REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 236A OF 2013

THE METHODIST CHURCH OF KENYA REGISTERED TRUSTEES

BISHOP MUKU

JOYCE J. KINOTI

JAMES KIBITI.....APPELLANT/APPLICANT

VERSUS

DAVID MWEBIA MUTHAMIA

M'INOTI M'MWARI

HELLEN MWARI.....RESPONDENT

RULING

1. The Notice of motion before me is the one dated 1st April 2019 brought pursuant to ***Order 45 of the Civil Procedure Rules 2010, Article 159 and Section 80 of the Civil Procedure Act***. The applicant seeks orders of stay of execution of the decree in Meru C.M.C.C 349 of 1999 and an order for review and setting aside of this court's ruling of 20th November 2018 (the ruling was actually delivered on 28.11.2018) dismissing this appeal. Applicant urges the court to set the suit down for hearing.

2. The application is supported by grounds stated on the face of the notice of motion and the supporting affidavit. It is contended that parties were in agreement that the lower court file was missing but now the file has re-surfaced. The respondent has through their agent proclaimed the properties of the Methodist Church of Kenya which is not a party to this suit. The applicants urges the court to review its orders and reinstate the appeal since the lower court file has been found and be heard on merit.

3. The application was opposed through the replying affidavit of Hellen Mwari filed, where she has deponed that the application is an abuse of the court process and a delaying tactic considering the matter is over 20 years old in court. That the application lacks merit since the appellants were afforded the chance to prepare the Record Of Appeal since 2016 but they neglected to do so necessitating the dismissal.

4. This matter was canvassed by way of oral submissions. The applicant and respondent submitted by reiterating what they had stated in their respective affidavits.

5. The issue for determination is whether to review and set aside the court order of 20.11.2018 dismissing the appeal and whether to grant a stay of execution.

6. **Section 80 of the Civil Procedure Act** states that:

> ***"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."***

7. **Order 45 Rule 1 of the Civil procedure Rules** goes ahead to stipulate on what grounds such an order may be granted:

> ***"Any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred ; or by a decree or order from which no appeal is 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."*** [Emphasis added]

8. In this application the applicant seeks the review and or setting aside of the order of 20.11.2018 where the suit was dismissed. However, no suit was dismissed on 20.11.2018. The order for dismissal was made on 28.11.2018. However, this is not fatal as suggested by the respondent. The Court of Appeal in the case of ***Peter Kirika Githaiga & another v Betty Rashid [2016] eKLR*** stated that:

> ***"Of course an order or decree is the formal expression of the decision of the Court. An order emanates from a ruling whereas a judgment gives rise to a decree and should ordinarily be extracted. As already stated, Order 45 (1) does not expressly provide that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the Court's attention to that part of the ruling or judgment which he complains of, since such decision would be on the Court file anyway, the application for review cannot be rendered fatally defective."*** *[Emphasis added]*

9. However, for an application of review to succeed, an applicant must satisfy any of the three criterions laid down under ***Order 45 Rule 1 of the Civil Procedure Rules***, which are:

> ***a) discovery of new and important matter or evidence that was not within the applicant's knowledge or could be produced at that time.***
>
> ***b) mistake or error apparent on the face of the record***
>
> ***c) any other sufficient reason.***

Provided the application is filed without unreasonable delay.

10. In the case of **Jeremiah Muku Methodist Church of Kenya Registered Trustees & Another (2009) eKLR,** it was stated that;

> ***"The three conditions for applying for a review of either the decree or order of court may be summarized from the above rule 1(1) of Order XLIV of the Civil Procedure Rules as – Firstly the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time the decree was passed or the order was made; secondly; on account of some mistake or error apparent on the face of the record, or thirdly; any other sufficient reason".***

11. The reason advanced by the applicant as to why they could not appeal was unavailability of the lower court file to make their Record Of Appeal which file has now appeared. I have perused the ruling of 28.11.2018 which triggered the present application where I stated as follows;

> ***"It is not this court's file which went missing, it is the lower court's file. There is nothing to indicate that the appellant made any efforts before the trial court to have the file reconstructed. By the time I was giving directions on the hearing of the application in May 2018, there was no tangible evidence on how the appellant intended to prosecute this application. I therefore find that the delay is inexcusable, more so because the appellants waited until the said application was filed to raise their excuse."***

12. The issue of availability (or unavailability) of the lower court file is not a new issue. It was aptly captured in the ruling of 28.11.2018. From the foregoing, I am of the view that the application is unmeritorious and the same is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF SEPTEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Kirimi for applicant

Mutunga for respondent

Appellants

1 & 3rd respondents

HON. LUCY. N. MBUGUA

ELC JUDGE