REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 155 OF 2017 (O.S)

(Formerly NYERI HCCC 15 OF 2017)

PETER WAITITU NJAU.....PLAINTIFF

-VERSUS-

BIASHARA SACCO SOCIETY.....DEFENDANT

RULING

1. Vide a ruling delivered on 22nd May, 2018 this court dismissed the plaintiff's application dated 18th September, 2017 through which the plaintiff (applicant) *inter alia* sought to restrain the defendant, its employees and/or agents from evicting, entering, trespassing or in any other way interfering with his enjoyment and possession of the suit premises (platinum five (5) dimension lounge) erected on LR No. Nyeri Municipality Block 1/89 pending the hearing and determination of the application and the suit. The plaintiff also sought an injunction to stay and prohibit the defendant from executing the various proceedings in other courts or bodies particularly the Business Premises Rent Tribunal (BPRT) and Nyeri CMCC No.303 of 2017 pending the hearing and determination of the suit.

2. Arguing that this court inadvertently misdirected itself and failed to grant an equitable remedy in a dispute which required the court to address itself equitably and in the best interest of justice and explaining that there is a new and important matter that was not brought to the attention of the court, through the notice of motion dated **31st November 2018**, the plaintiff urges the court to stay the orders made on 22nd May, 2018 pending the hearing and determination of the application and to review the said orders.

3. The application is supported by the supporting affidavit of the applicant in which the grounds on the face of the application are reiterated. The grounds are as follows: -

(i) That the decision sought to be reviewed emboldened the respondents who are said to be wantonly trespassing into the suit property;

(ii) That this court misapprehended the list of prayers sought in the application dated 31st August, 2017;

(iii) That the decision of this court compromised the plaintiff's cause of action;

(iv) That by failing to find in favour of the plaintiff, this court exposed the plaintiff to the risk of being evicted;

(v) That this court determined the main suit without the same being heard on its merits;

(vi) That this court failed to take into account that the BPRT had issued an order restraining the respondent from evicting the plaintiff from the suit property pending hearing and determination of the suit, which issue was not brought to the attention of the court by the parties to this suit.

4. Terming the existence of injunctive orders referred to above a new and important matter this court ought to consider in determining his application for review of the order hereto, the plaintiff urges the court to grant him the orders sought.

5. The application is opposed on the grounds that it is frivolous, bad in law and an abuse of the court process. It is also contended that the court cannot issue the orders sought as it is functus-officio. In this regard, see the grounds of opposition dated 13th August, 2018 and filed on 14th August, 2018.

6. When the application came up for hearing, counsel for the applicant relied on the grounds on the face of the application and the affidavit sworn in support.

7. Terming the grounds of opposition not specific, counsel for the applicant contended that the court is not functus officio as **Order 45 Rule 1** of the Civil Procedure Rules (CPR) provides an avenue through which the court can grant the orders sought.

8. Counsel for the respondent relied on the grounds of opposition filed in opposition to the application and submitted that the applicant has not satisfied the conditions for review set down under **Order 45 Rule 1** of the CPR.

9. Concerning the contention that there exists orders issued in the BPRT which were not brought to the attention of the court, counsel for the respondent submitted that it was not the duty of the court to peruse the file of the BPRT to establish whether an order had been made. According to counsel for respondent, the duty to bring to the attention of the court existence of the orders issued by the BPRT lay with the applicant.

10. In a rejoinder, counsel for the applicant submitted that the order is a public document and the respondents are aware of it.

11. I have considered the application, the grounds and the affidavits and I find the sole issue for the court's determination to be whether the plaintiff/applicant has made up a case for being granted the orders sought and in particular, the order for review of the order made on 22 nd May, 2018, dismissing his application dated 31st August, 2017.

12. For the applicant to be granted an order for review, he must satisfy the conditions set down under

Order 45 Rule 1 of the CPR, which are: -

"(1) 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; 2. existent of a mistake or error apparent on the face of the record,

3. any other sufficient reason,

4. the application was made without unreasonable delay."

In that regard, see the said section of the law which 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 and the case of **Salama Mahmoud Saad v. Kikas Investments Ltd & Another (2014)e KLR** where it was observed:

"The jurisdiction of the court under Order 45 of the CPR is restricted to the grounds set out in the said order which are; 1) there has been a discovery of new and important matter of 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 2) on account of some mistake or error apparent on the face of the record; or 3) for any other sufficient reason."

13. Also see the case of **National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported)** where it was held:

"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-evident and should not require an elaborate argument to be established…. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review."

14. With regard to the question as to whether the plaintiff/applicant has made up a case for being granted the orders sought, having carefully read and considered the reasons given in support of the application vis-à-vis the applicable to an application for review, I find that most of the grounds urged in support of the applicant's application for review are incapable of being raised in an application of this nature as they are issues that ought to have been raised through an appeal. Such issues include whether or not this court misdirected itself by failing to issue an equitable relief or determining the suit on its merits before the suit was heard and determined.

15. The only issue falling within the ambit of an application for review is the contention that there existed an order issued in the BPRT proceedings restraining the respondent from evicting the applicant from the suit property pending the hearing and determination of this suit.

Admittedly, those orders, if they exist, were neither brought to the attention of this court in the previous proceedings and also in these proceedings.

16. Whilst it is true that a court order is a public document, its existence cannot be presumed. It must be brought to the attention of the court or any other institution or person by the person who desires to benefit from it. In the circumstances of this case, it behooved the applicant to bring to the attention of this court the existence of such orders, something he failed to do in the previous proceedings and in the current proceedings.

17. Assuming such orders exist, the question to answer is whether their existence constitutes discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by the applicant at the time when the decree was passed or the order made to warrant review of the orders issued in the previous proceedings.

18. My answer to that question is negative as failure to bring to the attention of the court existence of those orders cannot reasonably be said to constitute discovery of new and important matter or evidence, which after exercise of due diligence, was not within the knowledge or could not be produced by the applicant at the time when the order sought to be reviewed was made.

19. Whilst in his application the applicant suggests that there are mistakes or errors apparent on the face of the court record as those mistakes or errors are said to relate to the decision of the court on certain issues, those are not the kind of mistakes or errors that the court can deal with in an application for review as such issues can only be dealt with through an appeal. In that regard see the case of **Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557** where it was held: -

> ***"A point which may be a good ground of appeal***
>
> ***may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal"***
>
> **Also see the case of Chittaley & Rao in the Code of Civil Procedure (4th Edn) Vol.3, pg 3227** where the distinction between a review and an appeal is given, thus:
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> ***"A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal."***

20. As to whether there is any other sufficient reason for reviewing the decision of this court, having reviewed the reasons given by the applicant, I find nothing that can warrant review of the orders sought to be reviewed.

21. The upshot of the foregoing is that the application dated 31st July, 2018 is found to be lacking in merits and is dismissed with costs to the respondent.

Orders accordingly.

Dated, Signed and Delivered in open court at Nyeri this 18th day of December, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. A. J. Kariuki h/b for Mr. Ombongi for the plaintiff/applicant

Ms Ndegwa h/b for Ng'ang'a Munene for the defendant/respondents

Court assistant - Esther