REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL SUIT NO. 22 OF 2006

MGG .....PLAINTIFF

(Person of unsound mind suing through CMN as the next friend).

VERSUS

SUSAN WAGUAMA.....1ST DEFENDANT

JACKSON MWANGI MURIUKI MBUTHIA.....2N DEFENDANT

JACKSON MWAI MURUIKI.....3RD DEFENDANT

MARGARET WANGARI NDEGE.....4TH DEFENDANT

STEPHEN MURIMI GICHURU.....5TH DEFENDANT

RULING

1. The applicant herein moved this court vide a notice of motion dated 19.10.2020 seeking for orders that:

i. *The Honourable Court be pleased to review and set aside the order given on 11.11.2014.*

ii. *The Honorable Court be pleased to consequently set down the suit herein for pre-trial directions.*

iii. *The Honorable Court be pleased to give such further reliefs as it may deem fit and just to.*

iv. *The cost of this application be provided for.*

2. The notice of motion is supported by the affidavit sworn by the applicant on the same day wherein she has deposed that the court on its own motion declared the suit herein as having abated because the summons issued on 10.07.2009 had not been served. That there is an error apparent on the face of the record because the defendants had been duly served and had failed to file a memorandum of appearance and statement of defence on 24.08.2009 and 07.09.2009 respectively. That, further, although the matter was filed as an ordinary civil suit, it ought to have been transferred to the environmental and Land Court after the establishment of the court since it relates to land and so the Honourable court lacked jurisdiction to make the said order.

3. It is their prayer that in the interest of justice, the application herein be allowed.

4. The application is opposed by way of a replying affidavit dated 20.09.2021 wherein it is deposed that the 3rd defendant has since died, that the 5th defendant has since transferred the Land Parcel Number MWERUA/KABIRIRI/1940 which is one of the suitland, to a person who is not a party to this suit. It is their case that, the summons dated 10.07.2009 was served on the defendants on 11.08.2009 while the suit was filed on 16.03.2006. That the summons was therefore served more than 3 years from the date of filing of plaint and since the validity of summons is 12 months, the same was invalid by the time it was served. They proceeded to depose that the suit is bad in law in that it is based on fraud attributed to the 1st defendant who was already deceased by 11.08.2009 when they were served summons. That there is inordinate delay between the dates the order sought to be reviewed was made and the date this application was made. They therefore prayed that this application be dismissed with costs.

5. The parties took directions for disposal of the matter by way of written submissions. In compliance thereto, each party filed its submissions in support of their respective positions.

6. The plaintiff submitted that on 11.11.2014, this court on its own motion dismissed the suit herein for reason that it had abated as summons issued on 10.07.2009 were never served. That the summons were properly served upon the defendants on 11.08.2009 and an affidavit of service by Jackson Mwangi Mbuthia dated 20.11.2020 confirms the same. That after the summons were served, the defendants through their firm of I.W Muchiri & Co. Advocates entered appearance via memorandum of appearance dated 24.08.2009 and a further statement of defence dated 07.09.2009.Reliance was made on the case of **Paulina Wanza Maingi v Diamond Trust Bank Limited & another [2015] eKLR** where it was held that where no summons to enter appearance are served within 12 months, the suit abates. However, the validity of summons can be extended where such summons were issued but not served within 12 months from the date of the first issue.

7. It is their case that the plaintiff took out summons issued on 05.04.2006 and on 20.03.2006; that when those summonses were not served, the plaintiff by the letter to the Deputy Registrar dated 06.07.2009 received in court on even date, requested for re-issuance of summons. That the court deemed it fit to reissue the summons dated 10.07.2009 which were finally served upon the defendants on 11.08.2009 and thus it was their take that by the time the summons were served upon the defendants, they were valid and they still had their legal effect.

