REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA E.L.C CASE NO. 258 OF 2017

ALVIN MBAE…….1ST PLAINTIFF/APPLICANT

ALICE MBIRO……..….2ND PLAINTIFF/(DECEASED)

WILSON MBAABU…….....……3RD PLAINTIFF/APPLICANT

VERSUS

EDWIN NYAGA MUKATHA…….…….....……1ST DEFENDANT/RESPONDENT

MONICA K. MUGO…….……..…….....…….2ND DEFENDANT/RESPONDENT

ANDERSON NKONGE MUGO……..…….....….3RD DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect of the notice of motion application dated **1st FEBRUARY, 2022** in which the Applicants/Plaintiffs seek the following orders:

1) That this application be certified urgent

2) THAT pending the inter partes hearing of this application an order do issue in the interim suspending the sentence meted out against the 1st and 3rd Applicants on 17/01/2022.

3) That pending the hearing and final determination of this application an order do issue suspending the sentence meted out against the 1st and 3rd Applicants on 17.01.2022.

4) THAT the Honourable court do authorize the firm of Basilio Gitonga, Muriithi & Associates Advocates to come on record in this suit in place of the law firm of CHARLES KARIUKI & KIOME ASSOCIATES.

5) THAT the Honourable court do review the orders of this court made on 02/12/2020, 03/03/2021 and 17/01/2022 by setting aside the same.

6) THAT costs of this application be provided for.

2. The application is based on the grounds set out hereunder and supported by the affidavit sworn by **MARK MURITHI** which contend that the court made varied orders relating to these proceedings on 02/12/2020, 03/03/2021 and 17/01/2022.

3. THAT there is an error apparent on the face of the record in that the court was funtus officio when it made the order of 02/12/2020 which has given rise to the subsequent orders.

4. THAT there is sufficient cause for the court to review the orders cited for the reasons that: -

a) The Applicants' woes are to a substantial part attributable to their former advocates.

b) The court issued orders of eviction long after the suit had been determined and in the absence of a substantive suit seeking such orders.

c) The court proceeded to determine the application dated 20/09/2021 on the basis that the same was unopposed whereas there is a replying affidavit by the Applicants filed on 14/12/2021.

d) The issue of service upon the Applicants of the orders of the court was not sufficiently addressed whereas it appears from the record that the affidavits of service are deficient in material substance of the requirements of a proper affidavit of service.

e) There is absolutely no indication that service of the application leading to the impugned orders were served upon **M/S CHARLES KARIUKI & KIOME ASSOCIATES** on 17/01/2022.

f) When presented to court the Applicants were not cautioned on need to purge the contempt or offer any mitigating circumstances considering that they were unrepresented.

5. The applicants aver that the order made on 02/12/2020 is to some extent ambiguous where it requires the Applicants to render vacant possession of the suit lands and at the same time direct the Respondents to forcibly evict the Applicants. That the Applicants right to liberty has been curtailed in circumstances that requires the court to revisit the propriety of the record. That the 1st Applicant's livelihood is in jeopardy as he stands to lose his job as a police officer. In conclusion that in order to advance the course of justice it is in order that the Application be allowed.

6. On the 4th of February 2022 the Respondents/Defendants filed grounds of opposition dated 4th February, 2022 and opposed the application on the grounds that the Applicant's/plaintiff application dated 1st February 2022 is incurably defective and otherwise an abuse of the court process, in that the Review orders sought were not filed timely as required under the express provisions provided under Order 45 Rule 1 of the Civil Procedure Rules.

7. The Respondents' contend that the Honourable court having fully pronounced itself vide the Judgement delivered on 21st March 2018 and subsequent execution Orders issued on 9th December 2020 and 8th March 2021 respectively, (and which Judgement and orders were not Appealed against nor reviewed by the Applicants/plaintiffs), this Honourable court is now funtus officio and has no jurisdiction to entertain the Applicants'/plaintiffs' application dated 1st February 2022.

8. The Respondents'/Defendants' aver that the orders sought on the Applicants'/plaintiffs' application herein are tantamount to requesting the Honourable court to sit on Appeal on its own orders and that in the upshot the application is unmerited and does not deserve to see the light of the day.

9. The Respondents'/Defendants' further aver that the orders issued for committal of the Applicant/plaintiffs to Civil jail were appropriate in the circumstances for upholding the dignity of the court. That it is imperative and a prerequisite that the contemnors/Applicants must first purge the contempt before they can get any audience before the court.

10. The application was canvassed orally in court on the 8th of February 2022 wherein Mr. Muriithi learned counsel for the applicant submitted that they are only pursuing prayers 3 and 5 of the application. He submitted that the applicants seek to have the orders made on 2.12.2020, 3.3.2021 and 17.1.2022 reviewed pursuant to Orders 45 of the Civil Procedure Rules. The applicants aver that there is a mistake and error apparent on the court record and also that there is sufficient reason for the court to review those orders.

11. Counsel for the applicants submitted that they had identified four errors that are discernable from the court record. The first is that on 14.11.2020, the court differently constituted pronounced itself as being funtus officio and that order has never been set aside, thus it was their submission that any other action taken by the court subsequently to the orders of 14.11.2020 are erroneous, hence invalid.

