



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 249 OF 2014

(FORMERLY EMBU HCC 16B OF 2004)

LEONARD MUTHIKE NJUKE.....PLAINTIFF

VERSUS

PAUL NDAMBIRI NJAGI.....1ST DEFENDANT

ELIZABETH RUGURU NJAGI.....2ND DEFENDANT

RULING

1. By a notice of motion dated 27th March 2019 purportedly grounded upon “**Section 21 of the Civil Procedure Rules**” the Plaintiff sought the following orders:

- a) *That this honourable court be pleased to review its judgement dated 14th March 2005.*
- b) *That this honourable court be pleased to find the 2nd Defendant as jointly and severally liable with the 1st Defendant.*
- c) *That costs of the application be provided for.*

2. The said application was based upon the grounds set out in the body of the supporting affidavit sworn by the Plaintiff on 27th March 2019. It was contended that although the relevant sale agreement for the purchase of 1½ acres out of *Title No. Ngariama/Ngiriambu/1851* (hereafter *the suit property*) was between the Plaintiff and the 1st Defendant, the suit property was in fact registered in the name of the 2nd Defendant. It was further contended that the 1st and 2nd Defendants were husband and wife and that the purchase price was used to settle the medical bills of the 2nd Defendant. The Plaintiff’s case was that it was the 2nd Defendant who had authorized the 1st Defendant to sign the sale agreement on her behalf hence should be held jointly liable with the 1st Defendant.

3. By his judgement dated 14th March 2005, the Hon. Justice Isaac Lenaola found the 1st Defendant liable to refund the purchase price of Kshs.135,000/- to the Plaintiff. The court, however, exonerated the 2nd Defendant from legal liability since it found as a matter of fact that the Plaintiff had made the sale agreement with the 1st Defendant only and that the purchase price was paid solely to him.

4. The Defendants filed a replying affidavit sworn by the 2nd Defendant on 1st October 2019 in opposition to the said application for review on three main grounds. First, that the decree sought to be reviewed was more than 12 years old hence statute barred under the **Limitation of Actions Act (Cap. 22)**. Second, the judgement and decree of the court exonerated the 2nd Defendant from any legal liability. Third, that a challenge to the dismissal of the Plaintiff’s claim against the 2nd Defendant could only be mounted by way of appeal.

5. When the said application was listed for hearing on 24th September 2019 it was directed that the said application be canvassed through written submissions. The Plaintiff was granted 14 days to file and serve his written submissions whereas the Defendants were granted 14 days to file and serve theirs. The record shows that the Plaintiff filed his submissions on 3rd October 2019. However, the Defendants’ submissions were not on record by the time of preparation of the ruling.

6. The correct provision of the **Civil Procedure Rules** (*the Rules*) applicable to the instant application for review is **Order 45 of the Rules**. The material provisions of **Rule 1** thereof stipulate that:

(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.

7. The court is of the view that the following issues arise for determination in this application:

- a. Whether the judgement and decree of the court dated 14th March 2005 is statute barred.
- b. Whether the Plaintiff has demonstrated any of the grounds for review set out in **Order 45** of the Rules.
- c. Whether the application for review was filed without unreasonable delay.
- d. Who shall bear the costs of the application.

8. The court has considered the material on record on the first issue. There is no doubt that the decree herein was passed on 14th March 2005 which is more about 14 years ago. At the time of filing the application for review, the decree was already more than 12 years old.

9. The court has considered the relevant provisions of the **Limitation of Action Act (Cap. 22)**. **Section 4 (4)** thereof stipulates as follows:-

“(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

10. The said **Act** does not define what an *action* is. The **Civil Procedure Act (Cap. 21)** and the Rules do not define the term *action* either. However, the interpretation and **General Provisions Act (Cap. 2)** defines an action to mean “any civil proceedings in a court and includes any suit as defined in Section 2 of the Civil Procedure Act (Cap. 21)”. On the other hand, **Section 2** of the latter defines a suit as “all civil proceedings commenced in any manner prescribed.” The term **prescribed** is defined to mean “prescribed by the Rules.”

11. The court is of the opinion that the decree dated 14th March 2005 became statute barred under **Section 4 (4) of the Limitation Action Act (Cap. 22)** on or about 13th March 2017 hence it is unenforceable. The court is further of the view that no action for its enforcement or review may be brought with respect thereto in view of the said statutory limitation. See **Mary Osundwa Vs Nzoia Sugar Company Ltd [2002] eKLR**.

12. The court is further of the opinion that it would be futile to review a decree which is statute barred since the resultant decree would not serve any useful purpose. The Plaintiff would still be unable to enforce or execute the reviewed decree on account of statutory limitation. It is a well-established principle of law that a court ought not to act in vain.

13. The 2nd issue is whether the Plaintiff has demonstrated any of the grounds for review. It is quite clear from the Plaintiff’s application and the material on record that there has been no discovery of new evidence or material which could not be availed at the trial of the action. There is no demonstration of any error apparent on the face of the record or any other sufficient reason to warrant a review. The Plaintiff is simply aggrieved because he considers the trial court may have erred in holding only the 1st Defendant liable whilst the 2nd Defendant was said to be the main beneficiary of the purchase price.

14. In the case of **Origo & Another Vs Mungala [2005] 2 KLR 307**, the Court of Appeal held, *inter alia*, that an erroneous conclusion of law or evidence may not necessarily warrant a review. The court concluded that:

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a ground of appeal. Once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction. They have come to a dead end...”

15. Similarly, in the case of **National Bank of Kenya Ltd Vs Ndungu Njau Civil Appeal No. 211 of 1996 [1997] eKLR** it was held, *inter alia*, 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-evident and should not require an elaborate argument to be established. It will not be a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review.”

16. Although the court has wide powers to review its orders and decrees under **section 80 of the Civil Procedure Act (Cap 21) and Order 45 of the Civil Procedure Rules** such discretion must be exercised judiciously and within the confines of the law. The law does not allow a court which has become *functus officio* to re-open a decided matter, sit on appeal over it and overturn its earlier decision. That is not permissible in law.

17. The court has also considered whether or not the application for review was filed without unreasonable delay. It is evident from the record that the decree sought to be reviewed was made on 14th March 2005. The Applicants' notice of motion for review was not filed until 5th April 2019. There was no explanation whatsoever rendered by the Applicant for the delay of over fourteen (14) years in filing of the application. The court finds and holds that the application for review must also fail for not having been filed without undue delay.

18. It is not every mistake of law or fact which would entitle a party to a review of an order or decree. It should also be borne in mind that the review contemplated in law is a review of the order or decree as opposed to a review of the ruling or judgement. A party who is aggrieved by various expressions in a ruling or judgement cannot legitimately apply for its review unless he is aggrieved by the resultant order or decree.

19. The 4th issue is on costs. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event as stipulated in the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant should normally be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Ltd Twentsche Overseas Trading Co. Ltd [1967] EA. 287**. The court finds no good reason to deprive the Defendants the costs of the application. Accordingly, the Defendants are hereby awarded costs of the application to be borne by the Plaintiff.

20. The upshot of the foregoing is that the court finds no merit whatsoever in the Plaintiff's notice of motion dated 27th March 2019. Accordingly, the same is hereby dismissed in its entirety with costs to the Defendants.

21. It is so ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7TH DAY OF NOVEMBER, 2019.

In the presence of Mr. Kimanzi holding brief for Wanjiru Wambugu for the Defendants and the Plaintiff present in person.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

07.11.19