REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITUI

ELC JR MISC. APPLICATION 6 OF 2021

REPUBLIC.....APPLICANT

-VERSUS-

THE CABINET SECRETARY FOR LAND,

HOUSING AND URBAN DEVELOPMENT.....1ST RESPONDENT

THE COUNTY SURVEYOR, KITUI.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

-AND-

FRANCIS NZELI MAUNDU.....INTERESTED PARTY

-AND-

EXPARTE APPLICANTS

1. ONESMUS KIMANZI MUSILI

2. BENEDICT MWANGANGI MUSILI

3. HARON MUSEMBI MUSILI

RULING

1. Before the Court is the Interested Party/Applicant'sNotice of Motion dated 10th February 2020. The application is brought under the provisions of Section 80, 1A, 1B and 3A of the Civil Procedure Act, Order 45 Rules 1, and 2, Order 51 (i) of the Civil Procedure Rules, and all enabling provisions of the law. The Application is supported by the affidavit of Francis Nzili Maundu and it seeks the following Orders:

> **1.** ***THAT this Honourable Court be pleased to review its judgment delivered on 18th October 2019 due to discovery of new evidence that was not available.***
>
> **2.** ***THAT this Honourable Court be pleased to review its judgment due to an error apparent on the face of the record.***
>
> 3. ***THAT costs of this application be provided for.***

2. The Grounds upon which the reliefs are sought are:

> *a)* ***The court made its judgment principally based on the ground that the Interested Party/Applicant herein had filed his appeal to the Minister out of the required 60 days.***
>
> *b)* ***That this court based its argument from the fact that the serial number for the appeal case to the Minister was Appeal Case no.***

14 of 1989 yet the decision being appealed against was delivered on the 7th October 1986, thus 3 years later

c) ***The truth of the matter is that this serialization if the appeal to the minister case number was an error and mistake due to the fact that the Interested Party/Applicant actually filed his appeal on 22 October 1986, 21 days after the decision was made by the objection committee.***

d) ***That it was actually the registry at the minister's office that made an error by giving the case number and year of 1989 instead of 1986.***

e) ***That this error was not by the Action of the Interested Party/Applicant.***

f) ***That this error has punished the Interested Party/Applicant and it is only this court of justice that can cure it.***

3. The Respondents did not enter appearance to the main Judicial Review proceedings and did not file any documents in reply to the present application.

4. The Ex-parte Applicant filed a replying affidavit sworn on 23rd March 2021.

Background to the Case

5. The Background to this Application is the original Judicial Review Miscellaneous Application dated 3rd January 2017 that was seeking for the following ORDERS:

1. **An order of Certiorari** to remove into this Honourable Court and quash the decision of the 1st Respondent dated 10th February 2016, whose effect was to overturn a decision of the Land Adjudication Officer, Mutonguni Adjudication Section delivered on 7th October 1986 allowing the sub-division of Mutonguni/Nzalae/50.

2. **An order of Prohibition** to bar the Respondents, their servants and agents from implementing or enforcing the decision of the 1st Respondent, the Cabinet Secretary for Land, Housing and Urban Development, delivered on 10th February 2016, whether through a resurveying of the Original Mutonguni/Nzalae/50, revocation of the 1988 subdivision, cancellation of the individual titles resulting from the 1988 subdivision, or alteration of the Adjudication records or in any other way howsoever.

3. Costs of and incidental to the application be provided for.

6. The grounds upon which the Exparte Applicants relied for the reliefs they sought were inter alia that the 1st Respondents decision was illegal and a nullity as the appeal was filed out of time. The Ex-parte Applicants stated that since the decision appealed against was made 7th October 1986, and the appeal was filed in 1989, the proceedings were taken without jurisdiction. They further claimed that by the time the appeal before the 1st Respondent was heard the suit land Mutonguni/Nzalae 50 had already been subdivided and fresh titles issue to third parties including the Plaintiffs. The 1st Respondent could therefore not cancel the said titles without due process. The ex-parte applicants further claimed that the appeal contravened Article 47 of the Constitution of Kenya and was unfair and unreasonable since no notice of hearing was given to all the parties who would be affected by the outcome of the appeal. The ex parte applicants also complained that they were not notified of the existence of the appeal and neither were they made aware of the date for hearing of the said appeal.Further that when the appeal was heard they were not notified of the decision rendered by the 1st Respondent.

7. On the substance of the appeal the ex parte applicants claimed that the 1st Respondent relied on Land Control Act in making his decision while the said Act was inapplicable to proceedings under the Land Adjudication Act.

8. They further claimed that the owner of the suit land died in 1999and there was no lawful substitution by the legal representative of his estate before further proceedings could be taken.

