for the plaintiff/respondent was dismissed Counsel for the plaintiff/respondent had actually applied for an adjournment and Counsel for the defendant/applicant has opposed the application. That though costs ordinarily follow the event, it is fair for the honourable court to specifically pronounce on costs for clarity before this file is ultimately closed. That this application has merit and it is made in good faith.

The respondent submitted that the application is an abuse of the court process and the same should be dismissed. That not every decision of the court qualifies for review as review can only be granted if the applicant has discovered a new fact, which was not available to him when the decision was made and in this case, no new evidence has been shown to exist which evidence the applicant could not apply due diligence to inform the court. That indeed there is no error apparent in the decision of the court which can be reviewed. That though costs follow the event they are discretionary and the application does not show that the court erred in its discretion not to award costs to any of the parties. That this application is belated and made in bad faith and it does not enhance the course of justice.

This court has considered the application and the submissions herein. The application is that, the plaintiff/respondent's case was dismissed on 21st February, 2018 because even after the plaintiff/respondent had been given the last chance the plaintiff/respondent was not ready to proceed with his case. That though costs ordinarily follow the event, it is fair for the honourable court to specifically pronounce on costs for clarity before this file is ultimately closed. **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-

(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.

(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-

(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 dismissed the suit with no orders as to costs. 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".

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 award of costs is discretionary. The application has no merit and it is dismissed with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD JULY 2019.

N.A. MATHEKA

JUDGE