REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 393 OF 2009

JENNIFER JOY PLEASANCE.....PLAINTIFF

VERSUS

1. JEPHASAON MAINA KARIOKI

2. ROBERT CYPRIAN LUCAS

3. JOHANNA MARIA LUCAS

4. SUBRANY WAMBOI YUSUF

5. DISTRICT LAND REGISTRAR KWALE

6. THE ATTORNEY GENERAL.....DEFENDANTS

RULING

I. PRELIMINARIES

1. The 2nd, 3rd and 4th Defendants/Applicants herein filed this Notice of Motion application dated 15th May 2021. It was brought under the provisions of Order 22 Rule 22, Order 45 Rules 1 & 2 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3A & 80 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya.

II. The Defendants/Applicants case

2. The Defendants/Applicants herein sought for the following orders:-

a) Spent.

b) Spent.

c) THAT this Honourable court be pleased in the interest of substantive justice and public policy to review the judgement dated 21st January 2019 and allow the Applicants and the Plaintiff to jointly sale Plot No. Kwale/Galu Kinondo/15 and all the developments erected thereon and the proceeds of sale to be distributed as follows:-

a) Value of the land to go to the Plaintiff.

b) Value of the developments to go to the Defendants/Applicants less the party and party costs payable to the Plaintiff.

d) ***THAT costs of this application be provided for*****.**

3. The Defendants/Applicants application is based on the grounds, testimony and averments of the 26 Paragraphed of the Supporting Affidavit of SUBRANY WAMBOI YUSUF sworn and dated 22nd April, 2021 and Six (6) annextures marked as "SW-1 to 6. It is the Applicants case that, when the court delivered its judgement against them on 21st January 2019, it never determined the question of the developments on the suit property. The Defendants/Applicants claim to have occupied the suit property when it was vacant and undeveloped

and proceeded to erect cottages that the Plaintiff/Respondent is currently unfairly benefiting from. The Defendants/Applicants argue that the court has jurisdiction and in the interest of substantive justice ought to review the Defendants/Applicants' evidence that demonstrated they constructed and developed the cottages on the suit property which are estimated to be worth Kenya Shillings Sixty Million (Kshs. 60, 000, 000.00) excluding the value of the land.

4. The 4th Defendant affirmed the supporting affidavit on 22nd April 2021. She claimed that there are some material evidence that was not presented before court relating to the structure standing on the suit property and as a lay person was not aware it was relevant and was not advised to plead or adduce the same into evidence. She maintained that the applicants constructed the developments on the suit property and that the plaintiff did not invest in it. She claimed that after the judgement, the Plaintiff has since moved into the suit property, renovated the existing structures as opposed to demolishing them as directed by court and is currently using them for business.

5. She averred that after the judgement they engaged the Plaintiff to sell the property and compensate them for the said developments but none has been entered, hence the need of court to review its judgement and consider the new evidence before it. She urged court to find the Plaintiff is benefiting unfairly from the developments which she did not invest in at the detriment of the applicants. She annexed change of user application, approved plan for construction of cottages, application for electricity as well as compliance certificate from the County Government of Kwale and lamented of numerous costs that the applicants incurred in setting up and running the cottages as a hotel only for the plaintiff to benefit.

6. The deponent claimed that there was an error apparent on the face of record of the judgement, when the court overlooked the obvious question of the consequential loss caused by the order of demolition, yet court ought to have made an alternative remedy. She pleaded with court to review the judgement as prayed and find that the Defendants/Applicants were victims of fraud and grant them justice.

III. THE PLAINTIFF/RESPONDENT'S CASE.

7. The Plaintiff/Respondent responded to the application with Grounds of Opposition filed on 2nd July 2021. The grounds of opposition were inter alia that the application does not fall within the realm of review under Section 80 or Order 45 Rules 1 and 2 hence no lawful justification to review the judgement. It was also pleaded that this court is ***"functus officio'*** having determined all the issues between the parties concerning their rights and obligations therefore, the Plaintiff/Respondent could not be cohered into an agreement to dispose of the suit property.

8. The Plaintiff/Respondent also filed a Replying Affidavit in opposition of the application on 31st August 2021. She claimed that court made a final determination on the suit property in its judgement dated 21st January 2019 and that the Defendants/Applicants ought to have appealed against it, which they haven't. The deponent denied that there were any developments on the suit property, as court issued an order on 16th November 2009 restraining the Defendants/Applicants from undertaking any constructions on the suit property. Therefore any further developments made on the suit property was in contempt of the said orders. The Plaintiff/Respondent further stated that the said structures were in worn out and inhabitable, and that she has incurred a sum of Kenya Shillings Twenty One Million (Kshs. 21, 000, 000.00) to rehabilitate and renovate the suit property, which she is not willing to sell to the Defendants/Applicants. She urged court to dismiss the application with costs.

