



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO.83 OF 2019**

**ELIJAH IKOHA IKANZO.....APPLICANT/REPOENDENT**

**VERSUS**

**JOSEPH NGAIRA ASUTSA sued as**

**Administrator of the estate of LIVOMBOLO ASUTSA...RESPONDENT/APPLICANT**

**RULING**

The application is dated 6<sup>th</sup> March 2019 and is brought under Sections 1, 1A, 3, 3A and 80 of the Civil Procedure Act Cap 21 Laws of Kenya and Order 51(1) of the Civil Procedure Rules seeking the following orders;

- a) That the judgement made on 7/6/2006 herein by Hon. G.B.M. Kariuki, J and the subsequent decree issued on 11/6/2006 be set aside, varied and or reviewed.
- b) That costs be provided for.

It is premised upon the affidavit of Joseph Ngaira Asutsa attached hereon and upon further grounds that the respondent is the registered owner of land parcel No. Isukha/Kambiri/808. That he acquired the same through succession proceedings in Kakamega HCCC Succession Cause No. 37 of 1987. That he was not aware of this suit until sometime in 2016 when the respondent threatened to evict him. That on doing a search at the lands registry he realized that the suit land had been fraudulently transferred to the respondent.

The respondent submitted that he commenced the suit herein against the applicant in the year 2001 by way of Originating Summons. That the said originating summons and the accompanying pleadings were properly served on the applicant Attached and marked "E11 1" is a copy of the affidavit of service. That as a result of the proper service of the said pleadings the applicant was informed of this suit and even attended court on several occasions Attached and marked "E11 2" is a copy of the proceedings of the suit herein. That further the applicant is misleading this court by stating that he only learnt of this suit in the year 2016 when he had a firm of advocates being M/s Wekulo & Company Advocates acting on his behalf. That despite the applicant's knowledge of the suit herein, he deliberately ignored the same and waved his right to be heard. That upon the court following the required procedure, the court passed a judgment in his favour on 7<sup>th</sup> June 2006 Annexed and marked "E11 3" is a copy of the decree. That upon obtaining a decree in his favour he proceeded to the land registry to have the suit title registered in his favour. Attached and marked "E11 4" is a copy of the Kenya Gazette recalling the title of the applicant. That the applicant failed to surrender the title to the suit land despite the notice and the Land Registrar issued a title in his favour Attached and marked "E11 5" is a copy of the said title. That he is now the registered owner of land parcel No. Isukha/Kambiri/808 which title he acquired legitimately and procedurally. That he has been in occupation of the suit land since 1980 to date and no one has ever attempted to evict the applicant as he is in occupation of another piece of land.

**This court has considered the application and the submissions therein. 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 found this suit was res judicata. 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”.*

In the instant case the applicant submitted that he was not aware of the suit hence the judgement. I have perused the proceedings in the said suit and find that the said originating summons and the accompanying pleadings were properly served on the applicant Attached and marked “E11 1” is a copy of the affidavit of service. That the applicant was informed of this suit and even attended court on several occasions Attached and marked “E11 2” is a copy of the proceedings. I find that he had a firm of advocates being M/s Wekulo & Company Advocates acting on his behalf. 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 applicant ought to have filed an appeal in this matter if he felt aggrieved with the decision. The applicant is guilty of laches as this application was filed on 6<sup>th</sup> March 2018 when he states he became aware of the judgement in 2016. The application is not merited and is dismissed with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 17<sup>TH</sup> DECEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**