



**REPUBLIC OF KENYA**

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

**AT NYERI**

**ELC CASE NO. 257 OF 2014**

**(Formerly NYERI HCCC NO. 202 OF 2000)**

**MONICAH NYAWIRA WAHOME.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**VERONICA WAMBUI ..... DEFENDANT/APPLICANT**

**RULING**

1. **Veronica Wambui** (hereinafter) referred to as the applicant, brought the notice of motion dated 21st July, 2014 seeking to review and/or set aside the judgment delivered on 4th July, 2014 and all consequential orders issued in that judgment.
2. The application, which is brought under **Section 80** and **Order 45 Rules 1** and **2** of the Civil Procedure Act and Rules respectively, is premised on the grounds that her family members and herself are in occupation of the parcel of land known as **Nyandarua/Kianjogu/Block1 (Muririchua)/133**, (hereinafter referred to as the suit property) and that there is a mistake in the court's proceedings because land parcels Nos. 116, 168 and 186 are occupied by the family of Shelmith Wahome (deceased). The applicant who states that she has just become aware of the judgment, explains that she did not attend the court when the matter came up for hearing because she thought the court was hearing a different matter (Nyeri High Court Succession cause No.658 of 2013), in which she is not a party and that she thought the matter had been amicably settled.
3. In reply and opposition to the application, Ibrahim Wahome Wambugu, who has described himself as the legal representative of the estate of Monica Nyawira Wambui Wahome has deposed that the applicant was never a wife of David Wahome Ndabi (the previous owner of the suit property, now deceased); that the property was legally transferred to the plaintiff/respondent (Monica Nyawira Wahome vide letters of grant of representation issued in Nyeri PMCCC No.60 of 1992) and that the letters of administration issued to the plaintiff/respondent were confirmed on 23rd June, 2010.
4. Terming the applicant a trespasser to the suit property, the deponent of the replying affidavit faults the applicant for having failed, refused or neglected to ventilate the issues raised in the application during hearing of the suit.
5. With regard to the explanation offered by the applicant concerning her failure to attend court and defend the case, the deponent argues that there is no way the applicant could have mistaken the succession cause with the current case because she is not a party to the succession cause (Nyeri Succession Cause No. 658 of 2013).

6. The deponent admits that the parties to this dispute tried out of court negotiations but contends that there being no consent recorded in court concerning the said negotiations, the applicant cannot be heard to say that she was under the impression that the matter was amicably settled out of court.

7. Arguing that there appears to have been no communication between the applicant and his advocate, the deponent contends that the apparent lack of communication between the applicant and her advocate is an indication that the applicant had abandoned the suit on realising that she did not have a case against the respondent.

8. The deponent further contends that review does not lie against a judgement.

9. In reply to the issues raised in the respondent's affidavit, the applicant filed the further affidavits he swore on 13th October, 2014 in which she reiterates her contention that she is a wife of Daniel Wahome Ndabi and that the suit had been amicably settled at the time the judgment was entered. In that affidavit, the applicant accuses the respondent of having concealed material facts to the court and urges the court not to punish her on account of mistakes of her advocates.

### **Submissions on behalf of the applicant**

10. On behalf of the applicant, reference is made to **Section 80** of the Civil Procedure Act; **Order 45 Rule 1; Order 12 Rule 7** of the Civil Procedure Rules and several decided cases and submitted that inclusion of properties belonging to Shelmith Wahome in the judgment is an error apparent on the face of the record. It is clarified that the applicant only occupies the suit property. The trial judge is said to have appreciated that under **Section 28** of the Land Registration Act, 2012 spousal interest is an overriding interest to registered land.

11. It is explained that owing to none attendance of the applicant to court when the matter came up for hearing, the court failed to make a finding in the applicant's favour.

12. Pointing out that reasons for none attendance have been provided and that the court was not informed of the alleged out of court settlement of the dispute, it is submitted that owing to the history of the suit property and the nature of the applicant's claim to the suit property, it is only fair and just that the judgment be set aside.

### **Submissions on behalf of the respondent**

13. On behalf of the respondent, it is submitted that the applicant failed, refused and/or neglected to attend court despite having been notified about the hearing. No attempt was made to move the court before judgment was delivered. The applicant has been indolent, for instance she failed to comply with **Order 11**, for that reason, it is submitted that from the conduct of the applicant, the only reasonable conclusion that can be made from the applicant's conduct is that she had lost interest. Further that, most of the issues and grounds raised in the application were settled by the court vide the judgement sought to be set aside. It is reiterated that the reasons given by applicant for none attendance of court for hearing are not convincing.

14. With regard to the alleged none disclosure of material facts, it is submitted that there is no evidence of none disclosure of material facts tendered.

