**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 384 OF 2013**

**EUNICE WANJA MURIITHI (DCD) Substituted with**

**ELIZABETH MUTHONI MURIITHI.....PLAINTIFF**

**VERSUS**

**WARUCHA KIRARA (DCD).....1ST DEFENDANT**

**STANLEY GICHOBI KABUI.....2ND DEFENDANT**

**RULING**

This is in respect to the 2nd defendant/applicant's Notice of Motion dated 18th November 2015 seeking the following orders:-

1. ***That the Honourable Court be pleased to grant leave to the firm of IKAHU NGANGA & CO. ADVOCATES to come on record in place of A.N. CHOMBA & CO. ADVOCATES.***

2. ***That the consent order dated 8th February 2008 and adopted on 3rd March 2008 be reviewed and/or set aside.***

3. ***That costs be provided for.***

The application is based on the grounds that the consent was obtained fraudulently. It is also supported by the affidavit of **STANLEY GICHOBI KABUI** the 2nd defendant herein. As will become clear in this ruling, much of the averments in the 2nd defendant/applicant's 21 paragraph supporting affidavit are not really helpful as this application will be determined on the issue of whether or not there has been un-reasonable delay in filing the same. Therefore, the only relevant averment in the said affidavit is paragraph 8 in which it is deponed as follows:-

> ***"That I am aggrieved by the consent order dated 8th February 2008 and given on 3rd March 2008 as I was neither a party to it and the same was interestingly filed by the firm of BALISHARMA & BALISHARMA ADVOCATES when their instructing client had died on 23rd March 2007 as per the death certificate marked SKG/2".***

The application is opposed by the plaintiff/respondent **ELIZABETH MUTHONI MURIITHI** who has filed both grounds of Preliminary Objection and a replying affidavit. Again that replying affidavit raises issues that are really not relevant for purposes of determining this application except paragraphs 14 and

15 thereof wherein it is deponed that:-

> **14:** ***"That it is contended by the respondent that the application does not satisfy either of the provisions of Order 45 and especially the inordinate delay exercised by the applicant".***
>
> ***15: "That this Honourable Court cannot interfere with a consent order by the parties signed 8 years ago".***

It was agreed that the application be canvassed by way of written submissions which have been filed both by the firm **of IKAHU NGANGA ADVOCATES** for the 2nd defendant/applicant and that of **BALI-SHARMA ADVOCATES** for the plaintiff/respondent.

I have considered the application, the rival affidavits and the submissions by counsel.

The application seeks two orders:-

> *1.* ***That the firm of IKAHU NGANGA ADVOCATES do come on record in place of that of A.N. CHOMBA ADVOCATES.***
>
> *2.* ***That the consent order dated 8th February 2008 and adopted on 3rd March 2008 be reviewed and/or set aside.***

The application is premised under the provisions of ***Section 80 of the Civil Procedure Act*** and ***Orders 45 and 9 of the Civil Procedure Rules***. ***Order 9 Rule 9 of the Civil Procedure Rules*** provides as follow:-

> ***"Where there is a change of advocate, or where a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court –***
>
> *a.* ***upon an application with notice to all the parties; or***
>
> *b.* ***upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be"***

It is clear from the record herein that the 2nd defendant/applicant was previously represented by the firm of **A.N. CHOMBA ADVOCATE** when the consent order sought to be reviewed and/or set aside was entered into on 8th February 2008. The prayer to have the firm of **IKAHU NGANGA ADVOCATE** come on record for the 2nd defendant/applicant is therefore allowed.

With regard to the second prayer seeking the review and/or setting aside of the consent order dated 8th February 2008 and adopted on 3rd March 2008, the same is governed by the provisions of ***Section 80 of the Civil Procedure Act*** and ***order 45 of the Civil Procedure Rules***. ***Section 80 of the Civil Procedure Act*** provides that:-

> ***"Any person who considers himself aggrieved –***
>
> *a.* ***by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
>
> *b.* ***by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit".***

***Order 45 Rule 1 (1) of the Civil Procedure Rules*** on the other hand provides that:-

> ***"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"***. Emphasis added.

Therefore, while ***Section 80 of the Civil Procedure Act*** donates the power for review, the rules are set out under ***Order 45 of the Civil Procedure Rules.*** It is clear that the grounds for review are:-

*1.* ***discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced at the time when the decree or order was made.***

*2.* ***some mistake or error apparent on the face of the record.***

*3.* ***Any other sufficient reason.***

However, even before any of the above grounds is considered, the application for review must be made '***without unreasonable delay***'. In ***FRANCIS ORIGO & ANOTHER VS JACOB MUNGALA (2005) 2 K.L.R 307***, the Court of Appeal held as follows:-

***"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 unreasonable delay".*** Emphasis added.

It is trite therefore that an application for review will be defeated where the applicant is guilty of unreasonable delay especially where that delay, as is the position in this case, is not explained or where the explanation offered is not satisfactory. The order sought to be reviewed or set aside was made on 8th February 2008 and this application was filed on 3rd December 2015. That is a delay of some seven years which is clearly unreasonable. That is enough to dispose of the second prayer in this application.

However, that is not all. The 2nd defendant/applicant seeks to set aside a consent order. It is well settled that a consent order or judgment has contractual effect and can only be set aside on grounds which could justify the setting aside of a contract – ***HIRANI VS KASSAM (1952) 19 E.A.C.A 131***. The consent order was signed by the 2nd defendant and the other parties on 8th February 2008 and although he has deponed in paragraph 12 of his supporting affidavit that he could not have signed it because he had an advocate by the name of **P.M. MUCHIRA ADVOCATE** on record, there is a notice of withdrawal of advocate signed by him on the same day withdrawing instructions from the said advocate. Surely, if **P.M. MUCHIRA** was still properly on record on his behalf, nothing would have been easier than for the said advocate to file an affidavit supporting that claim. On the other hand, **Mr. HARMESH KUMAR MAHAN ADVOCATE** for the deceased plaintiff (now substituted by **ELIZABETH MUTHONI MURIITHI**) had earlier deponed in a previous affidavit that the 2nd defendant/applicant had signed the consent order in his presence having withdrawn the services of his then advocate **Mr. MUCHIRA**. There is nothing placed before me to suggest that **Mr. MAHAN** has misled the Court. In short, there is no ground to warrant the setting aside of the consent order dated 8th February 2008. That prayer must therefore be dismissed.

Ultimately therefore and upon considering the 2nd defendant/applicant's Notice of Motion dated 18th

November 2015 and filed herein on 3rd December 2015, I make the following orders:-

1. ***The firm of IKAHU NGANGA & CO. ADVOCATES is granted leave to come on record on behalf of the 2nd defendant/applicant.***

2. ***The application seeking the review/setting aside of the consent order dated 8th February 2008 and adopted on 3rd March 2008 is dismissed.***

3. ***Each party to meet their own costs.***

**B.N. OLAO**

**JUDGE**

**1ST FEBRUARY, 2017**

Ruling dated, delivered and signed in open Court this 1st day of February 2017

Mr. Ngigi for Mr. Nganga for the Applicant present

Mr. Sharma for the Respondent absent

Respondent however present in person.

**B.N. OLAO**

**JUDGE**

**1ST FEBRUARY, 2017**