REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 266 OF 2010

JOHN MATHENGE GICHUHI .....PLAINTIFF/RESPONDENT

VERSUS

1. CYRUS NDUNG'U.....DEFENDANT/APPLICANT

2. ABIGAIL MUTHONI GITARI.....1ST INTERESTED PARTY

3. SAMUEL MAINA GACHENI….....2ND INTERESTED PARTY

RULING

1. Judgment in the above case was delivered on the 20th January 2012 by the Hon. Justice M.J. Emukule J. By the said judgment the court ordered that the Defendant be evicted from the plaintiff's land parcel **Laikipia/Marmanet/Extension/712** or any other part thereof. The court proceeded to grant a stay of execution of the said orders for 180 days and further directed the plaintiff and defendants counsel, together with the Director of Settlement to move and demarcate, on the ground, the areas occupied by **Plots 711 and 712** and in this regard the subdivisions so that the mater is settled once and for all.

2. On the **27th March 2012**, the defendant brought an application under **Order 45 Rule 1 and 2 of the Civil Procedure Rules** seeking an order of review of the courts judgment dated the 20th January 2012 on grounds that there was an error apparent on the face of the record, in that, the plaintiff did not disclose that the Land Registrar who has the statutory mandate to deal with boundary dispute had dealt with the matter conclusively and therefore Land suit, **Laikipia/Marmanet (Extension) 712** did not exist at the time of commencement of the case.

It was stated that the Director of Settlement is incapable of implementing the decree of the court as he is not the custodian of the R.I.M. and further that he is not charged with any authority to deal with disputes on boundaries over registered land. An affidavit in support of the application was sworn by the defendant on the 27th March 2012. Before this application could be listed down for hearing, another application dated 14th February 2013 was filed by two other persons named as the First and Second interested parties. They seek leave to be enjoined as interested parties in the matter and also an order of stay of execution of the judgment of the court dated 20th January 2012.

3. In support of the application the two interested persons based their application on grounds that:

> *1. Abigail Muthoni Gitari (first intended interested party) is registered as owner of Laikipia/Marmanet/ Extension/1200 Since 27th November 2006, a subdivision from the suit property, Laikipia/Marmanet extension/712 originally registered in the names of Mary Nyaruiri Wamugunda on the 3rd November 2003.*

2. Samuel Maina Gachiru, the second interested party is registered owner of Title No Laikipia/Marmanet/extension/1199 from the 19th February 2007, a subdivision of Laikipia/Marmanet/Extension 712.

They contend that they came to learn of the court's judgment that effectively affects their respective ownership of the plots after delivery of the judgment. They therefore seek to be enjoined in the suit and to be accorded an opportunity to be heard in respect of their titles.

It is their submission that the plaintiff's case is a claim over the whole title **No. Laikipa/Marmanet(Extension) 712** before the subdivisions to the interested parties and the defendant, and if such judgment remains on record, they will suffer loss as they are the beneficial owners of the subdivisions.

4. Parties appeared before me on the 23rd November 2015. An order of status *quo* was issued that both the plaintiff and the defendant who are both in occupation of the suit property **Liakipia/Marmanet/Extension 712 and 711** be maintained pending hearing of the applications dated 27 th March 2012 and 14th February 2013. The court was informed that the Respondents, though served with the application had failed to file their responses to the two applications that were directed, heard and determined simultaneously. The Appellants withdrew their **Prayer No. 4** of the application dated 14th February 2013 – (prayer for an order to set aside the Judgment).

Being satisfied that Respondents Advocates Omwenyo & Co. Advocates were duly served with the two applications and mention notices for the two by dint of affidavits of service filed on the 4th April 2011 and 21st March, the court directed the Applicants to file written submissions on the two applications.

5. The applicant's submissions are dated 2nd February 2016.The background of the applications is stated above.

Three issues were framed for determination.

1. Whether there is an error on the face of the record of the judgment dated the 20th January 2012.

2. Whether the judgment affected the interests of the intended interested parties who were no parties in the suit herein.

3. Costs.

An order of review of a judgment may be granted when the provisions of **Order 45 Rule 1 and 2 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act** are met**.**

Section I (1) Order 45 states**:**

"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 deligence 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."

6. The applicants submit that the judgment of the court dated the 20th January 2012 had errors apparent on the face of the record and sets to itemise them as follows:

*(1) that the court misconceived the evidence tendered by the defendant and made a finding that **Plot No. 711 and No. 712** belonging to the plaintiff and the defendant respectively were different land parcels and the defendant had inherited from his mother; and therefore the court erred in holding that the two had been amalgamated, contrary to the evidence of the District Land Registrar and District LandAdjudication and Settlement Officer who testified that the two plots existed separately.*

*(2) That at the time of filing the suit, Land parcel **Laikipia/Marmanet/Extension 712** did not exist as it had been subdivided the resultant land parcels **Laikipia/Marmanet/Extension 1200** and registered in the names of the first intended interested party and Extension**1199** registered in the second intended interested party. It is contended that this is new evidence, that was not brought to the attention of the court during the trial, and that had it been brought to the courts attention, the judgment would have been different.*

*(3) That the order of eviction as ordered in the judgment was erroneous as it touched on the defendant's land and the intended interested parties land parcels subdivisions **Nos. 1199 and 1202** when they were not parties to the suit.*

*(4) That relying on the private surveyors report, the plaintiff and the defendant built on the same **Plot No. 711** and the defendant sold the same plot thinking it was his portion Plot **712**.*

7. The applicant also submitted on the second issue, whether the judgment affected interests of the intended third parties.