15. On propriety of the application, it is pointed out that the applicant has not extracted and annexed the decree sought to be reviewed and based on the authority of **Yusuf Kifuma v. Equity Bank of Kenya Limited & Another (2015) e KLR** submitted that failure to extract and annex the decree to be reviewed rendered the application fatally defective. In **Yusuf Kifuma v. Equity Bank of Kenya Limited & Another (2015) e KLR** it was held:-

**“...Order or ruling being reviewed must be attached...failure to do so is fatal as was decided in Orchid Pharmacy Limited v. Southern Credit Corporation Limited & 2 others (2015)”**

**KLR.”**

It is further submitted that the applicant has not satisfied the requirements for review.

**Analysis and determination**

16. Whereas the applicant seeks to review and/or set aside the judgment delivered on 4th July, 2014 and all consequential orders issued against her and her family concerning the suit property, it is not in dispute that she did not extract and annex a copy of the decree sought to be reviewed as by law required. The question to answer concerning the applicant's failure to extract and annex the decree sought to be reviewed to the application is whether it rendered the application fatally defective as contended by the respondent.

17. There is divided opinion on the effect of failure by an applicant to extract and annex the decree sought to be reviewed to the application for review. In a majority of the cases, the opinion is that failure to extract and annex the decree sought to be reviewed to the application, renders the application fatally defective. In this regard see the following cases:-

- a). **Yusuf Kifuma v. Equity Bank of Kenya Limited & Another (2015) eKLR;**
- b). **Titus Mulandi Gitonga v. B.O (a minor suing through his mother & next friend SNO (2016) e KLR;**
- c). **Suleiman Murunga v. Nilestar Holdings Limited and another (2015) eKLR**
- d). **Emkus Company Ltd v. Charles Asikowa Okolo (2014) eKLR**

18. In the above cited cases, the courts were categorical that failure to extract and annex the decree sought to be reviewed to an application for review renders the application for review fatally defective. There is, however, an emerging jurisprudence, based on the overriding objective of the court, under **Article 159** of the Constitution and **Sections 1A** and **3A** of the Civil Procedure Act, to the effect that failure to extract and annex the decree sought to be reviewed, in as far as the court is able to discern what is sought to be reviewed and that no prejudice is occasioned on the respondent, is not fatal to an application for review. In this regard see the cases of **Eustace Mutegi Murungi & another v. Agrivine Kaburi Njoka (2016) e KLR** and **Abdullahi Mohamud v. Mohammad Kahiye (2015) e KLR**.

19. In the case of **Abdullahi Mohamud v. Mohammad Kahiye (supra) Aburili J.**, observed:-

**“The case law relating to review of judgments is abundant. In Nuh Nassir Abdi Vs Ali Wario & 2 Others (2013) eKLR, the Court held that a decision whether or not to vary, set aside or review earlier orders is an exercise of judicial discretion and the Court ought only to exercise such discretions if to do so would serve a useful purpose.**

**Therefore, on the first issue of whether the application as presented without an extract order or decree is fatally defective, the case of Stephen Boro Gittha Vs Family Finance Building Society & 3 Others Civil Appeal Nairobi 263/2009 is relevant. In that case, the Court held that:-**

***“The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflicts with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The Court must warn the litigants and counsel that the Courts are now on the driving seat of justice and the Courts have a new call to use the overriding objective to remove all the cobwebs hitherto experimented in the civil process and to weed out as far as is practicable the***

scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the Courts is to use the new broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory application and instead to adjudicate on the principle issues in a full hearing if possible.

In this case, the plaintiff’s counsel did annex copy of the judgment which is sought to be reviewed. The extraction of a decree or order sought to be reviewed no doubt stems from the judgment and is a purely procedural omission which should not be used to impede access to justice. Furthermore, Section 99 of the Civil Procedure Act gives latitude to this Court to amend judgments, decree or orders. It states

*Clerical or arithmetical mistakes in judgments, decree or orders or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties.”*

Therefore, failure to extract decree in this case is not fatal to an application for review. I am not persuaded by the cases cited by the Defendant, which cases were decided before the enactment of Sections 1A and 1B of the Civil Procedure Act and Article 159 (2) (d) of the Constitution of Kenya, 2010, which enactments require the Courts to administer justice “without undue regard to procedural technicalities,” and especially, where in the omission like the one in the instant case is not demonstrated to occasion any prejudice or injustice to the defendant, and which prejudice cannot be adequately compensated by an award of costs. This is not to say that Article 159, (2) (d) of the Constitution was meant to aid in the overthrow or destruction of rules of procedure and or to create an anarchical free-for all in the administration of justice. As was held in the case of *Nicholas Kiptoo Arap Korir Salat Vs IEBC & 6 Others* [2013] eKLR by Kiage JA, that Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines which make the process of judicial adjudication and determination fair, just, certain and even handed....” (Emphasis supplied)

However, the Supreme Court in the case of *Raila Odinga & 5 Others Vs IEBC & 3 Others* *Petition 5/2013 SC* [2013] eKLR, held that Article 159 (2) (d) of the Constitution is not a panacea for all procedural shortfalls, ...it is plain to us that Article 159(2) (d) is applicable on a case to case basis.”

