REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 126 OF 2004

RABECCA NASOMBI KHISA

(Applying as legal representative of the estate of

JOHN KHISA MUMELO (Deceased).....PLAINTIFF/APPLICANT

VERSUS

ALICE LUSWETI.....DEFENDANT/RESPONDENT

R U L I N G

1. The amended chamber summons dated **9/1/2018** sought the following orders

1. That the court be pleased to allow the applicant to be represented by the Firm of Wandati & Co. Advocates in place of Arunga & Co. Advocates

2. That the applicant be granted leave to file a review out of time against the judgment of the E. Obaga J at Kitale delivered on the 21st January, 2016.

3. That leave be granted to allow the applicant to prosecute the suit in place of the plaintiff who is now deceased.

4. That the judgment of the E. Obaga J, delivered on the 21st January, 2016 be reviewed; and

5. That the cost of the application be provided for.

2. The application is brought under **Section *80(a) and 95 of the Civil Procedure Act and Order 8 rule 5(1), Order 9 rule 9, Order 24 rules 3(1) and (2), Order 45 rule (1) (1)(a) and Order 50 rule (6) of the Civil Procedure Rules.*** The grounds on which the said application is made are as follows:-

a. That there is no explanation and/or reason how Alice Lusweti replace her deceased husband Edward Lusweti and got judgment.

b. That there is an apparent error on the face of the judgment at page 6-7, paragraph No. 8 where E. Obaga J, declares that all previous proceedings ended in favour of the defendant's husband while the real position is that all the previous proceedings as stated in the said judgment ended in favour of my deceased husband, the plaintiff, other than the award by the Commissioner for Co-operative development which was erroneous and never adopted.

c. That there is an apparent error on the face of the judgment where the learned judge states at page 6, paragraph 7, that after the plaintiff filed Civil Case o. 127 of 1998 the same was referred to the District officer of arbitration at paragraph No. 7 while the real position is that the case No.127 of 1998 was filed by the defendant's husband where an order for referral to the Land Disputes Tribunal was made by the Senior Principal Magistrates court at Kitale for lack of jurisdiction.

d. That the plaintiff then John Khisa Mumelo died on the 26th June, 2016 after a long illness bravely borne, and had expressed his intention to appeal against the entire judgment by E. Obaga J, delivered on the 21st January, 2016.

e. That the plaintiff then John Khisa Mumelo was ailing at the time of delivery of the judgment and he was never informed of the same by his advocates on record Ms. Arunga & Co. Advocates.

f. That the plaintiff then John Khisa Mumelo leant of the judgment in March, 2016 and since it was not in his favour despite overwhelming evidence that he was the owner of the suit premises, he became bedridden and could not give any directions on a way forward.

3. The application is supported by the affidavit of the applicant sworn on **12/7/2017.** It is by no means a short document, being made up of some very detailed 46 paragraphs. However the gist thereof is that: the original plaintiff who was the deponent's husband, now deceased had paid up shares in Bistati Farmers Cooperative Society and was member No. 12 thereof having 3.2 shares and was allocated some 12 acres of land ; that his plot was plot No. 34 but it later changed to plot number 32; that the defendant's husband was invited to join the society by the deponents husband; that both were however unable to complete paying for their shares and a resolution was made that they be refunded their monies; that a new member was admitted who refunded the defendant's husband his monies before the defendants husband had been allocated land; that thereafter the defendant's husband was allowed on humanitarian grounds to occupy the plaintiff's husband's land in the society farm but later refused to vacate when the deceased demanded that he does so, prompting an appeal by the deceased to the Commissioner for Cooperatives who erroneously ordered the land to be equally shared between the two; that the Cooperative Society never agreed with the commissioner's decision; that the defendant's husband then sued for vacant possession in the magistrate's court; that the magistrates court referred the dispute to the Land Disputes Tribunal before which the plaintiff's husband successfully laid claim to the entire land; that the tribunal decision was adopted by the court; that her husband was later issued with a title deed for the land and the defendant's husband was asked by the Land Registrar to surrender the title he had over the same land; that that the plaintiff's husband filed a judicial review for amendment of the official map; that the map was amended and forwarded to the Chief Land Registrar for effecting of the amendment; that the Chief Land Registrar asked for a vesting order and the court issued it; the ownership records were effectively amended whereupon the deceased instituted a suit **HCCC 126 Of 2004- Kitale** for eviction of the defendant's husband; that the judgment of the court stated that the deceased did not annex all his documents; that the advocates for the plaintiff never informed the deceased about the lack of documents in the court file; that the applicant obtained letters of administration to her deceased husband's estate in 2017; that the delay in bringing the application was occasioned by lack of the grant; that the suit land is still registered in the deceased's name; that the delay in the finalization of the suit was occasioned by the defendant; that the annextures to the supporting affidavit are new material in the matter that warrants a review; that; that in fairness, the judgment ought to be reviewed and set aside;

4. In reply to the application the defendant filed a replying affidavit sworn on **26/3/2018** in which she averred that she has been living on the land since 1975; that an appeal was intended but now a review application has been filed; that thus court is *functus officio*; that there is no new material that was not within the reach of the deceased; that there is no discovery of new evidence, that the deceased and his two sons were present when the judgment was delivered; that the allegation that the plaintiff's advocate was compromised is malicious; that the plaintiff's and the defendant's evidence on the record is clear and there is no need for review; that the contents of the chamber summons and the supporting affidavit are at variance; that there was no mandatory requirement that the Commissioner of Cooperatives' decision to be adopted; that there is no evidence that the deceased was ailing at the time of the judgment or that he could not give directions on the same; that the court's judgment was well reasoned and based on the pleadings; that there is no proof that the society refunded the share monies to the defendant's husband; that the applicant's husband was not truthful when he stated on the record that he never knew of the case referred to the Commissioner while at the same time saying that he did not agree with the Commissioner's findings.