9. The Interested Party however opposed the Notice of Motion dated 3rd January 2017 on various grounds inter alia that the application was brought outside of the mandatory period of six months, that the Notice of Motion was also filed outside of the mandatory twenty-one days from the date when leave was granted. He further claimed that the 1st Respondent had the requisite jurisdiction to hear the appeal under the Land Adjudication Act and all parties were granted opportunity to be heard and the decision rendered was a just one in accordance with the law and that the process was not flawed.

10. The Honorable Court also found that the decision that was appealed against before the Minister was made bythe District Land Adjudication and Settlement Officer on 7th October, 1986. Being dissatisfied by the said decision the Interested Party filed an appeal before the Minister in Appeal Case No. 14 of 1989. The judge stated that ***"Although it is not clear the date on which the Interested Party lodged the Appeal, the Judgment shows that the Appeal was filed in 1989. Indeed, the serial number of the Appeal is indicated as "Appeal Case No. 14 of 1989" meaning the Appeal was filed in 1989"***. This was more than 2 years after the Objection was determined, contrary to the provisions of Section 29 (1) of the Land Adjudication Act which requires such appeal to be filed within 60 days after the date of determination of an objection.

11. For this reason, the Honorable Judge found that the 1st Respondent acted without jurisdiction therefore the Appeal was a nullity. The Applicants had already acted on the decision of the Land Adjudication Officer and had the land subdivided. The orders sought therein were

granted by Hon. Angote J.

The Interested Party/Applicant's Application for Review of Judgement

12. In support of the application dated 10th February 2020, the Applicant stated that the court based its decision on the grounds that the appeal to the Minister was filed out of the required sixty days. That contrary to that finding, the Applicant claimed that he filed his appeal to the Minister on 22nd October 1986, a period of 21 days after the decision of the Objection before the Land Adjudication Officer. The Applicant attached a copy of an official receipt dated 22nd October 1986 showing payment for the Appeal and a Form of Appeal to the Minister dated 21st October 1986.

13. The Applicant therefore prays that the court allows his prayer for review because his failure to adduce the document was not malicious and he was wrong to think that a copy of the Minister's judgment was enough to shed the required light.

14. In his submissions, he stated that there is a clear error or mistake from the side of the office of the Minister who erroneously entered the year as 1989 instead of 1986.

15. He submits that the discovery of the receipt ought to be treated as new and compelling reasons in this case bearing in mind the Applicant herein had a long and difficult time tracing the said receipt from the offices of the Minister. It is their view that if the court had notice of the error, it would have arrived at a different judgment and relied on the decision in **Nyamogo v Nyamogo** that an error apparent on the face of the record cannot be defined precisely or exhaustively and must be determined judicially.

The Ex parte Applicants/Respondents' Case

16. In his Replying Affidavit sworn on the 23rd of March 2021 and filed in court on the 24th March 2021, on his own behalf and on behalf of the other Ex parte applicants, he states that the Applicant has not met the threshold for review on the following grounds:

a) The record of the proceedings before the Minister were implicated when the judicial review was filed and the Interested party had a chance to present all matters and facts relating to that decision but did not do so.

b) The Interested Party/Applicant always participated in the judicial review proceedings since commencement and had sufficient time to look for any information that was necessary and to place it before the court which he did not do.

c) The law requires that the applicant must demonstrate that the information presented before the court is not only new and important, but was also not within his knowledge or could not be produced by him after the exercise of due diligence.

d) The Interested Party has not demonstrated to the court any efforts he engaged towards accessing the evidence that he now alleges is new.

e) The Judicial review proceedings were commenced against the Respondents who were the custodians of the records did not challenge the allegation that the appeal was filed out of time.

f) The Interested Party/Applicant is asking the court to sit on appeal of its own decision because the Applicant is simply dissatisfied with the decision of the court and now wants to be heard again.

g) The documents presented before the court are not authenticated.

h) Appeals are serialized with numbers; the court was entitled to rely on the case number to make its final decision.

17. The 1st Ex parte Applicant stated that there was a case of indolence on the part of the Applicant, unreasonable and inordinate delay in bringing the Application for review five months after judgment. That the only explanation given for delay was that the search for receipts was caught up in the holiday season. The fact that they admit that the search for receipts began after the judgment was delivered and that he never looked for them before so as to bring them before the court shows inordinate delay. He contends that there must be an end to litigation and prays that the application dated 10th February 2020 be dismissed with costs.

18. In their submissions, the Ex parte Applicants submitted that this application is an appeal disguised as an Application for review since the Interested Party/Applicant had an opportunity to raise these issues before the final decision was made.

19. They also submitted that this was not 'new' evidence as it was always there and it only became necessary to look for more evidence after the Judgment because the Applicant was aggrieved by the judgment of the Court. They cited the case of **Afpack Enterprises Limited v Punita Javant Acharya (Suing as the Administrator of the Estate of the Late Suchila Anantrai Raval) (2018)eKLR** where the court found that the Appellant did not offer a reasonable explanation for the delay and also that the appellant was guilty of non-disclosure of all material facts.

