REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

JUDICIAL REVIEW NO. 8 OF 2012

REPUBLIC.....APPLICANT

VERSUS

KIRINYAGA COUNTY COUNCIL.....1ST RESPONDENT

SENIOR RESIDENT MAGISTRATE'S

COURT KERUGOYA.....2ND RESPONDENT

AND

STEPHEN MURIITHI NJERU

JAMES KAMARU MATHENGE.....EXPARTE (Interested parties)

RULING

Order ***45 Rule 1 (1) and (2) of the Civil Procedure Rules*** which donates to this Court the power to review its decree or order states that:

> ***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 orders without un-reasonable delay".***

Sub-rule (2) is not relevant for purposes of this application.

Citing the above order and also the provisions of ***Section 3A of the Civil Procedure Act,*** the Applicants **STEPHEN MURIITHI NJERU** and **JAMES KAMARU MATHENGE** have moved this Court by their Notice of Motion dated 4th September 2017 seeking the following orders:

> ***1. That the judgment or Decree of the Court issued by the Environment and Land Court Judge on 5th May 2017 be reviewed.***

2. That the costs of this application do abide the out-come of the application.

The application is premised on the grounds set out therein and supported by the Applicants joint affidavit. The gravamen of the application is that the Applicants are aggrieved by this Court's judgment delivered on 5th May 2017 and want it reviewed. The main reason is because in the judgment sought to be reviewed, this Court refused to grant them the order sought in the Judicial Review Application on the grounds that there is a pending appeal No. 125 of 2013 yet they are not aware about that appeal as they have not been served yet the Appellant's misled this Court that the said appeal is active. The Applicants therefore seek that the said appeal be dismissed. The Applicants further state that this Court's judgment dismissing their Judicial Review Application has no merit and should be dismissed.

The 1st Respondent filed grounds of objection to the application stating that nothing has been placed before this Court to warrant the review of this Court's orders and in any case, the said order has not been annexed. Further, that the appeal No. 125 of 2013 is yet to be admitted since the record of the lower Court has not been forwarded to this Court. The 1st Respondent therefore pray that this application be dismissed with costs.

The 2nd Respondent did not file any response to the application.

The application has been canvassed by way of written submissions which have been filed by **Mr. A.P. KARIITHI ADVOCATE** for the Applicants and **Mr. M. KAGIO ADVOCATE** for the 1st Respondent.

I have considered the application, the grounds of objection and the submissions by counsel.

It is correct, as stated by counsel for the 1st Respondent in his submissions, that the Applicants have not annexed the order or decree sought to be reviewed. I do not however agree that failure to do so is fatal to the application. I am aware that the High Court has in several cases taken the route that failure to annexe the decree or order sought to be reviewed is fatal to an application for review under ***Order 45 Civil Procedure Rules***. The Court of Appeal in the case of ***PETER GITHAIGA AND ANOTHER VS BETTY RASHID C.A CIVIL APPEAL No. 210 of 2014 (2016 e K.L.R)*** took the view that such failure is not fatal. It said:

> ***"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"***

In this case, though the order or decree was not annexed to the application itself, this Court's judgment dated 4th May 2017 is not only in the file but counsel for the Applicants also took the liberty to annexe it to his submissions. Un-orthodox though that practice may be, and bearing in mind the binding decision by the Court of Appeal in the case of ***PETER GITHAIGA*** (supra), and also the fact that the 1st Respondent was not really prejudiced and knew the case that it had to meet, I am not persuaded to declare this application defective as submitted by **Mr. KAGIO.**

Turning now to the merits of the application, it is clear from a perusal of ***Order 45 (1) of the Civil Procedure Rules*** that an application for review is restricted to the grounds set out therein which are:

> ***1. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced at the time when the decree was passed or order made;***

2. On account of some mistake or error apparent on the face of the record;

3. For any other sufficient reason.

4. The application must then be filed without un-reasonable delay.

I shall start with the requirement that such an application must be filed without un-reasonable delay. The judgment giving rise to this application was delivered on 5th May 2017 and this application was filed on 27th September 2017. That is a delay of some four (4) months and three (3) weeks. In ***EMAN KAMUNYA KITHAKA VS PETER KINYUA KAMUNYA KERUGOYA ELC No. 2 of 2015 (2017 e K.L.R***), I took the view that an un-explained delay of four (4) months was un-reasonable. I was emboldened in that view by the decision of ***ONYANGO – OTIENO J***. (as he then was) who, in the case of ***KENFREIGH E.A LTD VS STAR EAST AFRICA CO. LTD 2002 2 K.L.R 783***, found a delay of three (3) months to be un-reasonable. The law is that an application for review must be filed without un-reasonable delay. In ***FRANCIS ORIGO & ANOTHER VS JACOB KUMALI MUNGALA C.A CIVIL APPEAL No. 149 of 2001 (2005 2 K.L.R 307***, the Court of Appeal held that:

> ***"In an application for review, an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly, the applicant must make the application for review without un-reasonable delay"***. Emphasis added.

Having found that the delay herein is un-reasonable, I must dismiss this application.

Even if there was no un-reasonable delay, this application was bound to fail for the simple reason that nothing has been placed before me to demonstrate that there is discovery of new and important matter or evidence which, after due diligence, was not within the Applicants knowledge or could not be produced at the time when the judgment was delivered nor any mistake or error apparent on the face of the record or indeed any other sufficient reason to warrant a review of this Court's judgment dated 5th May 2017. From the Applicants' supporting affidavit, they appear to be complaining that although there is an appeal No. 125 of 2013 pending at this Court and which was one of the reasons why their Judicial Review Application was dismissed by this Court in its judgment sought to be reviewed, they were not aware about that appeal. The Applicants then proceed to make the strange plea in paragraph nine (9) of their supporting affidavit to the effect that:

> ***9: "That we are praying the Court to grant our prayers and dismiss the alleged appeal or make such orders or better orders as to (sic) the Court may seem just".***

This Court cannot of course make orders in this application to dismiss a pending appeal. Such orders can only be made in the appeal itself which, according to the submissions by **Mr. KAGIO,** is yet to be admitted and that is why the Applicants have not been served. It is however clear beyond peradventure that the Applicants have not met the threshold for review of this Court's judgment delivered on 5th May 2017. There is nothing either in the application itself or the supporting affidavit to show what new and important matter or evidence has now been produced or any mistake or error apparent on the face of the record or any other sufficient reason as required by ***Order 45 Rule 1 (1) of the Civil Procedure Rules***. If the Applicants are simply aggrieved by that judgment as deponed in paragraph two (2) of their supporting affidavit, then the right cause is to file an appeal.

The Notice of Motion dated 4th September 2017 lacks merit. It is hereby dismissed with costs to the 1st Respondent.

B.N. OLAO

JUDGE

7TH MAY, 2018

Ruling signed and dated at Bungoma this 7th day of May 2018.

B.N. OLAO

JUDGE

7TH MAY, 2018

Delivered at Kerugoya this 26th day of June 2018.

S.N MUKUNYA

JUDGE