IV. Submissions

A. The Defendant's Written Submissions

9. The Learned Counsel for the 2nd, 3rd and 4th Defendants/ Applicants the law firm of Messrs. Munyithia Mutugi, Umara and Menza & Co. Advocates filed their written submissions on 14th September 2021 in support of the application. The Learned Counsel submitted that the execution of the decree without regard to the valuable development made by the applicants on the suit property amounts to enrichment of the Plaintiff/Respondent. That the fact that the Plaintiff/Respondent would become the owner of the Defendants/Applicant's developments on the suit property, was an error on the face of record and also amounts to a discovery of a new issue which was not placed before the court.

10. The Learned Counsel submitted that upon entry into the suit property, the applicants developed cottages worth over a sum of Kenya Shillings Fifty Million (Kshs. 50, 000, 000.00) and has placed in the supporting affidavit evidence such as the approval documents from the County Government of Kwale and copies of permits. The Learned Counsel argued that these evidence was not placed before the trial judge and the question of developments standing on the suit property was never canvassed. The Learned Counsel further maintained that all the developments erected on the suit property were innocent investment of the Defendants/Applicants and the Plaintiff/Respondent should not be allowed to benefit from them.

B. The Plaintiff/Respondents Written Submissions.

11. The Learned Counsel for the Plaintiff/Respondent the law firm of Messrs. Ndegwa Muthama Katisya and Associates submitted on 26th October 2021, that the court upon delivering its judgement became functus officio and is prevented from reopening the matter. That the applicants neither raised the issue of developments on the suit property as a counterclaim nor adduce evidence to show value of the alleged developments, but court dealt with the issue when it issued mandatory injunction compelling the Defendants/Applicants to demolish the structures erected on the suit property. The Learned Counsel maintained that the only remedy available to the Defendant/Applicants would be appeal, which they have not pursued.

12. The Learned Counsel submitted that the application is incompetent, fatally defective and incurably bad in law for being made simultaneously with an appeal, as the Defendants/Applicants have admitted to have filed a Notice of Appeal. The Learned Counsel relied on the case of **Otieno, Ragot & Company Advocates – Versus - National Bank of Kenya Limited (2020) eKLR** where it was held that pursuing review while keeping the option of appeal open was gambling with the law and judicial processes. That there can be no place for

appeal once an intention to appeal has been intimated by filing a notice of appeal.

13. The Learned Counsel also submitted that the application has not fulfilled the threshold for review under Order 45. The Learned Counsel argued that there was no mistake or error apparent error on the face of the record as described in **National Bank of Kenya Limited – Versus - Ndungu Njau (1997) eKLR, as** being self-evident and should not require an elaborate argument to be established. That the Defendants/Applicants have neither pleaded any self-evident error or omission in the judgment nor have they pleaded that they have discovered new and important evidence, which after the exercise of due diligence was not within their knowledge. The Learned Counsel argued that the court lacks the jurisdiction to order for the sale of the suit property, since it was not a prayer pleaded in trial.

V. ANALYSIS AND DETERMINATION

I have read through the pleadings by all the parties, the well stated written submissions and the relevant authorities. in order to arrive to an informed just and fair decision with regard, to the Notice of Motion application dated 15.5.2021 I have framed these issues:-

(a) Whether the Notice of Motion application dated 15.5.2021 by the 2nd, 3rd and 4th Defendants meets the requirement of review under Section 80(1) of Civil Procedure Rules.

(b) Who will bear the costs of the application.

ISSUE No. (a) Whether the Notice of Motion application dated 15.5.2021 by the 2nd, 3rd and 4th Defendants meets the requirement of review under Section 80(1) of Civil Procedure Rules.

14. On 21st January 2019, this court entered judgement in favour of the Plaintiff, it found that the Plaintiff had proved her case on a balance of probabilities as against 1st, 2nd, 3rd and 4th Defendants/Applicants herein. The Honorable Court made the following orders:-

1. That the registration of Jephason Maina Karioki and the subsequent registration of Robert Ciprian Lucas, Johanna Maria Lucas and Subrany Wamboi Yusuf over TITLE NO. KWALE/GALU KINONDO/15 was illegal, null and void and the same is hereby cancelled.

