REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELCA NO. 21 OF 2019

CHARLES MWANGI MBURU.....1ST APPELLANT/APPLICANT

PAUL WAITHAKA MBURU.....2ND APPELLANT/APPLICANT

VERSUS

PETER NDUNGU KARIUKI

(Suing as the administrator of the estate of PRIMUS OLOO OBWAYO)....RESPONDENT

RULING

1. The Application for consideration is dated **18th June 2021,** wherein the Appellants/Applicants have sought for the following orders;

a) That the Ruling and Orders made by Hon. Lady Justice J.G. Kemei on 5th December 2019, and all consequential orders be reviewed and/or set aside.

b) That such further and other relief be granted to the Applicants as this Honourable Court deems fit and expedient in the circumstances.

c) That the costs of this Application be provided for.

2. The Application is brought under **Sections 80, 63 (c) and 3A** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules**.

3. The Application is premised on the grounds stated on the face of the Application and the Supporting Affidavit of **Paul Waithaka Mburu**. These grounds;

a) In the Ruling dated and delivered on the 5th December 2019, the Honourable Court dismissed the Applicants Application for extension of time to file and lodge an Appeal out of time.

b) That there was error apparent on the face of the record as in Paragraph 25 of the Ruling, the Court mistakenly concluded that the Applicants had not applied to set aside the judgement of the lower Court, when indeed such an Application for setting aside had been made vide Notice of Motion dated 19th June, 2019, and which was subsequently disallowed on 25th July, 2019, before lodging the instant Appeal.

c) That this conclusion was erroneous and fatal as it made the Honourable Court arrive at a decision that the Applicants had skipped a crucial step in failing to set aside judgment in the Court of the first instance before lodging an Appeal.

d) That inadvertently the Counsel acting for the Applicants at that time failed to attach a copy of the said Notice of Motion Application and Ruling for the kind consideration of this Court.

e) That the said omission having been made by the Counsel on record cannot be visited on the Applicants, who are innocent and had placed all the documents before their Advocates.

f) That if the said developments were to be considered by the Honourable Court, it would have definitely arrived at a different finding favourable to the Applicant.

g) That unless the Honourable Court reviews its ruling, the Applicants stands to suffer the permanent prejudice of being condemned unheard as the lower Court judgement in force was entered *exparte.*

h) That there has been no unreasonable delay in making this Application.

i) That it is in the interest of Justice that the Ruling and Orders of 5th December, 2019 be reviewed and/or set aside.

4. In his Supporting Affidavit, **Paul Waithaka Mburu** reiterated the contents of the above grounds and further added that the effects of the Ruling made on **5th December 2019,** is that the Applicants have been completely denied an opportunity to be heard because the lower Court matter was heard and determined exparte and in their absence. That the Applicants will suffer substantial loss if the orders sought are not granted.

5. The Application is contested by the Respondent herein **Peter Ndungu Kariuki,** through the grounds of opposition dated **19th October 2021.**

These grounds are;

a) That the Ruling by Court dismissing their Application was right and sound based on law and facts.

b) That the Applicants were dissatisfied, they ought to have appealed to the Court of Appeal instead of making another Application for review after about an year and when the Judge who delivered the Ruling has been transferred.

c) That the Respondent's key witnesses have passed on and hence to open this case afresh is prejudicial to the Respondent.

d) That the whole judgment has now been implemented, the titles have reverted back and the Applicants were evicted about five months ago. This is a case that was decided in the year 2018 and the Court delivered judgment based on the law and facts. They cannot keep saying that it was exparte judgment because of the following;

i. In application for review of the decree they attended and addressed Court where they said that they were not opposed to the decree and it was adopted by consent.

ii. The hearing date of the case was taken by consent in open Court.

iii. It is after the titles have reverted back and after service of notice to vacate when they filed their first Application for review hence it was dismissed.

iv. In their first Application for review and Appeal the Court wondered why they were just seeking for setting aside and not to have matter head afresh.

e) That there was no mistake at all and the Applicants are misleading the Court. The said Application was dismissed among many reasons because although they were seeking to have it set aside, they were not seeking to have the matter heard afresh.

That the Applicants ought to have appealed against this Ruling if they were dissatisfied instead of resulting to endless Applications for review. The Respondents urged the Court to dismiss the instant Application.

6. The Application was canvassed by way of written submissions which this Court has read and considered.

7. In their submissions, the Applicants relied on **Order 45 Rule I** of the **Civil Procedure Rules** which provide;

(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.

8. They further relied on **Section 80** of the **Civil Procedure Act** which states;

"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".

