**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL APPEAL NO.41 OF 2012**

**DANIEL LUWAMBI .....…….1st APPELLANT**

**IDI KATANA.....2ND APPELLANT**

**GEORGE TUJI.....3RD APPELLANT**

**VERSUS**

**PENGUIN HOLDINGS LIMITED……...……..…….DEFENDANT**

**AND**

**IDDI IBRAHIM**

**YUSUF NEVI (SUING ON BEHALF OF ALL THE 127 MEMBERS OF THE MABIRIKANI VILLAGE LAND COMMITTEE).....INTERESTED PARTY**

**RULING**

1. The application for determination is the Notice of Motion dated 5th April 2013. It is brought under Order 45 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law. The applicant seeks the following orders:

**1) Spent**

**2) THAT the ruling dated 27th February, 2013 and subsequent orders of this Honourable Court be reviewed and set aside.**

**3) THAT this Honourable Court be pleased to order a stay of execution of the ruling and consequential order dated 27th February, 2013 pending the hearing and determination of this application.**

**4) THAT costs of this application be provided for**.

2. The application is premised on the grounds: -

**a) THAT the ruling and the orders dated 27th February, 2013 were obtained through**

**concealment of fundamental information from the eyes of the court.**

**b) THAT the ruling and orders dated 27th February, 2013 were obtained through improper conduct by the appellants who ought to have disclosed to the honourable court the true state of facts.**

**c) THAT the applicant/respondent has discovered new and important matter and evidence which were not within his knowledge at the time the order was made.**

**d) THAT even after the exercise of due diligence by the respondent the new and important evidence and matter could not be produced at the trial when the order was made.**

**e) THAT the new and important matters and evidence were within the appellants' knowledge.**

**f) THAT despite having full knowledge of the relevant and important facts which are material to this matter the appellants failed to disclose the same to this Honourable Court.**

**g) THAT there is sufficient cause to review the said ruling and consequential orders and subsequently setting it aside where there has been material non-disclosure of facts.**

**h) THAT this honourable court has the power to set aside and/or vary this ruling and the consequential orders thereof so that the ends of justice are met and so as to preserve the integrity of this Honourable Court.**

**i) THAT this application is made timeously without undue and unnecessary delay.**

3. The application is also supported by an affidavit sworn by Abdulhakim Abdalla on 5th April, 2013 in which it is deponed, inter alia, that vide a Notice of Motion dated 21st March, 2013, Iddi Ibrahim and Yusuf Nevi who were suing on behalf of members of Mabirikani Village Land committee applied and were enjoined as interested parties in this matter, that the said interested parties had filed on Origination Summons in the High Court at Mombasa being Civil Application No.328 of 2010 (OS) claiming adverse possession against one Ainsely Leverrat Dopwell and vide a decree dated 15th February, 2013 the claim for adverse possession was granted in their favour over all that piece of Land containing an area of 152 acres and 134 acres respectively or thereabouts registered under the Registration of Titles Act (chapter 281) Laws of Kenya in the name of Ainsely Leveratt Dopwell and comprised in Title LR.3590 and 3591 subdivision Number 885 Section VI Mainland North and sub-division Number 288 Section V Mainland North at Mazeras Mombasa District. It is further deponed that the 1st and 3rd appellants herein are members of Mabirikani Land Committee and parties to the Mombasa HCCC NO.328 of 2010 (OS) but did not disclose this fact to the court with the intention of securing the orders sought at the expense of the integrity and reputation of the court. It was also stated that the 2nd Appellant does not appear in the list of the members of Maribikani Land Committee and therefore the 2nd Appellant had misled the court by claiming that he had been in occupation of the suit land for many years. According to the applicant, the orders of the court issued on 27th February 2013 were fraudulently obtained by concealment from the court of crucial facts that were necessary for a fair and final determination of the dispute.