8. It is their prayer that the court should thus make a just determination.

9. On the other hand, the 2nd, 4th and 5th defendants submitted that, they fully adopt the replying affidavit sworn by Jackson Mwangi Mbuthia on his own behalf and on behalf of the 4th and 5th defendants on 20.09. 2021. They contend that the application for review is not tenable under Order 45 Rule 1(a) in which Hon. Muchemi J., on her own motion declared the suit to have abated under provisions of Order 5 Rule 1 which deals with provisions of extension of expired summons. It is their case that, the order of the learned judge could only be challenged on appeal and not by review. That in as much as the plaintiff alleges that she applied for re-issuance of summons as opposed to extension of the summons, it was their take that the re-issued summons had no official stamp showing the period which its validity had been extended in regards to Order 5. They submitted further that, the application is fatally defective for failing to annex the order being sought to be reviewed; reliance was made on the case of Nairobi ELC No. 1549 of 2013 where the court was of the view that it could not be asked to review its own decisions since that was tantamount to it, sitting on its appeal. They further argued that the applicant's reprieve lay on appeal and not review.

10. I have perused the said ruling giving rise to the orders being sought to be reviewed and I find that the main issue for determination is whether this court can issue the orders sought of it.

11. Under **Order 45 of the Civil Procedure Rules**, review can only be allowed under the following circumstances:

> ***1) 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.***
>
> ***2) Mistake or error apparent on the face of the record.***
>
> ***3) Any other sufficient reason which may make the court to review its order.***

12. In succession matters, Order 45 Civil Procedure Rules of 2010; is provided for under Rule 63. A party who discovers a new matter of evidence after the order or decree has been made may apply for review to the Court which made the order. Order 45 Rule 1 Civil Procedure Rules provides:

> ***"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 judgment to the court which passed the decree or made the order without unreasonable delay."***

13. In the case of **Nasibwa Wakenya Moses v University of Nairobi & Another [2019] eKLR** Mativo J observed that;

> ***"Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. Put differently, the rules lay down the jurisdiction and scope of review. They limit it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.***

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 avers that the plaintiff took out summons issued on 05.04.2006 and on 20.03.2006; that when those summonses were not served, he, by the letter to the Deputy Registrar dated 06.07.2009 received in court on even date, requested for re-issuance of summons. That the court deemed it fit to reissue the summons dated 10.07.2009 which were finally served upon the defendants on 11.08.2009 and thus it was their take that by the time the summons were served upon the defendants, they were valid and they still had their legal effect.

17. He further argued that, although the matter was filed as an ordinary civil suit, it ought to have been transferred to the Environment and Land Court after the establishment of the court since it relates to land and so the Honourable court lacked jurisdiction to make the said order. In that regard, it was his case that the mistake apparently was on the court and as such this court ought to review its orders. It is out rightly clear that this cannot be described as a discovery of new evidence or an error apparent since the rules of the Civil Procedure are clear. The allegation clearly has no basis and has not met the requirements of Order 45.

18. The other element that I need to look into to determine whether the applicant herein has discharged his duty to deserve a case for review is whether there is an error apparent on the face of record. In **Muyodi v Industrial and Commercial Development Corporation & Another E.A. LR (2006) 1 EA 213** and cited in **Muhamed Mungai Vs. Ford Kenya Election, and Nominations Board and Another, Nairobi High Court Judicial Review Mis Application No. 53 /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."***

19. 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."

20. 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. To put it differently an order, decision, or judgment cannot be corrected 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 in appeal over its judgment/decision. In this case, nothing has been pleaded by the applicant herein to denote an apparent error over the same order he endeavours to review.

21. The applicant further must prove to this court that there is a sufficient reason which may make it to review the same orders being sought for review or setting aside. In relation to this case, and as discussed above I am of the view that the applicant has brought before this court an application that is incompetent.

22. The plaintiff also raised the issue of jurisdiction. He has contended that this court does not have jurisdiction to grant the orders sought herein or the earlier orders, as the subject matter herein touches on land. I note that the matter herein was filed in the year 2006 by which time the Environment and Land Court had not been established. Upon establishment of the said court under Article 162 of the Constitution, the plaintiff did not make any effort to have the matter transferred to the proper court until it was dismissed on 11.11.2014 by this court though differently constituted.

23. The only thing that the Judge did was to declare the suit as having abated and no more. The suit had already abated by operation of the law and strictly speaking, there was no suit to dismiss and so the issue of whether the court had jurisdiction or not, is neither here nor there.

24. It is my considered view that the application before the court is bereft of any merit and the same is hereby dismissed with costs to the defendants.

25. It is so ordered.

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

L. NJUGUNA

JUDGE

...................................for the Plaintiff

...................................for the Defendants