



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**LAND CASE NO. 83 OF 2011**

DAVID CULLEN ..... PLAINTIFF

VERSUS

THE MEDICAL SUPERINTENDENT KITALE

DISTRICT HOSPITAL

THE ATTORNEY GENERAL ..... DEFENDANTS

**R U L I N G**

1. The applicant filed a notice of motion dated 16th February 2015 in which he seeks review and setting aside of the Judgment delivered in this case. He also sought for costs of the application. The applicant contends that his claim against the defendants was dismissed on 3.6.2014 on the grounds that he did not produce a copy of the sale agreement between him and the vendor who sold him the suit property. He contends that he was unable to produce the agreement because it remained in the office of his former Advocate Messers Kidiavai & co. Advocates. That the said agreement was only given to him on 8.1.2015 long after judgment had been delivered.
2. The applicant contends that he was an innocent purchaser for value and that therefore his application should be allowed, the dismissal of his claim set aside and in place thereof an order be made allowing his claim against the defendants.
3. The applicant's application was opposed through grounds of opposition filed on 16.4.2015. The respondents contend that the application is fatally defective, is incompetent and is contrary to the Provisions of Order 45 Rule 1 of the Civil Procedure Rules. The respondents also contend that the application has been brought belatedly and that the applicant does not deserve the orders sought.
4. During the hearing of this application there was no representation from the Attorney General who had been duly served. Mr. Samba for the applicant submitted that when this matter was heard, the applicant was not able to produce a sale agreement because the same had been misplaced at the firm of Kidiavai & co. Advocates. He also submitted that the applicant could not file the application in time as he had not found the agreement. Mr. Samba further argued that under section 39 (1) of the Registered Land Act (Now repealed), the applicant was not obligated to inquire into the circumstances leading to the registration of the seller. He further argued that under section 143(1) of the Registered Land Act, a title could not be cancelled even where fraud is involved, the same being a first registration.
5. I have considered the applicant's application and the only issue which arises for determination is whether the same has met the threshold for grant of an application for review and if the same should be allowed. Review is provided under Order 45 of the Civil Procedure Rules. Order 45

Rule 1 1 (a) and (b) is clear on who should make an application for review and the grounds upon which it can be made.

It states as follows:-

**“1 (1) 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 judgement to the court which passed the decree or made the order without unreasonable delay.”**

6. A plain reading of order 45 Rule 1(1) (a) clearly shows that review is open to a person who is aggrieved by a decree from which an appeal is allowed but where no appeal has been preferred. In the instant case, the applicant's suit was dismissed on 3.6.2014. An appeal from that judgment is allowed as of right. The applicant would have been allowed to make an application for review if he had not preferred an appeal. However, in the present case, the applicant filed a notice of appeal against the judgement on 10.6.2014. An appeal to the Court of Appeal is deemed to have been filed when notice of Appeal has been issued in accordance with the Rules of the Court of Appeal. The applicant could not again apply for a review as he had removed himself from that route by filing the notice of appeal. I, therefore find that this application is incompetent and can be dismissed on that ground alone.
7. However for arguments sake I will proceed to determine whether the application would have succeeded were it not for the appeal filed at the Court of Appeal. The applicant filed this application on 18.2.2015. The Judgement whose review he is seeking was delivered on 3.6.2014. This application was made more than 8 months later. The reason given is that the agreement which was missing was only found on 8.1.2015. I find that the delay in bringing this application is unreasonable and the delay is not properly explained.
8. The finding of the agreement referred to in the application cannot be said to be an important evidence which could not be produced at the hearing. The applicant knew that he had filed a case in court and that to prove the same, he was required to produce the documents. Had he exercised due diligence, this is not a document he would have missed to produce. His explanation that the agreement had been misplaced in the firm of Kidiavai & Co. advocates is simply untenable.
9. Mr. Samba argued that the applicant was not obliged to inquire into how the seller acquired his title and that as it was a first registration, it could not be challenged even in the face of proof of fraud. This may be a good ground for appeal but certainly it cannot be a ground for review. The grounds for review are well set out and the applicant has not shown any ground upon which the court can review the Judgement of 3.6.2014. The upshot of this is that I find that the applicant's application lacks merit. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Dated , signed and delivered at Kitale on this 10th Day of June 2015.

**E. OBAGA**

**JUDGE**

In the presence of M/S Bett for Mr. Samba for Plaintiff. Court Clerk - Isabellah

**E. OBAGA**

**JUDGE**