Having examined and considered the matter herein anxiously, I am of the view that this is a proper case where omission to extract and annex a decree to an application for review will not occasion any injustice to the defendant, without overthrowing the rules and procedures since they guide the Court and parties in obtaining justice.

This Court as an agency of the legal processes of justice is called upon and appreciates all the relevant circumstances and the requirements of a particular case, and to conscientiously determine the best cause. I am convinced that this is one of the cases where a Court can disregard procedural technicalities in favour of substantive justice, having regard to all relevant circumstances obtaining in this case. For the above reasons, I dismiss the defendant’s objection that failure to annex copy of decree sought to be reviewed renders this application fatally defective.

I therefore proceed to determine the merits of the prayer for review of judgment of the Hon. Waweru Judge delivered on 24<sup>th</sup> October, 2014, on special damages having already laid down the applicable law.”

20. Having read and considered the above cited decisions, I am persuaded by the emerging jurisprudence to the effect that failure to extract the decree sought to be reviewed merely renders an application for

review defective. Whether the defect renders the application fatally defective, in my view, depends on the effect of the defect on the court's ability to fairly and effectually determine the questions in issue. If despite the failure by the applicant to extract the decree and annex it to the application the court is able to fairly and justly determine the issues raised, then the failure to extract and annex the decree should be treated as a mere procedural technicality which should, by dint of the provisions of **Article 159** of the Constitution and **Sections 1A** and **3A** of the Civil Procedure Act, not be used to deny litigants access to substantive justice.

21. In applying the foregoing principles to this case, I am of the view that the issues raised by the applicant are discernable from the pleadings. The respondent has not demonstrated that failure to extract and annex the order sought to be reviewed has occasioned on him any prejudice. In view of the foregoing, I find and hold that failure to extract and annex the order sought to be reviewed did not, in the circumstances of this case, render the application fatally defective.

22. Turning to the merits of the application, in order to justify the Court in granting an application for review sought by the applicant under the provisions of **Order 45 Rule 1(b)** of the Civil Procedure Rules, certain requirements must be met. These are:-

(1) The applicant must not have appealed from the decision sought to be reviewed. In this regard, see **Order 45 Rule 1(a)** which provides as follows:

***“45(1) Any person considering himself aggrieved —***

***by a decree or order from which an appeal is allowed, but from which no appeal has been preferred.***

(2) *The application must be based on*

***(a) 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 the applicant at the time when the decree was passed or the order made, or***

***(b) some mistake or error apparent on the face of the record,***

***(c) or any other sufficient reason,***

***(3) the application must be made to the court which passed the decree or made the order without unreasonable delay.***

23. The foregoing provisions are based on **Section 80** of the *Civil Procedure Act*, Cap 21 Laws of Kenya, which provides as follows:

***“Any person who considers himself aggrieved—***

***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***

***(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”***

24. Unlike **Order 45** of the Civil Procedure Rules which prescribe the conditions upon which an application for review may be granted, **Section 80** of the *Civil Procedure Act*, gives the Court wide and unfettered jurisdiction in the exercise of its powers of review and does not prescribe the conditions upon which the power may be exercised.

25. In the case of **Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs. Firestone EA (1969) Limited Civil Appeal No. 172 of 1998** the Court of Appeal held that **Section 80** of the *Civil Procedure Act* enables a court to make such orders on review application which it thinks just so that the words “or any sufficient reason” as used in **Order 44 [now Order 45] Rule 1** of the *Civil Procedure Rules* are not *ejusdem generis* with the words “discovery of new and important matter” etc. and “some mistake or error apparent on the face of the record” and that those words extend the scope of the review. Accordingly, the said court held that there is no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly **Section 80** of the *Civil Procedure Act* confers an unfettered right to apply for review and so the words “for any sufficient reason” need not be analogous with the other grounds specified in the Order. See

26. **In Republic v Anti-Counterfeit Agency & 2 others Ex- Parte Surgipharm Limited [2014] eKLR**, it was observed:-

