REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 259 OF 2014

(CONSOLIDATED WITH E & L CASE NO. 141 OF 2015 (OS)

SAKA DEVELOPERS LIMITED……..……PLAINTIFF

VERSUS

MARY AOKO OMONDI……...……...DEFENDANT

RULING

Saka Developers Ltd (hereinafter referred to as the Judgment debtors) has brought an application against ***Mary Aoko Omondi (hereinafter referred to as the Decree holder)***, seeking orders that the Honourable Court be pleased to recall, renew or set aside its judgment delivered on 21.12.2016.

The grounds for review are that the Judgment Debtor was represented by the firm of Mwinamo Lugonzo & Company Advocates. The firm was given all documents. The Judgment Debtor was to rely upon on the matter including a tenancy agreement dated 2.2.2014 between Fredrick Onyango Haudo, George Otoyi Oketch and Hesbone Odhiambo Odenyo and the Judgment Debtor. That the aforementioned agreement dated 7th February, 2014 was drawn by Mwinamo Lugonzo & Company Advocates the same firm on record on behalf of the applicant herein. That the erstwhile advocate suppressed crucial and vital evidence to the applicant's case in particular the aforementioned agreement. That at the time the judgment was made, it was not within the knowledge of the applicant that its former advocate omitted crucial evidence due to conflicts of interest in view of Rule 9 of the Advocate's Practice Rules. There was lack of disclosure on the part of the applicant's former advocate on the apparent conflicts of interest.

That the Honourable Court would have taken a different view of the matter had the crucial evidence been brought to the attention of the Honourable court. That the applicant has been highly prejudiced in the foregoing having been divested of its property. That the applicant should not be punished for the mistakes committed by its former advocate. That this application has been brought in good faith, in the best interest of justice and without undue delay.

The application is supported by the affidavit of Feisal Sadrudin Nurani who states that the applicant is the registered owner of the suit land herein and has been in actual and physical possession of the same. That the plaintiff instructed the firm of Mwinamo Lugonzo & Company Advocates to represent it and the said firm duly instituted the proceedings herein. That the plaintiff/applicant supplied the said firm of Advocates with all the documents it intended to rely upon in the matter including a tenancy agreement dated 7th February, 2014 between Fedrick Onyango Haudo, George Otoyi Oketch and Hesbone Odhiambo Odenyo and the applicant herein. The aforementioned agreement dated 7th February, 2014 was drawn by Mwinamo Lugonzo & Company advocates the same firm on record on behalf of the applicant herein. That he was apprehensive that the erstwhile advocate suppressed crucial and vital evidence to the

applicant's case in particular the aforementioned agreement. That at the time the judgment was made it was not within his knowledge that the applicant's former advocate omitted crucial evidence due to conflicts of interest in view of Rule 9 of the Advocate's Practice Rules.

That there was lack of disclosure on the part of the applicant's former advocate on the apparent conflicts of interest. That he is informed by his advocate on record, which information he verily believes to be true and correct, that Rule 9 of the Advocate's Practice Rules prohibits advocates in making representations in matters where they may be called as witnesses. The Honourable Court would have taken a different view of the matter had the crucial evidence been brought to the attention of the Honourable Court.

That he is informed by his advocate on record, which information he verily believes to be true and correct, that the tenancy agreement dated 7th February, 2014 introduces new and important matters that should have been disclosed to court and which would have influenced the decision of the court in its judgment dated 21st December, 2016. That the applicant has been highly prejudiced in the foregoing having been divested of its property. That the applicant should not be punished for the mistakes committed by its former advocate. That the applicant has hence appointed the new firm of Advocates to come in place of the erstwhile advocate. That this application has been brought in good faith, in the best interest of justice and without undue delay. That further, the plaintiff/applicant shall suffer irreparable loss and damage if the orders sought herein are not granted. That the application herein shall be rendered nugatory unless the prayers sought are granted. That it is in the interests of justice that the application be granted as prayed as there is no prejudice that will be suffered by the respondent if the said orders are granted.

