REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C CASE NO. 5 OF 2014

TAPSABEI SIGEI KORIR.....PLAINTIFF/RESPONDENT

VERSUS

JUDY CHEPKORIR KOECH.....DEFENDANT/APPLICANT

RULING

1. This suit was commenced by way of a Plaint dated the 4th February 2014 and filed in court on the 12th February 2014. The matter proceeded for hearing and on the 6th April, 2018 Judgment was delivered wherein the court found that the Plaintiff had proved her case on a balance of probabilities. The court further found that the Defendant had no claim over either land parcel No. Kericho/Silibwet /93 or Kericho/Silibwet/1231 and directed that the Defendant vacates land parcel number Kericho/Silibwet /93 within the next three months and further that she removes the cautions registered against land parcels No. Kericho/Silibwet /93 and Kericho/Silibwet/1231. There was no order as to cost since the dispute pitied a mother-in-law against her daughter-in-law.

2. Vide an application dated the 14th May 2019, brought pursuant to the provisions of Section 80, 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Article 159(2) (d) 48 of the Constitution, the Defendant/Applicant herein seeks for orders that the firm of P Sang & company Advocates (sic) on behalf of the Defendant, for a review of the court's Judgment and all the consequential orders and for stay orders of proceedings.

3. The said application was supported by the grounds on the face of it and an Affidavit, sworn on the 14th May 2019 by Judy Chepkorir Koech, the Defendant/Applicant herein.

4. The application was opposed by the Plaintiff/Respondent's Replying Affidavit dated 19th September 2019 wherein on the 25th February 2020, the court directed for the application to be disposed of by way of written submissions.

5. I have considered the said submissions to which I will summarize as herein under.

Applicant's submissions.

6. The Applicant framed the issues for determination as follows;

   i. Whether the Applicant meets the threshold for granting review orders

   ii. Whether an order for stay of proceedings should issue

   iii. Who should bear the costs of the application

7. On the first issue for determination, it was the Applicant's submission that they sought for the review of the judgment delivered by the court because the court had failed to note that she was married to the Plaintiff's son who was deceased and therefore she was a beneficiary to the said estate. That further, the court had failed to note that the land was held by the Plaintiff in trust having been acquired and/or transferred from the Plaintiff's husband. It was further the Applicant's submission that the court failed to note that all the beneficiaries lived on the suit land and that she should not therefor be evicted as she had no other home. Reliance was placed on the provisions of Order 45 Rule 1(a) of the Civil Procedure Rules and section 80 of the Civil Procedure Act to submit that for failure to take note of the issues herein above mentioned, there had been an error apparent on the face of the record.

8. The Applicant faulted the court for holding that the Plaintiff/ Applicant (sic) was the absolute and indefeasible owner of the suit lands yet it was trust land held for the benefit of the beneficiaries of the deceased and therefore right of that property ought to have been shared alongside other properties. Reliance was placed on the decided case in **Eldoret ELC No 877 of 2012, Michael Chelimo Kipkiru vs Julius Kiprop Kipkiru & Another.**

9. The Applicant further submitted that a trustee was not an absolute and indefeasible proprietor of a parcel of land held in trust and therefore the judgment of 6th April (sic) was erroneous as it had failed to identify that fact thus giving orders adverse to the Applicant. That this failure occasioned an error apparent on the face of the record.

10. On the second issue for determination as to whether an order for stay of proceedings should issue, the Applicant relied on the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules to submit that, the Applicant would suffer substantial loss if she were to be evicted from the suit land which had been her home for the last 30 years. That the application was brought without unreasonable delay and the Applicant would abide by the orders as to security for costs.

11. Lastly the Applicant relied on Section 27(1) of the Civil Procedure Act to submit that the successful party ought to be granted costs of the suit.

Respondent's Submissions

12. In opposition to the application the Respondent/Plaintiff filed their issues for determination as follows;

i. Whether the firm of P Sang & Company Advocates should be granted leave to act on behalf of the Defendant.

ii. Whether the Applicant should be granted stay of proceedings

iii. Whether the judgment entered herein and all consequential orders should be reviewed

iv. Who is entitled to costs.

