



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC NO. 225 OF 2011**

**JULIUS OCHIENG OLOO.....1<sup>ST</sup> PLAINTIFF**

**FLORENCE THIRA OCHIENG.....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

**LILIAN WANJIKU GITONGA.....DEFENDANT**

**RULING**

1. The Plaintiffs/ Applicants filed a Notice of Motion dated 19<sup>th</sup> February, 2015 in which they seek review and setting aside of the Orders of 27<sup>th</sup> January 2015 made by Honorable Lady Justice Nyamweya. The Defendant/Respondent had filed an application in which she sought the dismissal of the Applicants suit for want of Prosecution. The Defendant/ Respondent's application was heard and in a ruling delivered on 27<sup>th</sup> January 2015, the Judge allowed it and dismissed the Plaintiff/ Applicants suit. This is what triggered the present application.

2. The Applicants contend that there are sufficient reasons for review of the Court's orders of 27<sup>th</sup> January 2015. That they never had an opportunity to be heard on merits of their application. That the dispute revolves around Title and ownership of Land which is an emotive issue. That failure by the applicants to file an affidavit in their own name to respond to the Defendant/ Respondent's application was premised on the defence strategy adopted by their counsel but which was construed by the Court to evince disinterest in their case.

3. The Applicants further contend that the delay in prosecution of the case was partly because of attempts to have the case negotiated out of court and partly because of the busy schedule of their lawyer who was engaged in election disputes following the 2013 General elections and the movement of their lawyer from M/s Asiema & Company advocates to the new law firm of Ongoya & Wambola Advocates.

**RESPONDENT'S CONTENTION**

4. The Respondent has opposed the Applicants application based on a replying affidavit sworn on 11<sup>th</sup> March 2015. The Respondent contends that the applicants application is based on a mistaken believe that their application was dismissed because the affidavit in support was sworn by their advocate. The Respondent further contends that the reasons advanced for review are the same ones which were raised in their advocates replying affidavit in opposition to the application for dismissal for want of prosecution.

5. The Respondent goes on to state that the dispute herein has been pending in Court for long and that attempts to have it resolved outside court was not successful because the Applicants did not respond to the offer for settlement. That if the application for review is allowed, it will delay this matter further.

### **ANALYSIS**

6. I have considered the Applicants application as well as the opposition to the same by the Respondent. I have also considered the submissions filed by both the Applicants and the Respondent. Under Order 45 of the Civil Procedure Rules, there are three grounds for review. The first is discovery of new and important matter or evidence that was not in the applicant's knowledge or could not be produced when the decree or order was passed. The second one is mistake or error apparent on the face of the record. The third is any other sufficient reason.

7. A look at the applicants grounds and affidavit in support of the application show that the reasons for review are the same reasons which were raised in the affidavit in opposition to the application for dismissal of the applicant's suit for want of prosecution. Basically there is therefore nothing new the applicants are raising. The Applicants seem to think that the application for dismissal of their suit was allowed because they did not swear an affidavit in their own name. A careful reading of the ruling of the Judge shows that this was not the reason for allowing the Respondent's application. Even if this were to be the case, this cannot be a ground for review. It can only be a ground for appeal and since this is not an appellate court, that ground cannot be entertained before this court.

8. The decision by the Applicants former advocates who had filed Judicial Review matter which was later dismissed and the issue of the applicants current advocate being involved in Elections Petitions arising from the 2013 general elections were considered by the Judge. Also considered was the movement of their current lawyer from the law firm of Asiema & Co to Ongoya & Wambola Advocates. The applicants cannot raise the same issue in the present application in which they are seeking review. If the Applicants felt that those issues were not addressed, the best forum would have been the Appellate court, but they cannot raise the same issues before this Court.

9. In **Abasi Belinda –vs- Fredrick Kangwamu & Another ( 1963) EA 557** Bennet Judge had this to say:

**“ 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 an appeal.”**

The Applicant herein seem to think that the Judge allowed the application for dismissal of their suit because they had not sworn the affidavit in opposition to that application in their name. This cannot be a ground for review.

### **CONCLUSION.**

10. It is clear from the above analysis that the applicants application cannot succeed. The same is hereby dismissed with costs to the Respondent.

It is so ordered.

**Dated, signed and delivered at Nairobi on this 27th day of June, 2017.**

**E. O. OBAGA**

**JUDGE**

In the absence of Advocates for the parties who had been served with Notice of delivery of Ruling.

**E. O. OBAGA**

**JUDGE**