2. That the register of the LAND PARCEL NO.KWALE/GALU KINONDO/15 be rectified so as to remove the entries in favor of Jephason Maina Karioki, Robert Ciprian Lucas, Johanna Maria Lucas and Subrany Wamboi Yusuf and the title to revert back to the proprietorship of Jennifer Joy Pleasance the Plaintiff herein.

3. That a mandatory injunction do issue compelling the 1st , 2nd , 3rd and 4th Defendants by themselves, their servants, and agents to demolish the structures they have erected on the suit property within sixty (60) days from the date hereof, in default, the Plaintiff to demolish and remove the Defendants' materials at the Defendants' costs.

4. A prohibitory injunction restraining the Defendants from entering, constructing, or in any other way interfering with the Plaintiff's possession and enjoinment of the suit property and its title.

5. That the Plaintiff shall have costs jointly and severally against the 1st, 2nd, 3rd, and 4th Defendants.

15. The Defendants/Applicants seek to review the above orders on the ground that there is evidence that was not placed before the court and the question of the developments standing on the suit property was never canvased. The Defendants/Applicants claims that is discovery of important evidence that was never placed before the trial court, hence the need for review of the judgement. The Plaintiff/Respondent submitted that the application fell short of the threshold of Order 45, for the reason that; there was no mistake or error on the face of the record, no important discovery made by the Defendants/Applicants of evidence that was not within their knowledge and thirdly no other sufficient reason for court to review its judgement. The Plaintiff/Respondent has also claimed the court became functus officio after delivering its judgement and cannot reopen the case again, and that the only remedy available to the applicants was appeal, which they have not pursued despite filing a Notice of Appeal on 4th February 2019.

16. The discretion of court to review its judgement is provided by Section 80 of Civil Procedure Act and Order 45 of Civil Procedure Rules 2010.

Section 80 of the Civil Procedure Act, Cap 21 provides that:-

> **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.**

The procedure of making the application for review is provided for by Order 45, that:-

> (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.

17. The Plaintiff/Respondent has challenged the competence of the review on the ground that the Defendants/Applicants have already filed a Notice of Appeal. I have perused the court file and indeed there is a Notice of Appeal filed in court on 4th February 2019, of the Defendants/Applicants expressed intention to appeal against the judgement of court. The Plaintiff/Respondent has referred to the Court of Appeal decision in **Otieno, Ragot & Company Advocates – Versus - National Bank of Kenya Limited [2020] Eklr**, where it was held, ***"A perusal of the notice of appeal indicates that the Respondent intended "to appeal to the Court of Appeal on dismissal of the client reference and allowing the advocates reference on taxation". A careful look at the ruling dated 17th August, 2016 shows that what the respondent intended to appeal against though phrased as part was the entire ruling delivered by the learned Judge. It is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed."***

18. The question that seeks to be answered is whether the lodging of a Notice of Appeal can be tantamount to preferring an appeal itself? This Court is unable to agree with the Plaintiff/Respondent's counsel that this Court has no jurisdiction to entertain this application on the ground that the Defendants/Applicants have lodged a Notice of Appeal when they applied for review. I wish to associate myself with the decision of the Court of Appeal in the case of "**Noradhco Kenya Limited – Versus - Loria Michele (1998)eKLR**, where it was held:- ***"The filing of a notice of appeal in my humble view cannot deprive a party of his right under Order 44 Rule 1 of the Civil Procedure Rules to apply for review and the notice of appeal cannot be tantamount to preferring an appeal.***

In HARYANTO Versus - ED & F. Man (Sugar) Ltd Civil Appeal No. 122 of 1992 The Court of Appeal comprising of Judges of Appeal Gicheru, Kwach and Cockar (as he then was) held:

"(1) There was jurisdiction to entertain an application for review, notwithstanding the filing of a notice of appeal under the court of Appeal Rules and

(2) for an appeal to be deemed to have been preferred for the purpose of review, there must be an appeal instituted in compliance with rule 81(1) of the Court of appeal Rules."

Again in MOTEL SCHWEITZER VS. THOMAS EDWARD CUNNINGHAM and another (1955) 22 EACA 252 it was held that:

A notice of appeal is notice of intention to exercise a right of appeal and that an appeal is not instituted in the Court of appeal until the record of appeal is lodged in its Registry, fees are paid and security lodged as provided in rule 58 of the Court of Appeal Rules."