The Decree holder filed a replying affidavit sworn by herself stating that the court cannot on its own motion recall, review or set aside the judgment delivered on 21.2.2016. That the applicant had on 22.12.2016 filed a notice of appeal against the decision of the court. That the existence of a tenancy agreement dated 7.2.2014 between the plaintiff and one Fredrick Onyango Haudo, George Otoyi Oketch and Hesbone Odhiambo Odenyo could not have persuaded the court to determine the case differently. That the court was fully aware of the fact that some of his tenants had started paying rent to the plaintiff.

The court was aware before and during the hearing of the cases that after the commencement of the suit he was managing a portion of the suit land while the plaintiff was managing a portion thereof and that is why an order of status quo to enable each of the parties manage a portion of the land was made prior to the determination of the case. She states before the case was filed, she was in exclusive and continuous possession of the suit land and the same was admitted by the plaintiff in its notice to vacate and of intended suit. That if there was any suppression of evidence by the plaintiff and or his advocate that is up to them. That there is no basis for review as all the matters the plaintiff is raising were within its director's knowledge before the case was instituted heard and determined. That he is not aware of any conflict of interest between the plaintiff and its advocate. That the conditions precedent before review of a judgment can be considered to not obtain in this case. That there is no error in the judgment. That there is no mistake in the judgment. That the plaintiff was not in actual and physical possession of the suit land prior to 2014.

According to the respondent, failure to adduce evidence is no ground for seeking review and that the fact that some of the tenants changed allegiance and started paying rent to the plaintiff is not new and was brought to the attention of the court before the case was heard as well as during the hearing of the case. That it is now too late in the day to raise issues of conflict of interest and or the advocate being a potential witness. The advocate being a potential witness in the matter was known to the plaintiff before the hearing of the case.

The applicant/Judgment debtor submits that a notice of appeal does not pre-empt an application for review as a notice of appeal is not a record of appeal and therefore, does not amount to an appeal. The actual filing of an appeal to actualized by the filing of the record of appeal and payment of court fees thereto and this has not been done. The applicant/Judgment debtor further argues that under Section 80 of the Civil Procedure Act and under section 45 of the Civil Procedure Rules, 2010, an application for review is premised on three grounds namely; On the ground of the discovery of new and important matter

or evidence which, after the exercise of due diligence, was not within the knowledge of the party or could be produced by him at the time when the decree was passed or order made; On account of some mistake or error on the face of the record; For any other sufficient reason. The applicant submits that the court has unfettered discretion under section 80 of the Civil Procedure Act to grant the orders sought.

In conclusion, the applicant submits that although the respondent claims that she was in occupation of the suit land since 1988, that occupation was not within the knowledge of the applicant. The applicant entered into a lease agreement with 3rd parties oblivious of the respondent's occupation of the suit property prior to 2008. The affirmed agreements were supposed and not produced as evidence due to conflict of interest on the part of the applicant.

The defendant on the other hand, submits that the plaintiff was aware and in possession of the agreement that it seeks to rely on. The agreement was available but was not produced in court. The plaintiff has already filed a notice of appeal on 22.12.2016 and therefore it not credible to file an application for review under Order 45 of the Civil Procedure Rules, 2010 as the said rule precludes a person who has filed an appeal from applying for review under Order 45.

I have considered the application for review and do find that a notice of appeal does not preclude a party from filing an application for review so long as he has not filed a record of appeal. However, a party has to choose whether he is filing an application for review or an appeal. Where a party demonstrates that the issue being raised in review cannot be raised on appeal due to the fact that the evidence was not adduced in the proceeding then the provision for review are available so long as the party is not relitigating a matter or an issue that was decided. I do agree with Mr. Kitili that Notice of Appeal does not preclude a party from applying for review.

However, I do find that there are no grounds for review raised by the applicant to enable the court review its decision. Though Section 80 of the Civil Procedure Act provides for any sufficient reasons to enable the court review its decision, that reason should be read *with* the provision of section 80(a) and (b). of the Act. Failure by the applicant to produce evidence during hearing, which evidence was readily available, is not a grant for review. The agreement made on 7th February 2014 was readily available and therefore the plaintiff cannot seek to rely on the same after judgment. In any event the said agreement made on the 7th of February 2014 was not an important matter likely to affect the outcome of the case as the defendant took possession in 1988 approximately 26 years before the agreement.

I do find that the alleged conflict of interest between the plaintiff and his advocate is not sufficient reasons for review.

Ultimately, the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF AUGUST, 2017.

A. OMBWAYO

JUDGE