It is submitted that the intended third parties interests as registered owners of the subdivisions **Plot No.1199 and 1202** were adversely affected as they were not given an opportunity to be heard, that the plaintiff ought to have enjoined them in the suit. It is submitted that the order of eviction affected them directly, and therefore they ought o be enjoined to the suit.

On costs, the applicant citing **Section 27 of the Civil Procedure Act** submits that costs should follow the event, and ought be met by the plaintiff.

8. The court has considered the applicant's submissions, the pleadings, proceedings and the judgment delivered on the 20th January 2012.

It is not in doubt that the application for Review was filed without delay.

In **Misc. Application No. 39 of 1997** between Mburu Mutheka and Chairman of the Kinangop Land Control Board, quoting from the case of **Nyamongo & Nyamongo Advocates vs Kago (2001) I EA 173**, the Court of Appeal attempted to define the phrase "apparent on the face of the record" as follows:

> ***"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefinate less inherent in its very nature, and it must be left to be determine**d **judicially on the facts of each case.***
>
> ***There is a real distinction between mere errors in decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in 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.***
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> ***An error which has to be established by a 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 face of the record. Again, if a view adopted original record is a possible one, it cannot be***

an error on the face of record even though a another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal."

Further to the above elaborate attempt of definition of an error on the face of the record, an application for review should not be taken to be a form of an appeal. An error on the face of the record must be so clear as to leave no doubt in the mind of the court.

9. Looking at the Judgment sought to be reviewed, it presents itself as having been well thought in line with evidence tendered before it.

However, the items deemed to be errors on the face of the record require interrogation as to whether they are indeed new and important matters or evidence that was not in the knowledge of the defendant/applicant during or before the pendency of the suit.

While evidence was tendered that there were two separate **Plots No. 711** and **No. 712**, belonging to the plaintiff and the defendant, the judgment shows that indeed both plots were amalgamated and without knowledge of the plaintiff and defendant, both settled on one of the **Plots in No. 711,** in the mistaken belief that the defendant had occupied **Plot No. 712**.

Further, in the mistaken believe, the defendant proceeded to sell subdivisions of **Plot No.712** to two other persons, the interested parties these being subdivisions **No. 1199 and 1202**.

When the defendant was subdividing and selling the subdivisions alluded to above, did he have the knowledge that **Plot No. 712** did not exist?

Evidence came out clearly that he did not know, a fact well captured in the judgment when the learned Judge stated that what was in dispute at the commencement of the suit was a boundary dispute between the parties plots. It later transpired that **Plot No. 712** did not exist and that the defendant had built on **Plot No. 711**, the plaintiffs property.

The Judge made a further finding that the District Land Registrar too found that the two parcels of land **Plot No. 711 and 712** did exist on the ground but the boundaries had not been laid, a fact borne by reports filed by the surveyors indicating that **Plot No. 712** belonging to the Defendant did not exist on the ground consequently both parties built on **Plot No. 711**, that the defendant sold portions of **Plot No. 711** thinking it was **Plot No. 712**.

10. In my considered opinion, there were glaring mistakes, unknown to the defendant at the commencement of the case and during the hearing thereof, and that only came to light when the judgment was delivered in January 2012, and particularly at the execution of the decree stage when it became apparent that the orders of eviction issued against the Defendant were indeed to be executed against the Intended third parties who are the registered owners of the subdivisions created from **Plot No. 712** mistakenly and without prior knowledge by the defendant on the situation on the ground.

11. Admittedly, there are numerous issues of law that arise out of the evidence as tendered and the judgment of the court that ought to have been appealed from.

Going by the definition given by the Learned Judges of Appeal in the **Mburu Muthoga** case above, there is no clear cut definition of an error on the face of the record. In my understanding and interrogation of the judgment, there is a clear case of an error in the face of record on substantial points of law, and in particular when the judgment on record stated:

"the unfortunate and inevitable conclusion I have reached is that unless the original R.I.M Marmanet Extension is restored, the issue of Titles No. 711 and 712 in respect of one and the same parcel of land is an exercise in falsehood."

12. The court by its holding recognised the many anomalies that came out during the hearing of the

case and that required rectification. But the rectification and amendments were to squarely touch on third party properties whose owners were not parties to the suit. For those reasons, I am persuaded that the two issues framed for determination are answerable in the affirmative.

It is my finding that the plaintiff and the defendant would not have occupied and built on the same plot on the ground if one of them knew or had knowledge of the status on the ground. Further the intended parties had no knowledge that the case between the plaintiff and the defendant was actually touching their land parcels and such knowledge only came to their knowledge when it became evident that they we to be evicted from their land parcels yet they were not parties to the case.

13. It is trite that a party whose interest in subject of a court should be given an opportunity to be heard on his interest. It would be unjustified and a denial of justice to the two intended third parties if they were denied a hearing by the court when their properties are subject of the case. They have sought leave to be so enjoined in the case which case has been determined in the judgment dated 20th January 2012.

For the reasons above, the court finds that the applicant/defendant has made out a case for review of the court's judgment.

Consequently the applications dated 27th March 2012 and 14th February 2013 are allowed. The judgment of the court dated 20th January 2012 is hereby reviewed and set aside with all consequential orders arising therefrom.

The intended first and second parties are hereby granted leave to be enjoined as First and Second interested parties. Their respective claims shall be incorporated in the suit by the necessary and appropriate amendments as they may deem fit.

There shall be no orders as to costs on this application.

Dated, signed and delivered in open court this 21st day of July 2016

JANET MULWA <u>JUDGE</u>