19. I now proceed to determine the prayers of review sought. The main grounds for review flowing from Order 45 are; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay. The Defendants/Applicants argue in their supporting affidavit sworn by Subrany Wamboi Yusuf, that she was not aware the relevance nor was she advised to table the material evidence before court to demonstrate that the Defendants/Applicants had invested in the suit property. In the supporting affidavit, the applicants annexed several documents to prove undertaking developments on the suit property to the exclusion of the plaintiff; which their counsel in his submissions described as *'an error on the face of the record and a discovery of a new issue which was not placed before the court.'* These grounds for review have been termed by the Learned Counsel of the Plaintiff/Respondent as a failure to meet the threshold melted out in Order 45, and further to that the Learned Counsel argued that the applicants have not discovered any new evidence which after due diligence was not within their knowledge during trial.

20. The evidence attached to the supporting affidavit to establish that there are developments that the applicants had made in form of cottages and running a restaurant from the defacto Kwale County Council; a Certificate of Compliance dated 7th July 2009, Provisional approval to develop the suit property dated 2nd July 2009, Proposed Change of user dated 25th June 2009, construction permit effective in 2009, business permit for the year 2011, 2013 and a hotel license from the Ministry of tourism. The Defendants/Applicants have not shown that they made discovery of new and important matter or evidence as the documents they have produced date back to 2009, which were all along known to them. The Defendants/Applicants could not plead that they were not advised the importance of these documentations, yet they had a Learned Counsel on record who ought to have known the need of producing all relevant evidence during trial to prove that the Defendants/Applicants made developments made on the suit property.

21. Otieno, Ragot & Company Advocates – Versus - National Bank of Kenya Limited [2020] eKLR, the Court of Appeal held that Order 45 Rule 1 does not excuse every error or mistake, which allow a party, like what the Defendant/Applicants are trying to do, to introduce documents which they could have laid hands on after the exercise of due diligence. There was no lost diligence in this case, it is quite clear that the applicants after losing their case decided to go back to the drawing board and fished out evidence that would bolster their case. After trying unsuccessfully to convince the Plaintiff/Respondent to sell the suit property, the Defendants/Applicants are back to court to cover their tracks, however it's too late in the day the horse had already bolted from the stable.

22. In the application, it has been argued that the trial court did not made a determination on the developments standing on the suit property, since it did not have the chance of perusing the new evidence, that is not before it. This, counsel for the Defendants/Applicants

termed it as an error on the face of record. In my view, an error or omission must be self - evident and should not require an elaborate argument to be established. A review cannot be granted on the ground that the court omitted an issue for determination, which according to the Defendants/Applicants ought to have been fully canvassed before the learned judge. Reaching a wrong conclusion of law is a good ground for appeal but not for review, otherwise this court would be sitting in appeal of its own judgement which is not permissible in law. Reference is given to **National Bank of Kenya – Versus - Ndungu Njau (1997)eKLR.**

23. It seems clear to me that the 2nd, 3rd and 4th Defendants/Applicants basing their application on the failure of court to deal with the issue of developments standing on the suit property is faulting the decision on a point of law. Which as I have stated, is a good ground for appeal but not for review. **The Court of Appeal in Pancras T. Swai – Versus - Kenya Breweries Limited (2014)eKLR** stated ***"If parties were allowed to seek review of decisions on grounds that the decision was erroneous in law, either because a judge has failed to apply the law correctly or al all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review where such courts are functus officio and have no appellate jurisdiction. The power to review decisions in appeal is vested in appellant court."***

24. The threshold set Under Order 45 Rule 1 of the Civil procedure Rules 2010 relate to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law where court ought to have exercised its judicial discretion. The exercise of due diligence refers to discovery of facts but does not relate to ascertainment of an existing law which the court is deemed to be alive to.

VI. DETERMINATION

25. For the reasons given above, the Honorable Court finds that the Notice of Motion application dated 15th May 2021 is without any merit and I accordingly dismiss it with costs.

IT IS OREDED ACCORDINGLY

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF FEBRUARY 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

IN THE PRESENCE OF:

A) M/S. YUMNA, THE COURT ATTENDANT.

B) MR. TITUS MUTUGI HOLDING BRIEF FOR MR. KARINA ADVOCATE FOR THE PLAINTIFF/RESPONDENT.

C) M/S. UMARA HOLDING BRIEF MR. MUNYITHIA ADVOCATE FOR THE 2ND, 3RD AND 4TH DEFENDANTS/APPLICANTS.