12. The Applicants' counsel submitted that the second error was that when the court made the orders of 3.3.2021, it proceeded, under the provisions of Section 51 of the Civil Procedure Act and Order 22 rules 82 and 83 of the Civil Procedure Act. That the error was that the court proceeded on the premise that there was a decree to be executed by the respondents herein whereas the Respondents were executing an order as opposed to a decree. Counsel submitted that the only decree that emanated from the court is the one that dismissed the suit herein. That there was no decree capable of execution pursuant to section 51 of the Civil Procedure Act and order 22Rules 82 and 83 of the Civil Procedure Rules.

13. The Applicants' counsel further submitted that when the court made the order on 17.1.2022, it proceeded on the premise that the plaintiffs were not opposed to the application under consideration whereas, a perusal of the court record will reveal that a replying affidavit was filed on 14.12.2021.

14. It was further submitted that the fourth error was that when the court made the orders of 3.3.2021, there was an error in the sense that the affidavit of service that was filed indicating service upon the plaintiffs did not meet the threshold of a proper affidavit of service since there is no indication as to the place and time of service and the manner in which the plaintiffs were identified by the process server.

15. The applicants submitted that since the issue before the court was punishment of the plaintiffs for disobedience of court orders, the decree of proof is higher than that required in civil disputes, and should be proof beyond reasonable doubt that there has been disobedience of court orders. That where there is doubt as to whether service of the order was properly served, then the burden of proof was not discharged. Counsel submitted that the plaintiffs' liberties were taken away in circumstances that requires this court to revisit its previous orders and set aside the same pursuant to the discretion of the court by virtue of section 13 of the Environment and Land Court Act.

16. On their part, the defendants'/Respondents' through learned counsel Mr. Kirimi submitted that there is a history behind the ruling that committed the Applicants to Civil jail. That it's not just the ruling of this court delivered on 2.12. 2020. In that ruling, Mr. Kirimi submitted that it cannot be said that the court did not have power to deliver the ruling it made to implement the court's judgement delivered on 21.03.2018 earlier on in Meru Civil Appeal No.106 of 1979 and in Meru High Court Civil Suit No.204 of 2001.

17. The defendants'/Respondents' counsel further submitted that when this court was delivering its ruling on 1.12.2020, it had the capacity to do so, since there was that judgement which needed to be implemented.

18. The defendants/Respondents contend that the Applicants were committed for disobedience of court orders. That they appeared before the court on the day of committal and admitted that they were aware of those court orders. Counsel submitted that one of the Applicants is a senior police officer and the other one attended court throughout and never gave any reason for disobeying the court orders other than saying the land is their ancestral land and therefore the court had no choice other than to commit them to civil jail.

19. The defendants'/Respondents' counsel further submitted that the application dated 1.2.2022 is incurably defective and otherwise an abuse of the court process and that the court is functus officio having pronounced itself on the matter.

20. In conclusion the Respondents'/Defendants' counsel submitted that the applicants option is to purge the contempt for them to be given audience and that the application is tantamount to asking the court to sit on appeal against its own orders adding that they should have gone to the appellate court. The respondents submitted that the Applicants were validly committed and that they should be apologizing and state whether they are ready to purge the contempt by obeying the court orders otherwise it is not clear what will happen to the orders. Therefore, the Respondents opposed the application since according to them it amounts to continued disobedience of the court orders.

ANALYSIS & DETERMINATION

21. I have considered the application, grounds of opposition and rival submissions by both parties. What calls for determination is whether the court should review the orders that were made by this court on the 02/12/2020, 03/03/2021 and 17/01/2022 by setting them aside.

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

> ***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.***

23. 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.

24. 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."***

25. 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

26. 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 inter alia 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."***

27. Further, in **Attorney General & O'rs 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.

28. 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 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 applicants herein to denote an apparent error on the face of the ruling they endeavor to review. From the Applicants' submissions, it is clear to me that they are faulting the court for making the decisions or orders it made. From the above decisions, it is trite that such errors by the court, if at all, can only be subject of appeal and not review. Otherwise the court will be risking siting on appeal on its own decisions, which is prohibited by law.

29. The other ground for review is, if there is a sufficient cause. This court notes that the orders being sought by the applicants are similar in nature to those that had already been dealt with by the court. The court heard all the parties concerned and then made a determination on the applications. No sufficient cause has been explained in the instant matter. If the parties are dissatisfied with the orders and wish to pursue the matter further they can approach the Appellate court for review and or setting aside of the orders.

30. I am convinced that there is no mistake apparent on the face of the record to warrant a review on the rulings dated 02/12/2020, 03/03/2021 and 17/01/2022.

31. Consequently, it is my considered view that the application has not met the threshold for review under Order 45 Rule 1.

I find that the application before the court is bereft of any merit and it is hereby dismissed with c*osts to the respondents.*

Dated, signed and delivered at Chuka this **22nd day February, 2022** in the presence of:

C/A: Martha

Kirimi for Defendants/Respondents & h/b for Muriithi for Plaintiffs/Applicants

C. K. YANO,

JUDGE.