



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

**ELC CASE NO. 256 OF 2013**

**TERESIA MABUTI NJAGARA ..... PLAINTIFF**

**VERSUS**

**NJAGARA NGURE ..... DEFENDANT**

**RULING**

I have before me an application by the defendant brought under **Order 9 Rule 8 and Order 45 Rule 1 (a) of the Civil Procedure Rules** and dated 15th March 2016 seeking the following orders:-

- 1. That this Honourable Court be pleased to grant leave to the firm of R. MUTHIKE MAKWORO & CO. ADVOCATES to come on record on behalf of the defendant/applicant.***
- 2. That this Honourable Court be pleased to order that half share given to the plaintiff/respondent out of land parcel number GATURI/GITHIMU/1235 and NTHAWA/RIANDU/1834 go to the plaintiff/respondent and her eight children.***
- 3. That this Honourable Court be pleased to order that only 2 acres out of land parcel number NTHAWA/RIANDU/1834 are available for division.***
- 4. That this Honourable Court be pleased to issue any further order as may be necessary for the ends of justice to be met.***
- 5. That the costs of this application be provided for.***

The application is based on the grounds set out therein and supported by the affidavit of **NJAGARA NGURE** the defendant/applicant.

Briefly, it is the defendant/applicant's case that when this Court delivered its judgment in this suit on 20th April 2015, there was information that was not availed and further, that one acre out of land parcel number NTHAWA/RIANDU/1834 which measures approximately 3 acres had already been sold.

In his supporting affidavit, the defendant/applicant has deponed that he is the registered owner of land parcels number GATURI/GITHIMU/1235 measuring approximately 14 acres and land parcel number NTHAWA/RIANDU/1834 measuring approximately 3 acres. That in this Court's judgment dated 20th April 2015, it was ordered that the said properties be shared equally between him and the plaintiff/respondent. That he has another wife namely **CATHERINE WANDIRI NJAGARA** with whom he has eight children and therefore in total he has sixteen children including the eight other children he has with the plaintiff/respondent. That this Court did not take that into consideration in its judgment sought to be reviewed. That he had sold one acre out of land parcel number

NTHAWA/RIANDU/1834 to one **CONSOLATA GICHONI** which has not been transferred as there is a pending injunction and therefore, only two acres are available for division out of land parcel number NTHAWA/RIANDU/1834.

The application is opposed and the plaintiff/respondent has filed grounds of opposition in which she states, inter alia, that there is no proof of discovery of new evidence, error or mistake apparent on the face of the record or any other sufficient ground to warrant a review. That all the information was available to the defendant/applicant at the time of the hearing. That the defendant/applicant has not disclosed when **CATHERINE WANDIRI NJAGARA** became his wife. That the issue of the children was addressed both in the divorce matter and in this suit. That if the defendant/applicant has sold any portion, that should be considered as his share. That this application is a mere afterthought and an abuse of the Court process meant to pre-empt the execution process.

Submissions have been filed both by **Ms MUTHIKE** Advocate for the defendant/applicant and **Mr. OMBACHI** Advocate for the plaintiff/respondent.

I have considered the application, the grounds of opposition and the submissions by counsel.

The first limb of the application which seeks leave for Ms **MUTHIKE** Advocate to come on record on behalf of the defendant/applicant was allowed on 13th April 2016.

With regard to the second limb which seeks a review and setting aside of this Court's judgment dated 20th April 2015, this is governed by the provisions of **Order 45 (1) of the Civil Procedure Rules**. That order provides as follows:-

***“Any person considering himself aggrieved:-***

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

***(b) by a decree or order from which no appeal is hereby allowed and who from the 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 when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without un-reasonable delay”*** emphasis added

**Section 80 of the Civil Procedure Act** also 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”***

Therefore while **Section 80 of the Civil Procedure Act** gives the powers of review, **Order 45 of the Civil Procedure Rules** sets out the procedure.

It is clear from **Order 45 Rule 1 of the Civil Procedure Rules** that an application for review such as this one must be brought ***“without un-reasonable delay”***. The judgment sought to be reviewed was delivered on 20th April 2015 and a decree was extracted on 6th May 2015. This application was filed on 15th March 2016 almost one year later. There is no explanation for that delay which I find to be un-

reasonable. In FRANCIS ORIGO & ANOTHER VS JACOB KUMALI MUNGALA C.A CIVIL APPEAL No. 149 of 2001, the Court of Appeal stated as follows:-

***“In an application for review, an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly, the applicant must make the application for review without un-reasonable delay”*** emphasis added.