5. The plaintiff/applicant filed supplement affidavit on **23/4/2018** sworn on **13/4/2018** opposing the matters stated in the replying affidavit.

Determination

6. The issue that this court must determine is whether there are sufficient grounds for review of its judgment dated **26/1/2016.** The pertinent provisions of **Order 45** state 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.

2. (1)An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) 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.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

3. (1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the

application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation".

7. The questions this ruling must answer are as follows:

a. Has an appeal been preferred?

b. Has the applicant established that there is 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?

c. Is there some mistake or error apparent on the face of the record?

d. Is there any other sufficient reason?

8. No appeal has been preferred and therefore on that issue the application for review may be considered. The order also envisages that the application may be determined by the court as the judge who decided the suit has been transferred.

9. On the second issue there must be discovery of new material to warrant a review. In this case the applicant states that the documents were all in the hands of the advocate. She makes a curious statement in the supplementary affidavit that the documents marked as **Exhibits "RNK" 3,5,6,7,9,11,12,13,14,15,19,20,21**and **22** in her supporting affidavit are new material. She states at **paragraph 39** of the supporting affidavit:

"That I know my deceased husband through his advocates Ms. Arunga & Co Advocates annexed all the documents in support of his case although from the judgment of E.Obaga J delivered on 21st January 2016 did state that my deceased husband did not file his documents hence failure to prove ownership of the land in dispute."

10. Paragraph 39 above is the one challenged by the defendant as contradicting the face of the application.

11. I have perused the record and I find that the plaintiff produced **P.Exh 1 and 2. P.Exh 3, 4, 5 and 8** were not produced but they were marked for production alongside **P.Exh 6** and **P.Exh 7**, the latter two which were produced by consent on **3/4/2014**. In the courts view at the time of the judgment the documents that could have proved that the defendant's husband was refunded his money by the society were marked for identification without them being produced later.

12. In my view it appears that many of the documents that would have aided the court in the determination of this case were not produced. I also find that the **RNK 14** is the tribunal decision which hands back the entire land to the plaintiff's husband. There is a decree marked **RNK 15** in **Kitale RMCC 108 of 1995** which shows that the elder's award was adopted by the court on **13/10/1995**. There is also a letter dated **1/9/1998** demanding that the defendant's husband do return the title deed issued to him for destruction. There is a bundle of documents in **Judicial Review Application Number 116 of 1998** marked **RNK20.** These are just but some of the documents that the court notes were not produced.

13. But whose fault was it?

14. It can never be known, or if it ever will it would be after a long and arduous investigation, for the applicant's version is that all the documents necessary were given to his advocate and that they were annexed in support of the plaintiff's case. However it remains a fact that most of the documents now presented through the instant application were never brought to court.

15. One thing is notable though. In this application the history of the coming of the defendant's husband to the suit land is not denied. The strivings of the plaintiff's husband to secure his land from the defendant's husband tell it all: the defendant's husband was not welcome.

16. The plaintiff has also alleged that there are errors in the judgment. On this issue I have noted that there is indeed an error in that the judgment reads that the case was referred to the District Officer by the court whereas it was referred to the District Land Disputes Tribunal. The origin of that perception lies in the evidence given by the defendant. The court also appears to have gotten the impression that upon that referral it was ordered by the District Officer that the land should be shared equally between the plaintiff and the defendant. However, if exhibit **RNK 14** is to be believed the Tribunal ordered that all the suit land belongs to the plaintiff. The evidence of the defendant which is replicated at paragraph 5 of the judgment is that the Cherangany Land Disputes Tribunal ruled that the land be shared equally between the parties and the award was adopted in the Kitale Senior Resident Magistrate's court. This is an admission that the decision was even adopted as a judgment of the court. Going by the contents of **RNK14** the contents of that judgment appear to have been distorted and misrepresented before court by the defendant.

17. The court is now sure beyond doubt that there were proceedings which exist alongside these proceedings and whose import is of the opposite nature from the decree herein and that those proceedings were never set aside or appealed by the defendant.

18. This is sufficient ground for review, for it is improper in a justice system for two proceedings having different conclusions over the same subject matter to exist side by side without any conscious rationalization for that parallel existence.

19. I find that the defendant's application has merit. I hereby allow the application as prayed; the judgment dated **21/1/2016** is hereby set aside and it is hereby ordered that the hearing of this suit do begin *de novo*.

Dated, signed and delivered at Kitale on this 27th day of September, 2018.

MWANGI NJOROGE

JUDGE

27/9/2018

Coram: Before Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the applicant

N/A for the respondent

Applicant (Alice) present

(Respondent absent)

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

27/9/2018