



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 38 OF 2012

JOSEPH OUMA ONDITI.....PLAINTIFF

VERSUS

JANE KISAKA MONG'AU.....DEFENDANT

RULING

1. The application dated 8/5/2019 which was filed in court on 9/5/2019 has been brought by the defendant seeking the following orders:-

(1) ...spent

(2) That leave be granted to the firm of Ombati Otieno & Co. Advocates to come on record for the defendant/applicant in place of David Ingosi & Co. Advocates.

(3) That the notice of change of advocates filed together herewith be deemed properly filed and served.

(4) That the court be pleased to issue stay of execution of the judgment delivered on the 31/7/2017 and the resultant decree in the suit herein pending hearing and determination of the application herein.

(5) That the court be pleased to review and set aside its orders issued on the 23/4/2018.

(6) In the alternative, the court be pleased to issue stay of further proceedings in this suit pending hearing and determination of the applicant's appeal against the foreshadowed suit.

(7) Costs of the instant application be provided for.

(8) The court be pleased to issue further orders it deems just and appropriate.

2. The applicant has brought the application under the provisions of *Section 1A, 1B, 3A 63(e)* of the *Civil Procedure Act, Order 9 Rule 9 and 10, Order 51 Rules 1, 2, 3 and 4, Order 42 Rule 6, Order 45 Rule 1 of the Civil Procedure Rules 2010.*

3. The grounds upon which the application is made are that an appeal has been filed against the decision of this court; that a new advocate has been instructed by the defendant/applicant; that a previous application for stay of execution dated 22/1/2018 was dismissed by this court; that the defendant/applicant erstwhile advocate failed to file the application for stay within a reasonable period as contemplated by law which led to the dismissal of the application thus the applicant should not be punished for the mistake of his counsel which in any event he was not as a client aware of; that for 7 months the applicant has sought in vain to know from her erstwhile advocate why the application was dismissed but the advocate has failed to honour appointments to discuss the dismissal; that the defendant/applicant was unable to personally obtain the ruling from the court registry as the registry referred her to her advocate and having been failed by her erstwhile advocate, she has now engaged the services of a new advocate. She attributes the delay in bringing the instant application to lack of funds and maintains that in her view the application has been brought within a reasonable period considering the difficulties outlined above and therefore this court should exercise its discretion in her favour failure to which substantial and irreparable damage may result as her house is on the suit land and if it is demolished and eviction issues, the appeal shall be rendered nugatory.

4. The application is supported by an affidavit of the defendant dated 9/5/2019 which largely reiterates the grounds above.

5. The plaintiff is opposed to the defendant's application and prays that the same be dismissed with costs on the following grounds:

(1) The application is *res judicata* as the main relief sought therein namely an order for stay of the proceedings in this matter pending the hearing and determination of the defendant's appeal to the Court of Appeal is substantially the same relief

which was sought in the defendant's application dated 22/1/2018 which was heard and dismissed by this court for lack of merit.

(2) There is no ground for reviewing and/or setting aside the orders made by this court on 23/4/2018.

(3) The application having been brought more than a year and 10 months after judgment was delivered in this matter and more than a year after a similar application was dismissed by this court has been brought after inordinate and inexcusable delay.

(4) The application is an abuse of the court process as it is merely intended to unfairly delay the plaintiff's enjoyment of the fruits of his judgment.

6. The defendant filed a further affidavit dated 21/6/2019 adding that the order which she was asking the court to review was delivered on 23/4/2018.

7. The defendant filed written submissions on 18/6/2019. Counsel for the plaintiff stated that they would not file submissions. I have considered the application and the response including the defendant/applicant's submissions.

8. The instant application is essentially for review of order of this court. **Order 45 rule 1 (1)** of the **Civil Procedure Rules** 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."

9. To deserve an order of review an application therefore an applicant must demonstrate that:

(a) There is discovery of new and important matter or evidence which after the exercise of due diligence was not within an applicant's knowledge and which could not be therefore produce at the time the order was made, or

(b) Some mistake or error apparent of the face of the record, or

(c) Any other sufficient reason.

