



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 461 OF 2012

(Formerly Eldoret Hccc No. 149 of 2008)

ESTHER NGENDO.....PLAINTIFF

VERSUS

SARATHIA INVESTMENTS LTD.....1ST DEFENDANT

ASEGRAL ABDULHUSSEIN MAMUJEE.....2ND DEFENDANT

FAKHRUDIN MOHAMMED ALI.....3RD DEFENDANT

MUHSINALI MOHAMMED ALI.....4TH DEFENDANT

ADAMALI MOHSINALI MOHAMMED ESSAJI...5TH DEFENDANT

RULING

Esther Ngendo, the applicant herein comes to court for orders that the orders made on 26.2.2013 by the Honourable Justice Silas Munyao be reviewed, varied or vacated and that the suit be reinstated for hearing and that the matter be consolidated with ***Eldoret E & L Case No. 2 of 2015, Esther Ngendo Vs Sorathia Investments and 4 Others.***

The application is based on grounds that the applicant herein filed suit vide Eldoret Environment and Land Case No. 461 of 2012 against the 1st respondent claiming rights over land parcel No. Eldoret/Municipality/Block 7/107 through adverse possession and against the 2 to 5th respondents. The suit was struck out vide orders dated 26.2.2013 which allowed the respondent's application earlier dated 15.3.2011. That at such time of hearing of the application, the applicant had not filed her replying affidavit so as to properly defend the application and contest all issues raised therein. Moreover, that further such necessary documents were not placed before the Honourable Judge during the application and when the court made its orders. The applicant only came to know of the absence of her replying affidavit and the said documentation upon further perusal of the court record, her affidavits and the said ruling and when she received legal counsel and was thus able to understand the case and the mess already done. The failure to reply to the application and to put in the new documents was an inadvertence on the part of her former counsels unfortunately the same was visited upon her.

There being lack of proper defence and evidence to rebut the respondent's grounds the court erroneously found that the applicant was a tenant and further that issues in Eldoret Environment and Land Case No. 461 of 2012 were res-judicata. That such new evidence could not be produced by the applicant who was denied an opportunity to sufficiently defend her suit by filing a replying affidavit and the court went

ahead to strike it out. According to the applicant, justice ought to be determined without undue regard to procedural technicalities. That no irreparable loss shall be occasioned to the respondents since they are in exclusive possession and occupation of the suit land.

Esther Ngendo Mwiko in her supporting affidavit states that she filed this suit on her behalf and on behalf of her late husband Jonah Mwiko Njuguna seeking rights over Eldoret Municipality Block 7/107 having acquired the same vide adverse possession as they had stayed in the said land since 1964 when the 1st owners, Adul Mamooji & Mohammed Mamooji were in occupation and who later left them in their land in 1969. That since 1969, they had been in exclusive occupation over the land and such occupation was peaceful, quiet and uninterrupted. That later in the year 1996 (27 years later), and after her husband passed on, she was evicted by the 1st defendant. The said defendant claimed to have purchased the land from the owners yet they have never produced any sale agreement or such evidence on to how they acquired the land. That during their stay for the said 27 years, they have never seen anybody move to evict them or claim the land or interfere with their possession. That such rights by the 1st respondent and other respondents, if any, were defeated upon lapse of 12 years since 1969.

That they had never been tenants of the initial owners or any such person on behalf of the said owners. That during their stay with her late husband, her late husband Mr. Johna Mwiko Njuguna paid land rates and rent over the suit land since the initial owners had left there was no other purchaser or person to pay and being in occupation their land was at risk since the amount had been accumulating.

That during the suit, she had instructed his advocates M/s Naikuni Ngaa & Company Advocates with offices at Nairobi to act for her and awaited to come to court to testify. The matter was pending for years, the court directed that the matter be set down for hearing on 19.5.2010 hearing date when her said counsel informed her that she could finally get to testify unfortunately she fell ill and could not testify. The defendant was also ill and unable to proceed with this case. That she waited for a hearing date so that all matters could be determined but she was later informed that the case could not proceed and advised that it was struck out. That she was not informed of the application by the respondent to have the suit struck out nor was she given a chance to swear the replying affidavit in response as her counsel did not call her to swear such affidavit. That after the dismissal, she tried to appeal with difficulty since she was ill and financially incapacitated having exhausted all her earnings in hospital and medication. Her appeal could not proceed, she is now informed by her new counsel on record and which advice she trust to be legally sound that the notice of appeal was not served upon the respondents within requisite 7 days and that lack of the said service is fatal to the existence of an appeal. Further that the notice was not filed in the 1st place and in the circumstances no appeal existed and all this time she was left in the dark concerning the said inadvertence especially during the ruling of Hon. Justice Munyao to enable her present further documents in response to the application to strike her suit and thus seek review at that time instead they opted to rush to the court of appeal and proceed in abuse of court process and even failed to produce important documents indicating her sickness.

That she later got back to her feet disappointed and heart broken and opted to proceed in person when she filed an application dated 11.6.2015 before this court vide Environment and Land Case No. 2 of 2015 Judicial Review but at that time did not get proper guidance and legal advice and have sadly suffered in her quest for justice since documents are not proper before court, she was tricked misadvised and now financially incapacitated. She believes that if she was given a chance to testify in her case, this would be better, if her replying affidavit was proper before the court to contest the application to strike out the suit the court would not have issued such fatal orders. The Honourable Judge erroneously and with lack of a proper defence from her end agreed with the defendants that she was a tenant, that she had purportedly entered into an agreement with the 1st defendant where she had paid him rent and that he then paid her *exgratia* when she left. She is not aware of any such agreement and have been putting the defendants to prove to date and if the said exists the same is a conspiracy to defeat the interest of justice.

That she is also advised that the suit was said to be res-judicata but the issue was not as such since the issues in the Originating Summons are distinct and have never been determined by any court of law on merit or at all. That further that at no point have the defendants been put to proof as to acquisition of the

suit land and the originating summons was properly brought. The acquisition of the and the finding of the Judge was erroneous. That she is an old litigant and now a widow left to fend for the estate of her late husband, have been left homeless and frustrated along the way, she still wonders why the matters began when her husband died and the defendants took advantage of the fact that she was left defenseless, sickly and illiterate. That she took part in development of the suit land which was her place of business and a home for her even before the respondents came in and mercilessly evicted her.

The application is opposed vide the affidavit of Mansoorali Sorathia who states that the applicant has filed an appeal and Court of Appeal Civil Application No. 25 of 2013 and therefore, review is not available as one cannot file an application for review when an appeal is pending. The respondent further argues that the application for review has been filed with unreasonable delay as it was filed more than two years from the date when the decision was made. Moreover, the respondent states that the applicant has not demonstrated there is a mistake on the face of record or delivery of law and important matters or evidence which the applicant was unaware and could not present to court despite due diligence or other sufficient reasons.

Mr. Angu Kitigin learned counsel for the plaintiff/applicant submits that the matters before this court are yet to be determined by a court of law. The said matters still remain an open issue to this court and thus do not satisfy section 7 of the Civil Procedure Act for a matter to be res-judicata. On delay, he submits that the court should consider the interest of justice and the fact that it has counsel's mistake that cannot be visited on the plaintiff. On there being an appeal, the plaintiff submits that the same was struck out. Lastly, the plaintiff submits that no loss or irreparable harm shall be occasioned on the defendant.

The respondent submits that the application is brought with unreasonable delay and submits that the reasons given for delay are not sufficient. The respondent further submits that there are no grounds for review as the grounds exhibited are for appeal.

I have considered the application for review and do find that after the ruling by Justice Munyao on 26.2.2013, the applicant preferred an appeal in the Court of Appeal vide notice of appeal filed on 1/3/2013 and subsequently sought to obtain certified copies of proceedings from the deputy registrar though there was a delay in filing the record of appeal and therefore she filed an application for extension of time being civil application no NAI of 2013 (UR 187 OF 2013). The application for extension of time was dismissed and therefore closing the avenue of appeal due to delay. The application was dismissed on the 26th Day of May 2015 by hon justice A. K. Murgor judge of Appeal. This application was brought to this court on the 23rd September 2015 almost three months after the avenue in the Court of Appeal being closed. This fact illustrate that the applicant was aware that the decision had been made but was undecided as to whether to appeal or to go for review. I do hold that the delay of more than two months from the date of dismissal of the application for extension of time to file the record of appeal out of time to the date of filing this application was unreasonable.

The Memorandum of Appeal is dated 16.9.2013 and therefore, it can be said that the applicant was aware that the decision was made and at least commenced the appeal in the Court of Appeal. The applicant claims that she was not aware of the application for striking out the suit but her advocates were also aware of the application and therefore, she cannot visit the negligence of her advocates on the respondents. The explanation given by the applicant that she was under medication also does not make sense as the medication comes more than 2 months after the ruling.

At this point in time, I do find it is necessary to examine the provisions of Section **80** of the Civil Procedure Act and Order **45** Rule **1** of the Civil Procedure Rules, 2010. In my view, the Court has a power of review, but such said power must be exercised within the framework of Section **80** Civil Procedure Act and Order **45** Rule **1**.

Section **80** of the Civil Procedure Act provides as follows: -

80. *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 judgement 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 of the Civil Procedure Rules, 2010 provides as follows: -

45 Rule 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

Section 80 gives the power of review and Order 45 sets out the rules. The rules in my view restrict the grounds for review. In my view, the above rule lays down the jurisdiction and scope of review limiting it to the following grounds;

(a) 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 by him at the time when the decree was passed or the order made or;

(b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

On grounds for review, the applicant appears to be applying to review to decision of Hon Justice Munyao on the basis that the Honourable Judge was wrong on finding that the suit was res-judicata. I do hold that the applicant ought to go on appeal on this ground but not to apply for review under order 45 of the civil procedure rules 2010. I do find that the applicant has not demonstrated that there is any error apparent of the face of record and has not brought the court any new evidence or important matter to enable the court review its decision, which evidence was not within the applicant’s knowledge and could not be presented to court despite exercise of due diligence or any sufficient review.

Ultimately, having found that the application has been brought with unreasonable delay, the court declines to exercise its discretion and dismisses the application with costs.

DATED AND DELIVERED AT ELDORET THIS 31ST DAY OF MARCH, 2017.

A. OMBWAYO

JUDGE