20. Counsel for the Ex parte Applicants submitted that the Interested Party/Applicant has not met the threshold for review under Order 45 Rule 1 and 3 as they have not demonstrated exercise of due diligence at all. Counsel claims that if there was any other important evidence in support of the Interested Party, he would have looked for that evidence much earlier when the proceedings were ongoing. He never gave the court or the parties any indication that there was any other evidence that he was looking for to support his case. In addition, Counsel

submitted that the claim that there is an error on the face of the record has not been proved. They cited the case of **YMG v KN (Suing through his mother and next friend NKM)(2021)eKLR** where it was held that the issues raised in the application dated 9th September 2020 were not new issues for review but issues for appeal as what was being challenged was the merit of the decision of the trial court. They also cited the case of **Otieno, Ragot & Company Advocates v National Bank of Kenya Ltd (2020)eKLR** where the court found that it is not in dispute that there was a mistake in the letter filed before the taxing officer but the mistake was not apparent on the face of the record. The respondent failed to prove that it had discovered new evidence after the exercise of due diligence.

21. The Exparte applicants submitted on the doctrine of finality that the decision of the Land Adjudication Officer was implemented in the 1980s and the Applicant comes 40 years down the line to change the status quo. They submitted that there must be an end to litigation while quoting the case of **Francis Mwangi Kimani v Daniel Kimani Njihia (2019) eKLR** where the court found that the Respondent clearly stands to be prejudiced by the extended litigation relating to the suit property. They also relied on the case of **Joshua Ngatu v. Jenae Mpinda & 3 others (2019) eKLR** where a land dispute surrounded a transaction that had been done more than 40 years before and that the Plaintiff was found guilty of laches.

22. They urged the court to award the costs of the application to them.

Analysis and Determination

23. Having read the application dated 10th February 2020 and the supporting affidavit, the replying affidavit, the submissions filed and the attached authorities I am of the opinion, the only issue for determination is whether the Interested Party's Application has met the threshold for granting orders for review of the judgement dated 18th October 1989.

24. The Application is brought pursuant to Sections 80, 1A,1B and 3A of the Civil Procedure Act and Order 45 Rules 1 and 2 and Order 51(1) of the Civil Procedure Rules (2010). Order 45 Rules 1 of the Civil Procedure Rules (2010) provides that:

> *"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 matteror 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."*

25. The power of review is given by Section 80 of the Civil Procedure Act that states 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."***

26. The requirements for review are:

> a) the discovery of a new and important matter that could not have been known at the time the decree or order was issued after exercise of due diligence,
>
> b) a mistake or error apparent on the face of the record,
>
> c) or for any other sufficient reason.

27. In this case, it is the Applicants claim that the evidence of the receipts and Appeal Form indicating that the Appeal was filed in 1986 is new and important matter that could not have been known at the time the decree or order was issued after exercise of due diligence. Further, the Applicant claims that there was an error apparent on the face of the record.

28. However, in my view the documents adduced by the Applicant do not amount to new evidence for the reason that the Applicant is the one who alleges to have drawn the Form of Appeal to the Minister dated 22nd October 1986, signed it, paid for the filing of the Appeal and was issued with a receipt. He cannot thus claim that the date on which he filed the appeal was not known to him. Further, the Applicant cannot claim that the Form of Appeal to the Minister filed was new evidence that could not have been known to him at the time the decree or order was issued after exercise of due diligence. The Applicant has failed to provide strict proof to meet the threshold under Order 45 Rule 3 (2). This ground for review must therefore fail. The said Order 45 Rule 3 (2)provides as hereunder;

> ***"Where the court is of opinion that the application for review should be granted, it shall grant the same:***
>
> ***Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant***

alleges was not within h is is knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

29. The Applicant relies on a second ground for review the same being that there was an error apparent on the face of the record. He claims that the Learned Judge based his judgment on the finding that the Appeal before the Minister was filed in 1989 and not 1986. The Honorablejudge held as follows;