9. The Applicants also relied on the case of ***National Bank of Kenya vs Ndungu Njau, Civil Appeal No. 2111 of 1996***, where the Court held that;

> ***"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self evident and should not require an elaborate argument to be established."***

It was further submitted that the current Application meets the tenets of the law as set out in the case of ***Republic vs Advocates Disciplinary Tribunal Exparte Apollo Mboya (2019) eKLR,*** where the Court held that;

> ***"The term mistake or error apparent by its way connotation signifies error which is evident perse from the record of the case and does not require detailed examination, scrutiny, and elucidation either of the facts or the legal position".***

10. Further, they submitted that the power of review can be exercised only for correction of a patent error of law and fact which stares in the face without any elaborate argument being needed for stabling it.

11. It was further submitted that though the Court on Para 25 of the Ruling dated **5th December 2019,** stated that;

> ***"It is not clear to me why the Appellants did not seek to set aside the Judgment for purpose of being heard on merit, instead. They preferred to Appeal and review the exparte Judgment. This was not explained by the Applicants".***

12. They submitted that that was not the position and the Court was not correct as the Applicants had filed an amended **Notice of Motion Application** dated **19th June 2019,** seeking to set aside the Decree given on **8th February 2019,** and **25th April 2019**. However, there was an omission on the part of their Advocate to attach the said Application for Court's consideration. That the said error in the Ruling is so apparent that they do not need to delve into arguments for it to be clear. That had the Court seen the said Application, it would definitely have reached a different conclusion.

13. To buttress this point, the Applicants relied on the case of ***Attorney General & O'rs vs Boniface Byanyima*** which cited the case of ***Levi Outa vs Uganda Transport Company*** and 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."***

14. It was the Applicants further submissions that the Application herein is meritorious and meets the standard set out by the law for review. They urged the Court to allow the Application and that the Court should have another opportunity to consider all the materials placed before it to arrive at a fair determination.

15. On his part, the Respondent filed his submissions dated **1st December 2021,** and submitted that the Ruling given by the Court was sound in law and fact. He submitted that the Application for extension of time to Appeal was rejected because among other things the Judgement had been implemented/executed and it was sought after one year. Further, the Appellants/Applicants were parties when the **Decree** was amended by **consent** and at that time, they did not question the said Judgement and they also sought for leave to Appeal out of time after their Application for review had failed at the lower Court. The impugned Application was disallowed because the Applicants failed to give grounds to justify grant of leave to Appeal out of time.

16. The Respondent also submitted that the Application for extension of time was dismissed because the Court wondered why the Appellants/Applicants were not seeking to Appeal their Application for review in the Lower Court that was dismissed at **Murang'a CMCC No. 246/2013.**

17. Further that the Applicants were not denied leave to Appeal out time because the Application from the Lower Court seeking to set aside Judgement was not attached. It was declined because the Applicants did not Appeal against the Application of setting aside the Judgement in **CMCC No. 246 of 2013,** that was dismissed and instead opted for leave to Appeal out of time.

18. It was the Respondent's further submissions that if the Applicants were dissatisfied with the said Ruling of **5th December 2019**, they should have appealed against the same at the Court of Appeal instead of seeking for review of the said Application.

19. Further that the Application for review at the Lower Court was heard and dismissed, but was never Appealed against. That the Applicants are asking the Court to sit on the Appeal against a Ruling of a Judge of concurrent jurisdiction. They relied on the case of ***Executive Committee Chelimo Plot Owners Welfare Group & 288 Others vs. Langat Joel & 4 Others (sued as Management Committee of Chelimo Squatters Group (2018) eKLR*** where the Court held;

> "***Be that as it may, the argument that the Court ought not to have dismissed suit against the party whose suit was properly instituted may be an erroneous conclusion of Law, but it cannot form the basis of review since it would amount to asking this court to sit on Appeal against the Ruling of a Judge of concurrent jurisdiction".***

20. The Court has considered the instant Application and the rival written submissions and finds as follows; -

The issue for determination is whether the Applicants Application is merited.

21. The Applications herein is seeking for **review** of a Ruling that was delivered by this Court on **5th December, 2019**. The said Ruling dismissed the Applicants' Application dated **16th August, 2019.**

The Court dismissed the said Application on the following grounds;

> ***i. The Applicants knew about the Decree on the 20/3/2019, when they were served with the Application to amend the said Decree.***
>
> ***ii. That the Applicants consented and approved the said Decree.***
>
> ***iii. That the Applicants did not explain the delay in not filing the Appeal within time.***
>
> ***iv. That there will be prejudice to the Respondent as the Judgement has been fully executed with the titles registered in the name of the Respondent.***
>
> ***v. It was not clear why the Appellants/Applicants did not seek to set aside the Judgment for purposes of being heard on merit.***

22. Application for review is governed by **Section 80 of the Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules.**

23. From the above provisions of Law, it is evident that any person who is aggrieved by a **Decree/Order** which is appealable, but has not been appealed may seek for review of the said Order or Decree.