“In dealing with the delegated legislation made under the Act Farrell, J in **Sardar Mohamed vs. Charan Singh Nand Singh & Another HCCA No. 51 of 1959 [1959] EA 793** was of the following view, with which view, I respectfully associate myself:-

“In terms section 80 of the Civil Procedure Ordinance confers an unfettered right to apply for review in the circumstances specified and an unfettered discretion in the court to make such order as it thinks fit. The omission of any qualifying words at the beginning of the section appears to have been deliberate, since the section is obviously based on section 114 of the Indian Code, which is qualified, and similar qualifying words appear in a number of the other sections. Under section 81(1) of the Ordinance the Rules Committee has power to make rules “not inconsistent with the provisions of this Ordinance”. If a rule is inconsistent it is to that extent *ultra vires*; and if the Ordinance confers unfettered power, a rule which limits the exercise of the power is *prima facie* inconsistent with the Ordinance and *ultra vires*. If, however, a rule is capable of two constructions, one consistent with the provisions of the Ordinance, and one inconsistent, the court should lean to the construction which is consistent on the principle “*ut res magis valeat quam pereat*”. If the words “or for any other sufficient reason” can be given a liberal construction, there is nothing in Order 44, rule 1(1) in any way inconsistent with section 80 of the Ordinance. The paragraph is perhaps unnecessary, but serves to make it clear that at least the two grounds specified are such as would entitle an aggrieved party to apply for review”.

27. In applying the foregoing legal principles to the circumstances of this case, it is clear from the pleadings and the submissions filed in this case that the applicant did not appeal against the decision sought to be reviewed. There was no inordinate delay in making the application for review, as the application was made barely three (3) weeks after the decision sought to be reviewed was made.

28. On whether the applicant has satisfied the conditions set under Order 45 Rule 1 for being granted the orders sought, whereas the applicant contends that there is an error apparent on the face of the court’s record; having considered the reasons given for that contention to wit that the court should not have dealt with some of the properties because the applicant was in occupation, I find the alleged mistake to be incapable of amounting to the error contemplated under Order 45 of the Civil Procedure Rules. I say this because the error contemplated in that section of the law does not require evidence to prove. In that regard see the case of Anthony Gachara Ayub v. Francis Mahinda Thinwa (2014) eKLR where the Court of Appeal stated:-

“In the case of **Draft and Develop Engineers Limited – v- National Water Conservation and Pipeline Corporation, Civil Case No. 11 of 2011**, the High Court correctly stated that:

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere

*erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal". (Emphasis supplied).*

29. In the instant case, I am of the view that it cannot be reasonably said that there is an error apparent on the face of the court's record because the issues that touch on the alleged error are questions of fact that ought to have been brought to the attention of the court for the court to consider and make a determination thereon.

30. Besides the contention that there is an error apparent on the face of the court's record, the applicant contends that she is entitled to the orders sought, on account of what **Order 45** categorises as any other sufficient reason.

31. Under this ground, the applicant has flanked the following issues in support of her claim:-

1. that she is in occupation of the suit property;
2. that she has legally recognised interest in the suit property (is a spouse of Shelmith Wagaki (deceased), the previous owner of the suit property);
3. that failure to attend court and defend the case was caused by a mistake on the part of her advocate; and
4. that the failure to attend court and defend the case has been properly explained.

32. From the respondent's response to the above contention, it is not in dispute that the applicant is in occupation of the suit property and that there were negotiations to amicably settle the dispute out of court. Whereas there is no evidence that the dispute had been amicably settled; I am persuaded that the applicant's failure to attend court and defend the suit was caused by her advocates.

33. From the conduct of the parties prior to the entry of the judgment sought to be reviewed or set aside, to wit the parties were negotiating the dispute with the view of settling it out of court, I hold the view that in the absence of any evidence to the effect that the negotiations had hit a snag, and given the fact that the court was not informed that the negotiations had flopped, allowing the judgment to stand on account of the mistake by the applicant's advocate may occasion unnecessary hardship on the applicant.

34. In view of the foregoing and cognisant of the principles that guide the court in reviewing or setting aside its orders enunciated in the case of **Patel Vs East Africa Cargo Handling Services Limited (1974) EA 75 at page 76 cited in Lochab Bros. Limited V Peter Kaluma T/A Lu mumba Mumma & Kaluma Advocates & 2 others (2013) eKLR at page 4** thus:-

**"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment 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 to it by rules;"**, I am inclined to allow the application herein.

35. As the applicant, through her advocate, was responsible for the circumstances that led to filing of this application I condemn her to pay the costs of the application.

**Orders accordingly.**

**Dated, signed and delivered at Nyeri this 10th day of August, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

N/A for the defendant/applicant

N/A for the plaintiff/respondent

Court assistant - Rahab