> ***"20. The record annexed to the Ex parte Applicants' Application shows that the decision that was appealed against before the Minister was made by the District Land Adjudication and Settlement Officer on 7th October 1986. Being dissatisfied with the said decision, the Interested Party filed an appeal before the Minister in Appeal Case No.14 of 1989.***
>
> ***21. Although it is not clear the date that the Interested Party lodged the Appeal, the Judgment shows that the Appeal was filed in1989.Indeed the serial number of the appeal is indicated as "Appeal case No 14 of 1989" meaning that the appeal was filed in 1989.***
>
> ***22. Section 29(1) of the Land Adjudication Act provides that any person who is aggrieved by the determination of an objection may within sixty (60) days after the date of the determination, Appeal against the determination to the Minister.***
>
> ***23. It is clear from the record before me that the Interested Party herein filed an Appeal against the decision of Land Adjudication Officer after more than two (2) years from the date of the decision contrary to the provision of Section29(1). The being the case, the 1st Respondent should not have entertained the Appeal, considering that the timelines stipulated in the Act are pertinent to the preparation of the register in an adjudication area.***
>
> ***24. Having not filed the Appeal before the Minister within the requisite sixty (60) days, the Minister acted without jurisdiction. Consequently, the decision that the1stRespondent rendered on 10th February, 2016 was a nullity.In fact, by the time the said decision was rendered, and due to the delay in filing the Appeal, the Applicants had already acted on the decision of the Land Adjudication Officer and had the entire land sub-divided into several portions of land."***

30. However, a look at the Ministers Judgement rendered by Deputy County Commissioner Kitui, the same paints a different picture with regard to the time of filing the Appeal. At Paragraph 7 of the judgement the Deputy County Commissioner noted concerning the Appellants submissionsthat: -

> **"He** ***claimed that the subdivision was done in 1988 and the appeal was on 22nd October, 1986."***Similarly, at Paragraph 35, the Deputy County Commissioner noted that,:-
>
> ***"Besides theappeal was lodged on 22nd October 1986, yet the Defendant did the subdivision of land in 1988."***At paragraph 36 it is stated*:* -
>
> ***"Given that there was an active appeal it was not possible for the Land Control Board to have given consent for the subdivision of the land to take place. It cannot therefore be understood how the Defendant subdivided the parcel of land given the prevailing circumstances."***

31. Having in mind the totality of the above statements within the Ministers judgement, I am satisfied that there was evidence on record that the Appeal to the Minister was not lodged in 1989 as found by the Court. I find that there was an error in the numbering of the decision of the Minister to read 1989 instead of 1986.The Appeal was therefore filed in 1986, even though the heading referred to it as a 1989 case. This was an error apparent on the face of the judgment and that is reason enough to be considered for orders of review. In **Zablon Mokua v Solomon M. Choti & 3 others [2016] e KLR** the Court of Appeal cited its earlier decision in **Nyamogo & Nyamogo v Kogo [2001] EA 174** where it held that:

> ***"… an error apparent on the face of the record cannot be defined precisely or exhaustively…and it must be left to be determined judicially on facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face the record. Where an error on a substantial point of law stares one on 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 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."***

32. . In the same vein, Mativo J so elaborately defined the meaning of 'error apparent' in the case of **High Court at Nairobi Misc. Application 317 of 2018 Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** where he noted as follows:

> ***"There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out, see the decision in Thungabhadra Industries Ltd. v. Govt. of A.P.1.***
>
> ***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."

33. It is the Courts view that the issue of when the Appeal to the Minister was filed is apparent on the face of the record. The error on the part of the judgement rendered by the court on 18th October 2019 is also apparent on the face of the record. The issue does not requireproof in a long-drawn process of debate and reasoning. For these reasons, this ground for review succeeds.

34. The Appellantfurther claimed that the Interested Party/Applicant was guilty of indolence in filing this application after the judgment, The Appellant further claimed that the Applicants did not demonstrate to the court that they were in the process of looking for this evidence but only started looking for them after an adverse judgment was issued against them which in my view amounts to unreasonable delay. In the case of the **Environment and Land Court at Kitale Land Case 46 of 2017 Andrew Shimbiro v Sammy Talam [2021] eKLR the** court had this to say about unreasonable delay:

"A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation equity aids the vigilant, not the indolent' or 'delay defeats equities'. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay ('laches')."

Further down in the same case the court stated:

35. Judgement in this case was entered on 18th October 2019, the present application was filed on 12th February 2020. The Applicant has endeavored to explain the reasons for the delay in bringing the application whichreason is that he was in the process of getting the documents he deemed were necessary in making the application. The said reasons are contained in the supporting affidavit. I am satisfied that indeed there was sufficient reason for the delay which was in any event is not deemed to have been inordinate.

Final Orders:

For the foregoing reasons the Court finds that the application dated10thFebruary 2020 has merit and the same partly succeeds. Prayer 1 of the application is hereby dismissed. Prayer 2 of the application is hereby allowed and the judgement entered on 18th October 2019 is hereby reviewed and set aside.The Court will proceed to re-hear this matter as provided under Order 45, rule 5 of the Civil Procedure Rules.

DATED, SIGNED AND DELIVERED AT KITUI THIS 31ST DAY OF JANUARY, 2022

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

In the presence of:

C/A C Nzioka

Mwendwa for the Interested Party/Applicants

No attendance for Respondents

Kimuli for the Ex-parte Applicants/Respondents