The applicant also filed submissions which elaborated upon the grounds set out hereinabove as well as the contents of the supporting affidavit. The applicant submitted that the failure by the 1st and 3rd appellants to disclose to the court that they were parties in HCCC No.328 of 2010 (OS) was an abuse of the court process that brings the integrity of the court into disrepute as it amounts to multiplicity of actions which may have potentially embarrassing effects on the fair and just determination of the Appeal and the proceedings in the subordinate court. The applicant also submitted that it was not informed of the existence of the proceedings in the HCCC NO.328 of 2010 (OS) before the interested parties were enjoined into the case. It was further submitted that material non-disclosure of relevant facts to the court is extremely fatal and can only be cured by the setting aside of the orders issued. The applicant found

justification for review and the setting aside in the fact that there is discovery of new and important evidence that reveal that this dispute was flawed and lacking in disclosure.

4. The application was opposed by both the Appellants and the interested party who filed their respective Replying Affidavits and grounds of opposition. They also filed written submissions.

5. Mr. Taib, learned counsel for the interested party, submitted that the interested parties were awarded the suit property vide Mombasa HCCC No.328 of 2010 (O.S.) and have been issued with title deeds as ordered by the court. According to him, any order given in this application would be pre-judicial to the proprietary rights of the interested parties. It was counsel's submissions that the court should not issue orders in vain, the subject matter having been conferred to the interested parties. Learned counsel further submitted that the ruling of the court dated 27th February 2013 was a manifestation of the anger of the court which was to strike a blow to the applicant's deliberate action of lying and misleading the court by extracting and executing an order that did not faithfully reflect and capture the order that the learned magistrate had issued on 24th February 2012 in Mombasa RMCC No.2524 of 2011. Mr. Taib submitted that the court in its ruling was rectifying the foundation of justice by reversing the implementation of an unlawful order and required that the position as ordered by the court to remain until the hearing and determination of the appeal. It was further submitted that there was no new matter that has arisen or error apparent on the face of the record to warrant the issuance of the review order being sought. Counsel urged the court not to aid a party who comes to court with unclean hands. The learned counsel cited several authorities in support of his submissions. Mr. Mohamed, learned counsel for the Appellants and Mr. Tindi learned counsel for the interested parties both adopted the submissions of Mr. Taib.

6. I have considered all the issues raised in the application and the rival submissions. In his ruling dated 5th November, 2012, Tuiyott. J noted that an order extracted in Mombasa RMCC No. 2524 of 2011, Penguin Holdings Limited –vs- **1)** Daniel Luwambi, **2)** Idi Katana and **3)** George Tuji did not faithfully accord with the ruling of the learned magistrate, Hon. T. Gesora delivered on 24th February, 2012. The learned judge observed that the extracted order did not include part of the learned magistrate's ruling and that the same was not prepared in accordance with the law as provided for under Order 21 Rule 8 of the Civil Procedure Rules. To the learned judge, this was a threat to the integrity of the court. The learned judge then invited the parties counsel to address him as to why he should not order the restoration of the status quo existing before the evictions based on the offensive order were carried out. The parties duly addressed the court as directed through written submissions.

7. In his ruling dated 27th February 2013, and which is the subject of this application, the learned judge held, inter alia, that the flagrant breach of law in the order extracted and executed was an attack on the integrity of the court process. He faulted the applicant herein for deliberately extracting a court order that did not faithfully reflect and capture the order of the magistrate and added that the portion of the order that was suppressed or left out was intended to give the applicant a licence to evict immediately and without notice. In the end, the learned judge concluded that the applicant's behaviour could not be allowed to lie and that the applicant must suffer and live with the consequences of its misfeasance until the appeal is heard and determined. The learned judge then ordered the appellants to be restored back to the land in the manner obtaining before eviction and that they shall remain there until the appeal is heard and determined. The restoration of the Appellants to the suit property was to be undertaken and completed within 30 day from 27th February 2013. It is this ruling that the applicant is seeking to review and set aside.

8. Order 45 Rule 1 of the Civil Procedure Rules allows an aggrieved party to apply for review where there is discovery of new and important matter or evidence which, after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time when the order was made, or on account of mistake or error apparent on the face of the record, or for any other sufficient reasons.

9. In this case, the applicant states that there was non-disclosure by the respondents about a separate suit in which they were parties. The applicant further states that there is discovery of new and important

matter or evidence found which were not within its knowledge at the time the order was made and specifically attached the pleadings and decree in Mombasa HCCC No.328 of 2010 (O.S.) to the supporting affidavit.