13. On the first issue for determination the Respondent submitted that contrary to the provisions of Order 9 Rule 9 of the Civil Procedure Rules, Counsel for the Applicant herein ought to have sought leave of court, with notice to all parties who participated in the suit, to come on record for the Applicant, and thereafter file notice of appointment, before seeking for review orders.

14. On the second issue for determination as to whether the Applicant should be granted stay of proceedings the Respondent relied on the provisions of Sections 6 of the Civil Procedure Act to submit that this prayer was in vain since judgment in this matter had already been delivered on 6th April 2018 and therefore there were no proceedings to be stayed. That even if the Applicant sought for stay of execution she had not met the conditions of being granted the same and therefore the court ought not to grant an order not prayed for as was held in the case of in **Ragot Otieno & Company Advocates vs. National Bank of Kenya Limited** and **Caltex Oil Kenya Limited vs Rono limited(supra)** (sic)

15. That a party was bound by its pleadings which go to the very core of justice and give each party notice of the case they have to meet and with it an opportunity to prepare to answer the same.

16. On the third issue as to whether the judgment entered should be reviewed, the Respondent relied on the provisions of Order 45 Rule 1 of the Civil Procedure Rules to submit that the Applicant had not demonstrated any of the grounds under the said order which include the discovery of new evidence mistake or error apparent on the face of the record or any other sufficient reason to warrant a review. The issue of an existing marriage had already been addressed by the trial court at paragraph 17 and 18 of its judgment dated 6th April 2018.

17. That the issues raised by the application and supporting affidavit were debatable and ought to have been filed as an Appeal and not as a Review. That in order for the court to review its decision, the error or omission must be self-evident and should not require an elaborate argument as was held in the case of **National Bank of Kenya Limited vs Ndungu Njau [1997] eKLR**

18. The Respondent finally submitted that it was trite law of general principle that the costs did follow the event and the successful party would always have costs unless the court for good reason orders otherwise.

Determination.

19. I have anxiously considered the application, the averments therein, the grounds to which the Applicant seeks that the court reviews its judgment of 6th April 2018. I have also considered the response in the Respondent's replying affidavit and submissions herein. I find the main issue for determination being;

i. Whether the firm of P Sang & Company Advocates are properly on record.

ii. Whether there should be stay of proceedings

iii. Whether the Applicant has established grounds for review.

20. Order 9 Rule 7 of the Civil Procedure Rules provides as follows:

> *Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.*

21. Order 9, rule 10 of the Civil Procedure Rules provides;

> *An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.*

22. As per the provision of Order 9 Rule 7 of the Civil Procedure Rules, the correct procedure that was to be followed in the present case where the matter was heard and a judgment delivered, was that Counsel coming on record ought to have filed his Notice of Appointment to come on record *with notice to all the parties*, before filing the application seeking for the subsequent orders from the Court.

23. In the present case, the Plaintiff/Applicant's Counsel, without filing his Notice of Appointment, filed their Certificate of Urgency wherein he purported to come on record, and sought to have the judgment delivered on 6th April 2018 and all consequential orders to be reviewed. Counsel also sought for stay of proceedings. This clearly offends the express provisions of order 9 rule 7 of the Civil Procedure Rules.

24. Although the said provisions do not impede the right of a party to be represented by an Advocate of her/his choice, but sets out the procedure to be adhered to when a party wants to appoint Counsel after representing themselves. Thus a party so wishing to have Counsel represent him/her must first file a Notice of appointment with service to other parties. Although the Applicant/Plaintiff has a constitutional right to be represented, yet where there were clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 7 of the Civil Procedure Rules above is mandatory and thus cannot be termed as a mere technicality. The Applicant's prayer on this issue is rejected.