In HASSAN VS NATIONAL BANK OF KENYA LTD H.C.C.C No. 446 of 2001 (KISUMU), an un-explained delay of three months was found to be un-reasonable. **ONYANGO OTIENO J.** (as he then was) also found a delay of three months to be un-reasonable and dismissed an application for review in the case of KENFREIGHT (E.A) LTD VS STAR EAST AFRICA CO. LTD 2002 2 K.L.R 783. I am of course aware that the law has donated a discretion to the Court while considering such an application. However, such a discretion must be exercised on sound basis and where the law demands that the application be made **“without un-reasonable delay”**, then it is to be expected that applicants and their counsel must move with speed in such applications. In my view, an un-explained delay of almost one year is clearly un-reasonable and disentitles the defendant/applicant herein to the remedy of review sought. On that basis alone, this application must fail.

I will however consider the application on its merits nonetheless. In my view, the applicant has put forward the following reasons to justify the orders sought in his Notice of Motion dated 15th March 2016. These are:-

***(1) That he has sixteen children in total.***

***(2) That he had already sold one acre of land out of land parcel number NTHAWA/RIANDU/1834 to one CONSOLATA GICHONI leaving only two acres available.***

His application is premised on the ground that when the judgment was delivered, **“there was information that was not availed to the Court”**. In paragraph 7 of his supporting affidavit, he depones that **“the Court did not consider that I had sixteen children”** who are entitled to a share of his property. In paragraph 9, he adds that he had sold one acre out of land parcel number NTHAWA/RIANDU/1834 to one **CONSOLATA GICHONI**. However, none of the above is really **“new and important matter or evidence”** which was **“not within his knowledge or could not be produced by him”** when he testified before this Court on 9th December 2014. Infact when he was cross-examined by **Mr. OMBACHI** Advocate for the plaintiff/respondent, the record shows that he stated as follows:-

***‘I have another wife. All my children left. The plaintiff should refund me the cost of bringing up the children. They are all adults and I want a refund of what I used to bring them up’***

Clearly, the number of his children and the selling of part of his land to a third party were all matters within his knowledge. There is also no mistake or error that has been drawn to this Court’s attention nor any other sufficient reason to warrant a review of this Court’s judgment and subsequent decree. The defendant/applicant’s advocate **Ms MUTHIKE** has made a passionate submission urging this Court to apply the principles and values of equity, social justice and human rights and administer justice without undue technicalities as provided under Article 159 (2) (d) of the Constitution to prevent a miscarriage of justice. It is of course true that Article 159 (2) (d) of the Constitution of Kenya 2010 enjoins the Court to administer justice without undue regard to technicalities. Indeed under the overriding objectives rules commonly known as the **Oxygen Principles** or double ‘O’, the Courts are mandated in the discharge of their duties to ensure the just determination of proceedings. However, it must be remembered that neither Article 159 of the Constitution nor the **Oxygen Principles** which enjoin the Courts to do substantial justice were meant to overthrow the rules of procedure or provide cover to parties who disregard rules and timeliness – NICHOLAS KIPTOR Arap KORIR SALAT VS I.E.B.C & OTHERS (2013) e K.L.R. It will clearly be an injustice to the plaintiff/respondent if this Court allows an application which has been filed in contravention of clear provisions of the law that require it to be filed **“without un-reasonable**

**delay**". Besides, the law provides a clear basis upon which a review can be granted. Where the Court abides by those guidelines, it cannot be said to be applying undue regard to technicalities. The truth of this matter is that all the issues that the defendant/applicant has raised in his application were all within his knowledge and further, there is no mistake or error apparent on the record or any other sufficient reason to warrant the review of this Court's judgment dated 20th April 2015.

The up-shot of the above is that the defendant/applicant's Notice of Motion dated 15th March 2016 was not filed without un-reasonable delay as mandated under **Order 45 (1) of the Civil Procedure Rules**. It is also devoid of merit as it does not meet the requirements of the law under which it was brought. It is accordingly dismissed with costs to the plaintiff/respondent.

**B.N. OLAO**

**JUDGE**

**30<sup>TH</sup> SEPTEMBER, 2016**

Ruling dated, delivered and signed in open Court this 30<sup>th</sup> day of September 2016.

Mr. Mwangi for Ms Muthike for Applicant present

Mr. Ombachi for the Respondent absent.

**B.N. OLAO**

**JUDGE**

**30<sup>TH</sup> SEPTEMBER, 2016**