10. It is critical that the reasons advanced by the applicant be assessed to determine if they fit into any of the categories above.

11. First the applicant blames her erstwhile counsel for firstly, failing to bring the application dated 22/1/2018 before court without unreasonable delay as contemplated by law, and secondly, failing to effectively outline and convince court as to what occasioned delay in the filing of the application dated 22/1/2018.

12. The first limb of this ground does not aid the applicant's case in so far as that revelation and justification that the delay was occasioned not by her but by her advocate is being made in this application and not in the first application dated 22/1/2018. If it had been made in that application, it may have been of assistance to her.

13. Indeed the applicant herself admits in the instant application that her erstwhile advocate never brought up the issue of his alleged dilatory conduct to the attention of the court while urging the application dated 22/1/2018. Whether the applicant was then aware of a mistake committed by her advocate or not that led to that delay is immaterial in respect of the current application. I summarily reject that ground.

14. The second limb of the same ground is that the applicant's counsel failed to convince the court, while arguing the application dated 22/1/2018 as to what occasioned the delay.

15. In respect of that second limb, I do not need to search far and wide to discover whether this ground falls under the category of discovery of new and important matter or evidence within the meaning of **Order 45 rule 1** of the Civil Procedure Rules. It clearly does not because failure of the counsel to do so occurred during the presentation of that application whereas the explanation needed for the delay occurred earlier. In my view it does not also by any stretch of imagination fall in the second category of "*mistake or error apparent of the face of the record.*" I will examine whether it falls under the category of "*any other sufficient reason*" later in this ruling.

16. The other grounds that the applicant advances are principally aimed at explaining why this application was brought after a hiatus of one and half years. She posits that the main reason is that her erstwhile advocate played hide-and-seek after her application dated 22/1/2018 was dismissed and failed to explain the ruling to her, and that she finally ended up terminating his services and engaging another counsel. She also claims that lack of funds contributed to the delay. In my view these grounds may be genuine, but they are relevant only to explain the delay in the instant application. This court is on a mission to find out if there is discovery of new and important matter or evidence or error

apparent on the face of the record, and only in so far as the proceedings that led to the dismissal of the application dated 22/1/2018 are concerned; in my view these grounds do not aid the review aspect of the applicant's instant application.

17. As to whether the first two grounds relating the conduct of the applicant's former counsel are concerned and whether they fit into the category of "*any other sufficient reason*," I must cite the words of Mativo J in **Stephen Gathua Kimani -vs- Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR** where he cited the case of **Ajit Kumar Rath -vs- The State of Orisa & Others, 9 Supreme Court Case 596:**

"Discussing the scope of review, the Supreme Court of India in the case of Ajit Kumar Rath vs State of Orisa & Others had this to say:-

"The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "*any other sufficient reason*" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule."

18. Later on in his judgment in that case he stated as follows:

"In other words I am not persuaded that the reason offered amounts to "sufficient reason" within the meaning of the rules cited above nor is it an analogous or *ejusdem generis* to the other reason stipulated in Order 45 rule 1."

19. I am persuaded by the reasoning in the above cited case. In other words while a court of law is considering whether a ground amounts to "*sufficient reason*" within the contemplation of **Order 45 rule 1** it must be so closely connected or arising out of similar circumstances or related to grounds provided for under the category of "*discovery of new and important matter or evidence*" or "*error apparent on the face of record*."

20. The upshot of the above is that none of the grounds advanced by the applicant warrant a review of the order of dismissal of the application dated 22/1/2018. The applicant's application dated 8/5/2019 has no merit and the same is dismissed with costs.

Dated, signed and delivered at Kitale on this 30th day of September, 2019.

MWANGI NJOROGE

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Oduor holding brief for Otieno for Applicant

Mr. Bisonga for the Respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/9/2019