



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 29 OF 2011**

**JAMES CHUMO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ZABLON KIPLANGAT CHUMO.....DEFENDANT/APPLICANT**

**RULING**

**Introduction**

1. What is before me is an application for review dated 18<sup>th</sup> December, 2017 brought pursuant to Order 45 Rule 1 of the Civil Procedure Rules. The said application seeks an order for review of the court's judgment delivered on 26<sup>th</sup> May 2014.
2. The application is based on the grounds stated in the Notice of Motion and the applicant's affidavit sworn on the 18<sup>th</sup> December 2017. The main ground of the application is that the applicant has discovered a new and important piece of evidence which was not within his knowledge and could not be produced at the time of the hearing and which will assist the court to reach a favourable determination on the matter.
3. In his supporting affidavit the applicant depones at paragraph 5 that his former advocate failed to produce a critical document which he gave him which shows that indeed the plaintiff has been disposing of the ancestral land in Kisii after which he uses the proceeds to purchase land. The said document is a copy of a sale agreement which he has attached to his affidavit. He has also attached 2 certificates of official search showing that the respondent and their mother sold 5 acres and 5.5 acres respectively of their family land known as NOTH MUGIRANGO/NGOMAGWAGWA/27 to third parties.
4. The application is opposed by the Respondent through his Grounds of opposition filed on 1<sup>st</sup> March 2018 in which he states that the application is fatally defective, incompetent and bad in law. He further states that the court is *functus officio*, having pronounced itself with finality in its judgment.
5. The parties agreed to canvass the application by way of written submissions and both parties filed their submissions.
6. It has been submitted on behalf of the plaintiff that the discovery of the sale agreement and certificates of official search are new and important pieces of evidence that are likely to change the outcome of the case. Counsel for the applicant relies on the case of **Silah Enane Omututi V Catherine Wanjiku Githiaka (2016) eKLR** where the court held that the discovery of the Grant of Letters of Administration after the delivery of the judgment amounted to discovery of a new and important matter which was not within the knowledge of the applicant and which could not be produced at the time when the judgment was made.
7. On the other hand, counsel for the respondent has submitted that the applicant has not satisfied the grounds for review set out in Order 45 Rule 1 of the Civil Procedure Rules. He has cited to me the case of **Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR** which provides very useful guidance to me. In the said case the Court cited the decision of the Supreme Court of India in the case of **Ajit Kumar Rath V State of Orisa & others** and observed as follows:

*“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 you in the face without any elaborate argument being needed for stabilizing 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”*

**Issues for Determination**

8. I have considered the pleadings, application, rival affidavits as well as counsels' submissions and the following issues emerge for determination:

- i. Whether the applicant has met the threshold for review of the judgment delivered on 26<sup>th</sup> May 2014
- ii. Whether the defendant should be granted the reliefs sought
- iii. Who should bear the costs of this suit.

**Analysis and Determination**

9. With regard to the first issue, the conditions for review are set out in Order 45 Rule (1) of the Civil Procedure Rules as follows:

*“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 a 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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”*

10. Applying the above rule to the instant case I hold the view that this case is distinguishable from the case of **Silah Enane Omututi** (supra). In the instant case the applicant states in his affidavit that he made inquiries after the judgment and discovered that his mother and the respondent had sold family land to third parties. In the same breath he states that he had given his advocates some crucial documents which the advocate failed to produce. This is not only contradictory but it shows lack of diligence on the part of the applicant.

11. We have not been told why the applicant did not point out to his former advocate, which documents he intended to rely on, or indeed why he did not make inquiries regarding the sale of their family land before the hearing. Order 45 Rule 1 (b) of the Civil Procedure Rules is clear that one must demonstrate that they were unable to discover the new evidence after the exercise due diligence (emphasis added).

12. Moreover, the rule states that the application for review must be made without unreasonable delay. In the case of **Stephen Githua Kimani V (supra)** the court observed that to reopen a case after a period of more than a year without sufficient reasons would amount to injustice.

13. This application was filed more than three years and seven months from the date of judgment without any satisfactory explanation. I find this inordinate and unreasonable.

14. In the circumstances I am not satisfied that the applicant has met the threshold for review of the Court's judgment dated 26<sup>th</sup> May 2014. I therefore find no merit in his application and I dismiss it.

15. Considering that this is a matter involving members of one family each party shall bear his own costs.

**Dated, signed and delivered at Kericho this 3<sup>rd</sup> day of May, 2018.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Orina for the Respondent
2. No appearance for the Applicant
3. Court Assistant – Ms Wambany