24. However, the conditions for such are;

> ***(i) There is discovery of new and important matter on evidence, which after the exercise of due diligence, was not within the Applicant's knowledge and could not be produced by him at the time when the Decree was passed or the order made.***
>
> ***(ii) There is some mistake or error apparent on the face of the record.***
>
> ***(iii) For any other sufficient reasons.***

25. The Applicants herein were aggrieved by the Court Ruling of **5th December 2019,** that dismissed their Application for leave to file an Appeal out of time and for stay of execution.

26. The Applicants herein had a right to Appeal against that decision but they did not.

27. As provided by **Section 80** of the **Civil Procedure Act** and **Order 45(1) of Civil Procedure Rules,** they chose to file an Application for review of the said decision on **18th June 2021**. That was almost **1½ years** after the said Ruling was delivered.

28. The reasons given for seeking the instant review was that there was **error apparen**t on the face of record in respect of the said Ruling as the Court in Paragraph 25 mistakenly concluded that the Applicants had not applied to set aside the Judgment of the lower Court.

29. However, upon perusal of the said Ruling of **5th December 2019**, the Court gave **five** reasons as to why the Application for leave to Appeal out of time could not be allowed; -

It was held that there was delay in bringing the said Application and the Applicants had participated in amendment of a **Decree** by consent on **20th March 2019.**

30. Therefore, the main reason for dismissal of the said Application dated **16th August 2019,** was not because the Applicants had not attached an Application to set aside the Judgment which had been heard and dismissed by the lower Court as alluded by the Applicants. The reasons for dismissal of the same were various and thus the Court finds that the question paused by the Court on why the Applicants did not seek to set aside the Judgement at the lower Court for purposes of being heard on merit was **a by the way**. It was not the major reasons for the dismissal, as the Court had elaborated the other omissions by the Applicants which would not warrant grant of leave to Appeal out of time.

31. By asking the Court to review the Ruling of **5th December 2019**, the Applicants are indeed asking the Court to sit on its own Appeal or to sit on Appeal against a Ruling of a Judge of concurrent jurisdiction. If the Applicants were aggrieved by the said Ruling, they had an option of filing an Appeal at the Court of Appeal.

32. The Court finds **no error apparent** on the face of record of the Ruling delivered on **5th December 2019**, to warrant a review of the said Ruling.

33. This Court is not lost to the fact that the impugned Judgment was delivered after an exparte hearing of the matter. The Applicants sought

to set aside the said Judgement and Decree that emanated after the exparte hearing.

34. May be what the Applicants should have done was to file an Appeal against the denial of their Application to set aside the exparte Judgement or as stated above, appeal against the Ruling of **5th December 2019,** since they are aggrieved by the same.

35. On the submissions that the Applicants had sought for review at the lower Court and therefore the right to appeal was lost, the Court finds and holds that the same is not tenable submissions. The Applicants right of Appeal was not lost due to the Review Application.

36. See the case ***of African Airlines International Ltd v Eastern & Southern African Trade & Development Bank (PTA BANK) [2003] KLR 140 or (2003) 1 EA 1, where the Court held;***

> ***"Jurisdiction of a Court to hear review is not taken away after the review petition, an appeal is filed by any party. An appeal may be filed after an Application for review, but once the appeal is heard the review cannot be proceeded with."***

37. Having now carefully considered the instant **Notice of Motion Application** dated **18th June 2021**, the Court finds it **not** merited and the Ruling of **5th December 2019**, cannot be reviewed. Maybe, the Applicants can choose to Appeal against the said Ruling.

38. For the above reasons, the said **Notice of Motion Application** dated **18th June 2021**, is **dismissed** entirely and given the circumstances of this case, there will be no orders as to costs. Each party to bear its own cost.

39. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 20TH DAY OF JANUARY, 2022.

L. GACHERU

JUDGE

DELIVERED ONLINE;

IN THE PRESENCE OF;

MR ONGERI FOR THE APPELLANTS/APPLICANTS

MR NDUNGU FOR THE RESPONDENT

KUIYAKI - COURT ASSISTANT

L. GACHERU

JUDGE