10. The ruling made on 27th February 2013 was in respect to two applications. The first application dated 19th April, 2012 was by the Appellants who were mainly seeking an order of stay of execution of the orders made in Mombasa RMCC No.2524 of 2011 pending appeal. The second application which was dated 3rd May 2012 was by the respondent, now the applicant herein, and was mainly seeking a temporary order of stay or variation or setting aside of the order issued on 24th April 2012 by this court which stayed the execution of the order of the learned magistrate pending inter-partes hearing. All the parties were given full opportunity to canvass their respective positions in the two applications.

11. I have carefully studied the ruling of the learned judge. It is evidently clear that his decision was informed by the conduct of the applicant herein in deliberately extracting and executing an order that did not faithfully reflect and capture the order that was granted by the learned magistrate. The orders sought in the two applications, just as in this application, are discretionary. Looking at the tenor and meaning of what the learned judge said, I have no doubt that he used his discretion judicially having considered all the facts that were availed to him. It is clear from the application herein that the applicant in the motion, supporting affidavit and even the submissions has deliberately avoided commenting on the issue of the offensive order that formed some substantive portion of the learned judge's ruling.

12. In the case of **NATIONAL BANK OF KENYA LTD –VS- NDUNGU NJAU (1997) eKLR**, the court of Appeal held ".....the matters in dispute had been canvassed before the learned judge. He made a conscious decision on matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned judge would be sitting in appeal in his own judgement which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it....". I wish to be guided by the above decision as well as the decision in **PATEL VS E.A. CARGO HANDLING SERVICES LTD (1974) EA 75** in which Duffus P at page 76 stated: "there is no limit or restrictions on the judge's discretion except that if he does vary the judgment (order) he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by rules".

13. The applicant has cited concealment and non-disclosure of some material fact by the respondents as one of the main grounds in support of the application. I have looked at Order 45 of the Civil Procedure Rules. The jurisdiction of the court under Order 45 of the civil Procedure Rules is restricted to the grounds set out in the said order which are:

> **i)** There has been 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 the decree was passed or order made, or **ii)** on account of some mistake or error apparent on the face of the record; or **iii)** for any other sufficient reason. The question on non-disclosure or concealment of some material fact is not a ground for review under the said order. The mere allegation against the respondents for non-disclosure should not therefore suffice as a basis for review under order 45 of the Civil Procedure Rules. I am not satisfied that the applicant has established any sufficient reason to review the impugned order herein. Consequently, the ground for concealment or non-disclosure fails.

14. The applicant has also based his application for review on discovery of new and important matter or evidence. The applicant has not disclosed when the new and important matter or evidence came to its knowledge. In the supporting affidavit the applicant is relying on information from its advocates but it is not shown when the advocates got to know about the new matter or evidence. The applicant has not shown that the new and important matter or evidence, after exercise of due diligence, was not within their knowledge or could not be produced by them at the time the order was made.

15. I have looked at the two applications that formed the basis of the ruling that the applicant seeks to review. The alleged new and important matter or evidence, in my view, may not have changed the ruling made by the learned judge. The new evidence may have been relevant to the subordinate court but not this court.

16. The nature of the application herein is that an order for review would definitely reverse the orders already issued by the learned judge. The ruling had directed that the orders be undertaken and completed within 30 days from 27th February 2013. In my view an order for review would not be appropriate in the circumstances of this case as the orders given were discretionary reliefs and were granted by the learned judge depending on the special circumstances that prevailed then before him. To issue an order for review would reverse the orders already executed and I would be sitting in an appeal and not review. I am not prepared to do that. In my view, the orders such as the ones being impugned are incapable of interference by a judge of concurrent jurisdiction in an application for review or setting aside, unless such judge will be pretending to sit on appeal against the order of the peer judge.

17. By reason of the foregoing, I find that the application has not passed the test for grant of an order for review and the same is dismissed with costs to the respondents.

**Delivered, dated and signed at Mombasa this 11th May 2017.**

**C. YANO**

**JUDGE**