25. In case I am wrong, I have looked at the subsequent prayers sought by the Applicant wherein I find that on the second issue for determination the judgment in this matter having been delivered on 6th April 2018, and there being no other proceedings pending, this prayer must also fail.

26. On the third issue for determination, I have anxiously considered the application as a whole which I must state was poorly drafted and which did not specify the provisions of the law under which the Applicant sought the orders herein stated but was brought under the provisions of Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, provisions which do not give this Court jurisdiction to grant the prayers sought.

27. Indeed in the case of **Mumias Out growers Company (1998) Ltd vs Mumias Sugar Company Ltd NRB HCCC No. 414 of 2008** the court held that:

> *'The Applicants has invoked the inherent jurisdiction of this court. I have always known the law to be that the inherent power of the court cannot be invoked where the rules have provided for the procedure to be followed'.*

28. In the case of **Muchiri vs Attorney General & 3 Others (1991) KLR 516** stated at page 530 that:-

> *"Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be anchored, or where the invocation of rules of procedure will work an injustice."*

29. Section **80** of the Civil Procedure Act gives the power of Review and Order **45** of the Civil Procedure Rules sets out the rules. In the present application, the Applicant's relief was anchored on the provisions of Order 45 Rule 1 of the Civil Procedure Rules which rules restrict the grounds for review and lay down the jurisdiction and scope of review limiting it to the following grounds;

> *(a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made or;*
>
> ***(b)*** *on account of some mistake or error apparent on the face of the record, or*
>
> ***(c)*** *for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

30. In terms of **Order 45 Rule 1** of the Civil Procedure Rules**,** any person who is aggrieved by an order or a decree may ask the court that made the order or issued the decree to review it if (s)he can demonstrate that (s)he has discovered 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. The court will also review its decision if it finds some mistake or error apparent on the face of the record. Finally, it is open to the court to review its decision if it finds any other sufficient reason to do so.

31. From the Applicant's application and submission, the trial court had been faulted for failing to consider that the Applicant was married to the Plaintiff/Respondent's son who was deceased and therefore she was a beneficiary to his estate. That further, the court had failed to note that the land was held by the Plaintiff in trust having been acquired and/or transferred from the Plaintiff's husband wherein all the beneficiaries lived on the same and therefor by evicting the Applicant/Defendant, she would suffer as she had no other home. Paragraph 17 and 18 of the impugned judgment are in clear terms to wit:

> *''Similarly, in the instant suit, the rights of the Defendant whose claim is based on her marriage to the Plaintiffs late son, can only accrue upon the death of the Plaintiff. She can therefore not acquire or use the suit property contrary to the Plaintiffs wishes. The*

caution that she placed on the suit property ought to be removed.

It is unfortunate that the Defendant has fallen out with her mother- in -law after her husbands death and it is clear from the pleadings and testimony that the Plaintiff wants nothing to do with her. Even though I sympathize with the Defendant, I cannot order that she continues staying on the suit property contrary to the express wishes of the Plaintiff who is the absolute and indefeasible owner of the suit property.''

32. I find from the Applicant's submission that there was no material from which I can conclude that there was discovery of new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced at the time when the judgment was passed. I also find no mistake or error in the decision of the court delivered on the 6th April 2018.

33. The Court of Appeal in **Muyodi vs. Industrial and Commercial Development Corporation & Another (2006) 1 EA 243** explained a mistake or error as follows:

"In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous 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. 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal."

34. The grounds herein brought forth by the Applicant in my considered view are not grounds as envisaged under Order 45 of the Civil Procedure Rules. Indeed it is important to distinguish grounds of appeal and grounds for review. See the case of ***National Bank of Kenya Ltd vs Ndungu Njau*** (supra) where the court of appeal held as follows:-

''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 will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.''

35. I find that the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his/her alleged wrongful exercise of discretion as was brought out in the Applicants application and argument in the submission, was to Appeal the decision.

36. I find no merit in this application and proceed to dismiss it in its entirety with cost

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 17TH DAY OF FEBRUARY 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE