REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL SUIT NO. 7 OF 1996

BONIFACE NJIRU.....PLAINTIFF/APPLICANT

VERSUS

STEPHEN NJUGUNA GITHURI.....1ST DEFENDANT/RESPONDENT

GATONYE KARIUKI.....2ND DEFENDANT/RESPONDENT

RULING

1. Before me is an application dated 27.05.2021 filed by the applicant herein and wherein he seeks the following orders that;

(i) *Spent*

(ii) *This Honourable Court be pleased to substitute the plaintiff/applicant one (Boniface Njiru (deceased) with Benard Mucungu Nthiga to act in this matter.*

(iii) *This Honourable Court be pleased to issue an order of temporary injunction restraining the respondent by himself, his agents and/or servants from entering, trespassing, encroaching ploughing or interfering with that parcel of land known as MBETI/GACHURIRI/ 306 the suitland herein pending the hearing and determination of this application interpartes.*

(iv) *Pending the hearing and determination of this application interpartes, the respondent by himself, his agents and or servants be restrained by an order of temporary injunction from entering, trespassing, encroaching, ploughing or interfering in any manner with the parcel of land known as MBETI/GACHURIRI/ 306 pending the hearing and determination of this suit.*

(v) *This Honourable Court be pleased to review its judgment made on 15.05.2001.*

(vi) *That cost of this application be provided for.*

2. The application is premised on the grounds on its face and it's supported by the affidavit sworn by Benard Mucungu Nthiga, the applicant herein. The applicant's case is that the 2nd respondent in blatant disregard of law has threatened to violently, forcefully encroach, trespass and or forcefully evict the applicant from the suit land and deprive the plaintiff/applicant's occupation despite his quiet, peaceful enjoyment of his entitlement of the suit property. They did not move the court to consider reviewing or setting aside the judgment dated and delivered on 15.05.2001.

3. In opposing the application, the respondents filed grounds of opposition dated 22.06.2021. It is their case that this court is *functus officio* and therefore cannot revisit the said judgment on merits or purport to exercise a judicial power over the same subject matter. It is their view that no discovery of new and important matter, mistake or error apparent on the face of the record or any other sufficient reasons have been given to warrant a review of the said judgment and hence the application before the court does not meet the threshold for review.

4. Further, the 2nd respondent filed a replying affidavit sworn on 26.11.2021 whereby he depones that the applicant has not met the conditions for grant of review as provided under Order 45 Rule 1 of the Civil Procedure Rules and in particular, there is inordinate delay in filing this application since it has been done after 20 years. Reliance thus was made on the case of **Giella v Cassman Brown (1973) EA 358.**

5. The parties took directions to have the application proceed by way of written submissions.

6. The applicant submitted that the suit is meritorious and that the applicant is still desirous of prosecuting his suit. That the timely filing of

this application echoes the spirit of Article 47(1) of the Constitution and that the applicant currently is in possession of new and important evidence being that this court's attention is drawn to the annexures marked as BMN 'C', 'D' and 'E' filed as indicated in the annextures before this court being land maps, agreement of sale of land dated 29.05.1976 and mutation form relating to parcel of land known as MBETI/GACHURIRI/87. The applicant further submitted that he has been in search of the said documents for a while now and only discovered their existence recently, necessitating the current application.

7. It was further submitted that there was an error apparent on the face of the record and thus prays for a review of the judgment to accord a fair and just decision touching on the matters at hand since the court failed to take evidence from key witnesses who could help the court reach a fair verdict. Reliance was made on the case of **Ryce Motors Limited v Jonathan Kiprono Ruto & Another 2016 eKLR.**

8. It was their prayer that this application be allowed with costs to be borne by the respondent and thereafter this suit be placed before the court with the requisite jurisdiction.

9. The respondents submitted that they are opposed to the prayers sought by the applicant before court since according to them, there was no sufficient cause. It is their case that there is no discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant at the very time the suit was heard and judgment entered. Further that, there is no mistake apparent on the face of the record and the application was brought late in the day, approximately 20 years from the time a determination was made on it by a court of concurrent jurisdiction to this. Reliance was made on the case of **National Bank Limited v Ndungu Njau [1977] eKLR.**

10. It is their case that the application has no merit and for that reason, it should be dismissed with costs to the respondents.

11. I have considered the application herein together with the respondents replying affidavit on record. I have equally considered the submissions as filed by both parties. I therefore find that the main issues for determination are:

i. Whether this court has jurisdiction to review its orders.

ii. Whether temporary injunction order should thus issue?

iii. Whether this court could substitute the current plaintiff/applicant with the prior applicant (deceased)

12. The applicant herein has sought to review the orders made by this court on 15.05.2001. Orders made by a probate court can be reviewed under Order 45 as being among the orders in the Civil Procedure Rules that apply to the succession matters. (See Rule 63).

13. Under **Order 45 of the Civil Procedure Rules**, review can only be allowed if the applicant satisfies the following;

i. ***Discovery of new and important matter of evidence which, after 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.***

ii. ***Mistake or error apparent on the face of the record.***

iii. ***Any other sufficient reason which may make the court to review its order.***

14. As indicated above, a review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed; the underlying object of this provision is neither to enable the court to write a second judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.

15. Where an applicant in an application for review seeks to rely on the ground that there is discovery of new and important evidence, one has to strictly prove the same. In the case of **Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & Another (2018) eKLR** the Court of Appeal stated as follows:

"We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation."

16. In the same breadth, the Court of Appeal in the case of **Rose Kaiza v Angelo Mpanju Kaiza (2009) eKLR** held that not every new fact will qualify for interference of the judgment. In this case, the applicant states that it has come to his knowledge land maps, an agreement of sale of land dated 29.05.1976 and mutation form relating to parcel of land known as MBETI/GACHURIRI/87 from which the suitland has been hived from have come to his knowledge. In my view, this cannot be described as a discovery of new evidence which was not within his knowledge since the green card has always been within reach all along. Further on the allegation that this court never took evidence from key witnesses who holds information that could help this court reach a fair determination, the allegation clearly has no basis and has not met the requirements of Order 45. It should be remembered that justice is justice even for the respondents. As the old adage goes, he who alleges must prove; it was incumbent upon the applicant to bring his case before this court with all the evidence to prove it and not in piece meals hence dragging the respondents back to court after so long. This goes against the spirit of constitution as nuanced under Article 47.

17. On whether there was an error apparent on the face of record, in **Muyodi Vs Industrial and Commercial Development Corporation & Another EA LR [2006] 1 EA 213** and cited in **Muhamed Mungai Vs. Ford Kenya Election, and Nominations Board and Another,**

Nairobi High Court Judicial Review Misc. Application No. 53 of 2013, the court interalia went on to state;

> ***"For one to succeed in having an order reviewed for mistake or error apparent on the record, he must demonstrate that the order contains a mistake that is there for the whole world to see. It is not enough for an applicant to say that he is dissatisfied with the decision or that the same is wrong. Such opinions ought to be the subject of an appeal. The applicant before us has not established that there is an error or mistake in decision he has asked us to review. He has not even pointed out what in his opinion is the error or mistake in that decision. He has just told us to review the court's decision. That is not good enough, his dissatisfaction with the decision aforesaid notwithstanding. We therefore find no reason for reviewing the decision on the said ground."***

18. Further, in **Attorney General &Others v Boniface Byanyima, HCMA No.1789 of 2000** the court citing **Levi Outa v Uganda Transport Company[1995]HCB 340**, held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.

19. The term "mistake or error apparent" by its very connotation signifies an error which is evident *per se* from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put differently, an order, decision, or judgment cannot be reviewed merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit on appeal over its judgment/decision. In this case, nothing has been pleaded by the applicant herein to denote an apparent error on the face of the judgment he endeavours to review.

20. The other ground for review is, if there is a sufficient cause. The judgment dated and delivered on 15.05.2001 was as a result of the suit dated 23.11.1995 wherein the plaintiff had moved this court seeking for orders inter alia that the land parcel MBETI/ GACHURIRI/306 be registered in his name after having acquired the same through adverse possession. This court notes that the plaintiff's suit against both the first and the second defendants was dismissed with costs to the defendants as such this court can never endevour to set aside its orders as the same is not merited.

21. Having determined that the prayer to set aside and or vary the orders by this court dated 15.05.2001, is not merited, it would thus be an academic exercise to determine whether the substitution of the prior applicant with the current one and/or temporary injunction orders sought by the applicant should issue.

22. In the judgment dated and delivered on 15.05.2001 the court considered all the facts that were placed before it by the parties and thereafter dismissed the suit giving reasons.

23. It is my considered view that:

i. The application before the court is bereft of merit and is hereby dismissed.

ii. Costs to the respondents.

24. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF JANUARY, 2022.

L. NJUGUNA

JUDGE

.....for the Plaintiff/Applicant

.....for the Defendants/Respondents