



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE NO. 134 OF 2017**

**ISAAC INDAH MUCHESI .....PLAINTIFF**

**VERSUS**

**LAWRENCE GICHURU NJENGA .....1<sup>ST</sup> DEFENDANT**

**JOHN LUSI .....2<sup>ND</sup> DEFENDANT**

**SILFESTUS GITIMU .....3<sup>RD</sup> DEFENDANT**

**REGISTERED TRUSTEES**

**(AFRICA ISRAEL NINEVEH CHURCH)..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**(An application for review; dismissed)**

1. This ruling is in respect of plaintiff's Notice of Motion dated 6<sup>th</sup> July 2017, an application brought under Section 80 of the Civil Procedure Act and Order 45 rules 1 and 2 of the Civil Procedure Rules.

The following orders are sought in the application:

**1. Spent.**

**2. That pending the hearing and determination of the main suit, this honourable court be pleased to review the orders of Justice L. N. Waithaka made in a ruling delivered on the 14<sup>th</sup> day of August 2013.**

**3. That this honourable court be pleased to restrain the defendants either by themselves, their agents and servants howsoever from dealing with the suit property, Nakuru Municipality Block 29/455, in any way adverse to the interests of the plaintiff/applicant herein pending the hearing and determination of the main suit.**

**4. That this honourable court be pleased to make all such further orders and/or directions as it may deem fit.**

**5. That cost of this application be provided for.**

2. The application is supported by an affidavit sworn by the plaintiff on 15<sup>th</sup> June 2017. In it, he states that the order sought to be reviewed was issued on 14<sup>th</sup> August 2013. A copy of the ruling is annexed. Similarly, a copy of notice of motion dated 11<sup>th</sup> February 2013 which was the subject of the ruling, complete with its supporting affidavit and annexures, is annexed. Several of the statements made in the affidavit constitute material that go into the merits of Notice of Motion dated 11<sup>th</sup> February 2013 and I will therefore not reiterate them.

3. The plaintiff further deposed that there exists an error apparent on the face of the record in the ruling in that it was found that the 1<sup>st</sup> respondent lacked capacity to enter into sale agreements and therefore had no good title to pass to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants yet the judge went ahead and held that the balance of convenience tilted in favour of the defendants even when they cannot be termed as better than trespassers. The plaintiff thus stated that accordingly, the order of the learned judge entitling the defendants to enjoy the benefits of the property pending hearing and determination of the suit is mistaken.

4. The 1<sup>st</sup> defendant opposed the application through his replying affidavit sworn on 22<sup>nd</sup> July 2017. He deposed that the application raises nothing new as all the issues raised by the applicant were in his knowledge when the earlier application was canvassed. That the court considered the issues and came to the conclusion that no case to warrant granting an interlocutory injunction had been made.

5. The 1<sup>st</sup> defendant further deposed that the applicant does not deserve the orders sought as the application has been made almost three years after the ruling was delivered and that there is no justification for the delay. Further, that there is no error apparent on the face of the record to warrant granting the orders sought.

6. The application was argued by written submissions. The applicant filed submissions on 5<sup>th</sup> October 2017 while the 1<sup>st</sup> defendant filed submissions on 17<sup>th</sup> October 2017. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants did not file anything and did not participate in the hearing of the application. I have considered the application, the affidavits, the submissions and the authorities cited.

7. The application seeks review of orders made by Lady Justice L. N. Waithaka on 14<sup>th</sup> August 2013. Order 45 rule 1 (1) of the Civil Procedure Rules provides as follows:

**1(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.**

8. The learned judge who made the orders on 14<sup>th</sup> August 2013 is no longer in this station. Accordingly, I am in a position to hear the application under rule 2(2) which provides as follows:

**If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.**

9. An application for review should, under Order 45 rule 1, be made without unreasonable delay. There is good reason for this requirement. It ensures that litigants can after a reasonable period have the assurance

that a particular judicial outcome has finality and will not be disturbed. Litigation must, as is often said, come to an end. Besides, it is a cardinal requirement of our law that justice be administered without delay. In the case of Teachers Service Commission v Simon P. Kamau & 19 others [2015] eKLR the Supreme Court stated as follows:

**But if we were to assume that the data in question here was relevant, we would still find the three-year delay to be unreasonable, for a litigant seeking justice. It is well known that equity comes in aid of the vigilant, and not the indolent. We cannot fail to take into account the pain of the successful respondents waiting for the fruits of the Judgment for as long as three years, only to be confronted with a fresh cycle of litigation. We would restate the wisdom of the old principle of the common law that litigation must come to an end: This has been adopted as a vital principle in constitutional and statutory laws that prescribe timelines to guide the pursuit of justice in the Courts.**

*[66] Article 159(2)(b) of the Constitution cautions Courts against permitting injustice through delays, in the following terms:*

**“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**

**(a) .....**

**(b) justice shall not be delayed.”**

*[67] Thus, the standpoint of the Constitution is that, delayed justice amounts to injustice: and the Courts, which are the dedicated mechanism for the delivery of justice, have an obligation to see to a steady pace of litigation, terminating within a reasonable time-frame ....*

*.... The three-year period that elapsed is, in the circumstances, to be regarded as unreasonable delay, which is inconsistent with a quest for justice before this Court.*

10. The present application was filed on 11<sup>th</sup> July 2017, three years and eleven months after the Order sought to be reviewed was made. The applicant has offered no explanation whatsoever as to why the application was not filed earlier. There being no reason for the delay of almost four years, I find that the delay is unreasonable. That alone would be sufficient to seal the fate of the application.

11. It is important that an applicant seeking review states clearly the grounds on which the application is made since Order 45 rule 1 is very specific and limiting as regards the circumstances under which an application for review would be allowed. A reading of the application and the supporting affidavit shows that the applicant alleges that there exists an error apparent on the face of the record. The error is said to be in the judge’s finding that the 1<sup>st</sup> respondent lacked the capacity to enter into sale agreements. If that be the case, it can only be termed as an erroneous conclusion of law and evidence. That cannot be a ground for review even though it could be an argument to be advanced in an appeal.

12. In Jameny Mudaki Asava v Brown Otengo Asava & another [2015] eKLR the court stated:

**At this juncture, we consider it opportune to repeat the sentiments expressed by this Court in Origo & Another vs Mungala [2005] 2 KLR 307,**

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

13. Further, looking at prayer 3 of the application and the statements at paragraphs 5 to 14 of the supporting affidavit, it is clear to me that the applicant is seeking to have a second chance at arguing the

application dated 11<sup>th</sup> February 2013. The application having been heard and determined by the learned judge, I have no jurisdiction to revisit it as by doing so, I would be sitting on an appeal from the said decision.

14. For all the foregoing reasons, Notice of Motion dated 6<sup>th</sup> July 2017 is dismissed with costs.

**Dated, signed and delivered in open court at Nakuru this 13<sup>th</sup> day of February 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Nanda for the plaintiff/applicant

Mr. Chege holding brief for Mrs. Mukira for the 1<sup>st</sup> defendant/respondent

Court Assistants: Gichaba & Lotkomoi