REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC Appeal NO. 21 OF 2015

MICHAEL KIRARA MURAYA……..…….....…APPELLANT

VERSUS

THE COUNTY COMMISSIONER MURANG'A COUNTY…...1ST RESPONDENT

HON. ATTORNEY GENERAL…….....….2ND RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 5TH DECEMBER, 2014 BY HON. B. OCHIENG – Ag. C.M AT MURANG'A CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 371 OF 2013)

RULING

When this appeal was placed before me for directions on 2nd November 2015, this Court directed that it be canvassed by way of written submissions. The Appellant was to file his submissions within three (3) weeks and the Respondents to do so three (3) weeks after service. The appeal was then fixed for mention on 25th January 2016 to confirm compliance.

On 25th January 2016, only the appellant's counsel **MR. MWANIKI** confirmed compliance and **MS MASIKA** for the Respondent sought an extension of two (2) weeks to do so. The appeal was therefore fixed for mention on 16th March 2016 but come that day, counsel for the appellant informed the Court that they had not been served with the respondent's submissions and sought a date for judgment. As there were no submissions filed by the Respondent as directed nor any appearance by its counsel to explain the lack of compliance, this Court fixed the judgment date for 6th May 2016. However, I was not sitting on 6th May 2016 as I was engaged at the Launch of the Enhanced Service Delivery Initiative at Milimani Court and by our letter ref JUD/KER/ELCA/21/15 dated 26th April 2016, the Deputy Registrar informed both the firm of **MWANIKI WARIMA** Advocates for the Appellant and the **HON. ATTORNEY GENERAL** for the Respondent that judgment would be delivered on 12th May 2016 at 2 p.m. when it was indeed delivered with no representative from the Attorney General's office.

The Respondents have now moved this Court by their application dated 14th September 2016 and filed on 5th October 2016 seeking the following orders:

1. ***That the decision of this Honourable Court be set aside and the application be heard by the Judge.***

2. ***That the Court orders stay of execution until hearing and determination of the review.***

3. ***That costs of this application be in the review.***

The application which is premised on ***Article 159 of the Constitution and Order 45 Rule 1 of the Civil Procedure Rules*** is based on the grounds set out therein and supported by the affidavit of **STEPHEN TERERELL** advocate.

The gravamen of that application is that although the Respondents filed their submissions on 16th March 2016 as directed, this Court did not make any reference to these submissions and this Court also ignored public interest which far outweighs the Appellant's rights. It is also deponed in paragraph five (5) of the said affidavit that this Court erred in law by over-turning the trial magistrate's decision. I can answer that submission straight away by stating that misconstruing a statute or other provision of the law cannot be a ground for review – ***NATIONAL BANK OF KENYA LTD VS NDUNGU NJAU C.A CIVIL APPEAL No. 211 of 1996.***

Though served with the application, the Appellant did not appear nor file any replying affidavit or grounds of objection thereto and **MR. TERRELL** State Counsel urged me to allow it. I nonetheless directed that I would make a ruling on the said application which I now propose to do.

The application basically seeks the setting aside or review of this Court's judgment delivered on 12th May 2016 on the main ground that this Court did not consider the Respondents submissions filed on 16th March 2016 as directed. When the application first came up before me on 23rd November 2016, I observed, curiously, that there were on record submissions filed by the Respondents in this case and stamped 16th March 2016. I therefore sought an explanation from the officer in charge of this Court's Environment and Land Registry, Ms Esther Wanjau, as to why the said submissions were now in the file yet they were not there when I drafted the judgment sought to be set aside or reviewed. Her explanation which I accept, was that the submissions were brought after the Court had risen for the day on 16th March 2016. I advised her that in future, once a Magistrate or Judge has fixed a date for judgment or ruling, no further pleadings or submissions can be received in the registry except with the direction of the Magistrate or Judge handling the matter. Once a case is finalized and a date for judgment or ruling taken, the file goes to the custody of the Judicial officer and not to the registry and so it is not possible to file any further pleadings or submissions. Only the Judicial officer can accept such late submissions and that discretion will not normally be exercised favourably without the opposing party being notified. It is abundantly clear therefore that the Respondents submissions were taken to the registry and stamped notwithstanding the fact that the case file was no longer in the registry. My advice to counsel faced with a similar predicament is that you write a formal letter to the Judicial officer handling the matter to seek their indulgence in the matter. A mention date can be taken so that the other party is kept in the picture because Court proceedings are not conducted in secrecy.

Having said that, the bottom line really is that the Respondents submissions dated 26th February 2016 and stamped 16th March 2016 were not in the file when this Court was drafting its judgment delivered on 12th May 2016. In the said judgment, I have observed as follows:

> ***"This Court directed that the Hon. Attorney General be served with the appellant's submissions which was done and on 25th January 2016 Ms Masika Counsel for the respondent asked for two weeks to file submissions. However, by 16th March 2016 when the appeal came up for mention, there were no submissions filed by the respondents and neither did their counsel appear. This Court therefore fixed the judgment date for 6th May 2016. I have therefore not had the benefit of submissions by the respondents in drafting this judgment***" Emphasis added.

Clearly therefore if the Respondents counsel was in Court when this appeal was mentioned on 16th March 2016, he could have told the Court that the submissions had been filed or were in the process of being filed. The Court would have noted that on the record. However, to take the submissions to the registry long after the Court had risen and have them stamped was improper. It was also improper on the part of the registry to accept such submissions. I have been assured that, that will not happen again.

This Court's power to review its judgment is donated by ***Order 45 Rule 1 (1) of the Civil Procedure Rules*** which 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

It is clear from the above that a party seeking review of a decree or order must prove that:

1. There is discovery of new and important matter or evidence that could not be produced, even with due diligence, at the time the decree was passed or

2. That there is a mistake or error apparent on the face of the record or

3. Any other sufficient reason

4. And the application must be filed without unreasonable delay.

In ***FRANCIS ORIGO & ANOTHER VS JACOB MUNGALA (2005) 2 K.L.R 307***, the Court of Appeal said:

"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

The judgment sought to be reviewed or set aside was delivered on 12th May 2016 and this application was filed on 5th October 2016 six (6) months later. No explanation has been given for that delay which is clearly un-reasonable. And even on its merits, this application is bound to fail. There is no new and important matter or evidence that can be said not to have been within the Respondents knowledge or any mistake or error apparent on the face of the record nor any other sufficient reason to warrant the grant of the orders sought. This Court did not consider the Respondents submissions for the simple reason that they were not on the record. That mistake cannot be attributed to the Court. It can only be attributed to the Respondents in failing to comply with time lines. The mistake or error referred to in ***Order 45 Rule 1 (1) of the Civil Procedure Rules*** can only be a mistake or error attributed to the Court and which must be on the record. The error must be self evidence and should not require any elaborate argument to be established – ***NATIONAL BANK OF KENYA VS NDUNGU NJAU*** (supra).

Clearly, the Respondents are not deserving of the orders to review or set aside this Court's judgment delivered on 12th May 2016. They have not satisfied the requirements of ***Order 45 Rule 1 (1) of the Civil Procedure Rules.*** Submissions on the appeal were invited way back on 2nd November 2015 but the Respondents did not meet the time-lines. Parties and their counsel must know that Courts can only deliver justice expeditiously if they abide by directions issued to them. They are enjoined to assist the Court meet its objectives and should not therefore be heard to complain when they do not play their roles effectively.

The up-shot of the above is that the application dated 14th September 2016 and filed on 5th October 2016 is without merit. It is accordingly dismissed with no order as to costs.

B. N. OLAO

JUDGE

19TH MAY, 2017

Ruling dated, delivered and signed in open Court this 19th day of May, 2017

Mr. Terrell for the Applicant present

No appearance for the Respondent

Right of appeal explained.

B. N. OLAO

JUDGE

19TH MAY, 2017