



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

**HCC No. 102 OF 2004**

**BOROP MULTIPURPOSE CO-OPERATIVE SOCIETY LTD ..... PLAINTIFF**

**VERSUS**

**SONOIYA ARAP SIMSIM & 3 OTHERS..... DEFENDANTS**

**RULING**

1. This ruling is in respect of plaintiff's Notice of Motion dated 27<sup>th</sup> January 2016. The application is brought under Order 45 rule 1(1) (a) and (b) and rule 3(1) and (2) among other provisions cited on the face of the application. The prayers sought on the application are:

1. *(Spent).*

2. *THAT this honourable court be pleased to review the judgment and decree rendered by Hon. L. N. Waithaka Judge on the 14<sup>th</sup> day of November, 2014 and upon review, set aside and/or discharge the judgment and decree of the said date and the plaintiff suit reinstated for re-hearing before another judge.*

3. *Spent.*

4. *THAT the honourable court be pleased to make such order or orders at it thinks fit and just in the circumstances.*

5. *Costs of the application be in the cause.*

2. The application is supported by the affidavit of John K. Rotich Sworn on 27<sup>th</sup> January 2016 and filed on 28<sup>th</sup> January 2016. He deposes in the affidavit that there is an error apparent on the face of the record and the error being that the learned judge did not consider the question of alleged breach or violation of the plaintiff's by-laws.

3. The defendants responded to the application through the replying affidavit of Sonoiya Arap Serser sworn and filed on 13<sup>th</sup> March 2017. It is deposed on behalf of the defendants that the application is meant to keep the defendants from enjoying the fruit of the judgment; that judgment having been delivered in the year 2014 and the application having been filed on 28<sup>th</sup> January 2016 there has been delay on the part of the applicant; that the applicant had filed a Notice of Appeal on 27<sup>th</sup> November 2014 against the judgment sought to be reviewed.

4. Parties opted to dispose of the application by way of written submissions. In that regard, the defendants

submissions dated 10<sup>th</sup> April 2017 were filed on 11<sup>th</sup> April 2017 while plaintiff's submissions dated 24<sup>th</sup> May 2017 were filed on 25<sup>th</sup> May 2017.

5. It was submitted on behalf of the applicant that there is an error apparent on the face of the record on a substantial point of law being that the court did not consider alleged breach of the plaintiff's by-laws, which by-laws made the actions of the defendants illegal and null and void. It was further submitted that the resulting situation was that the court failed to consider the applicant's case on substantial points of law.

6. Regarding the alleged delay in filing the application for review, the applicant submitted that the application was timeously filed on 28<sup>th</sup> January 2016 but its prosecution was delayed due to difficulties in retrieving the court file. Regarding the question as to whether or not the applicant had appealed against the judgment, the applicant submitted that the notice of appeal which had been filed on 27<sup>th</sup> November 2014 had been withdrawn entirely. The applicant thus urged the court to allow the application.

7. For the defendants, it was submitted that the applicant was guilty of laches as regards the time of filing the application. Further, that there is no error apparent on the face of the record since. That what the applicant is terming error apparent on the face of the record requires a long drawn process of reasoning and interrogation of evidence and cannot therefore be the subject of review.

8. I have considered the application, the affidavits filed both in support and in response to the application and the submissions by both sides as well as the authorities cited. I note that that the affidavit in support of the application raises largely matters of law or issues that would properly belong to the province of submissions.

9. The application is brought under Order 45 rules 1 and 2. The applicant is seeking review on the ground of "error apparent on the face of the record." According to the applicant the error is that the court failed to consider alleged breach of the plaintiff's by-laws. As I understand it, the contents of the said by-laws and the nature of breach are all matters of evidence. Basically, the applicant is urging the court to review the evidence on these issues and to arrive at a different conclusion from that of the learned judge. I cannot do so as I would be sitting on appeal from the decision of the learned judge.

10. In the case of **Jameny Mudaki Asava v Brown Otengo Asava & another [2015] eKLR** the court of Appeal stated:

***Order 45 of the Civil Procedure Rules is unequivocal on the basis upon which a court can review its orders. The conditions are a) there must be a discovery of a new and important matter which after the exercise of due diligence was not within the knowledge of the applicant at the time the decree was passed, or the order was made; or b) there was a mistake or error apparent on the face of the record; or there were other sufficient reasons; and c) the application must have been made without delay.***

Further on in the decision, the court added:

***At this juncture, we consider it opportune to repeat the sentiments expressed by this Court in Origo & Another vs Mungala [2005] 2 KLR 307 ,***

***"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. "***

11. From the foregoing, it is clear that the alleged error apparent on the face of the record herein is not such as would warrant a review of the learned judge's findings. Perhaps, it is a point that could be taken on appeal to the court of appeal.

12. The other issue for determination is whether the applicant is guilty of delay. Order 45 rule 1(1) (b) is clear that an application for review ought to be made without unreasonable delay. In the present case judgment was delivered on 14<sup>th</sup> November 2014 and the application for review was filed on 28<sup>th</sup> January 2016, some 14 months later. No reason has been offered for the delay. I find that the applicant is guilty of unreasonable delay.

13. Order 45 rule 1(1) (a) makes it clear that review is only available to a party who has not preferred an appeal on 27<sup>th</sup> November 2014 against the judgment sought to be reviewed. As at 28<sup>th</sup> January 2017 when the application for review was filed, the notice of appeal was on record, though it was withdrawn on 25<sup>th</sup> May 2017 when the application was pending, and after the defendants had filed their submissions. I find that the remedy of review is not available to the applicants since the application was filed in contravention of Order 45 rule 1 (a).

14. In the end, Notice of Motion dated 27<sup>th</sup> January 2016 is dismissed with costs to the defendants.

**Dated, signed and delivered in open court at Nakuru this 31<sup>st</sup> day of July 2017.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms. Nancy Njoroge holding brief for Mr. Arusei for the plaintiff/applicant

Mr. Langat holding brief for Mr. Ogola for the defendants/respondents

Court Assistant: Gichaba