IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 313 OF 2012

JOHN ODERO OKOMBO ……..……. 1ST APPLICANT

AMOLO OPIYO ……..…….…….…… 2ND APPLICANT

VERSUS

SAMSON OOKO AJWANG……...…… RESPONDENT

RULING

1. **Introduction;**

On 2nd April 2008, **John OderoOkombo** and **AmoloOpiyo** the applicant's herein (hereinafter referred to only as "**the applicants**") filed a suit by way of originating summons dated 26th March 2008 against, one **Rispa Obonyo Ajwang,** deceased, in Kisii HCCC No. 10 of 2008 (O.S), **John Odero Okombo & Another –vs- Rispa Obonyo Ajwang** (hereinafter be referred to only as "**the originating summons**" or "**Kisii HCCC No. 10 of 2008 (O.S)**). The respondent herein, **Samson Ooko Ajwang** is the son and legal representative of, **Rispa Obonyo Ajwang**, deceased who has since passed on. The respondent, Samson Ooko Ajwang and Rispa Obonyo Ajwang deceased, shall hereinafter be referred to jointly and severally as "**the respondent**" save where the context does not allow in which case **Rispa Obonyo Ajwang** shall be referred to by her full names or simply as "**Rispa**". In the originating summons (Kisii HCCC No. 10 of 2008 (O.S)), the applicants sought; a declaration thatthe applicants had acquired or had become entitled by virtue of adverse possession for a period of more than 12 years to a portion measuring 3.544ha (2.153ha. for the 1st applicant and 1.391ha. for the 2nd applicant) of all that parcel of land known as **LR No. Kanyamwa/Kochieng/Komungu/Kaketa/169** ("hereinafter referred to only as "**the suit property**") and an order that the applicants be registered as proprietors of the said portion of the suit property in the aforesaid shares.

2. The applicants' originating summons was supported by the affidavit of the 1st applicant a copy of which has not been annexed to the present application. Prior to the institution of the suit that was brought by way of the said originating summons, the applicants had filed an earlier civil suit against Rispa namely, **Kisii HCCC No. 125 of 1995,John Odero Okombo & Another –vs-Rispa Obonyo Ajwang** (hereinafter referred to only as "**Kisii HCCC No. 125 of 1995**" where the context so admits). In this suit (Kisii HCCC No. 125 of 1995), the applicants had contended that the Rispa was fraudulently registered as the proprietor of the suit property. The applicants contended that the 1st applicant's deceased father and, Rispa's husband (Samson Ooko Ajwang's father) had cases namely, **Ndhiwa DM Court Land Case No. 1 of 1968** and **Kisumu High Court Civil Appeal No. 5 of 1970** over the parcel of land that later became the suit property prior to the registration of Rispa as the proprietor of the suit property which cases Rispa's deceased husband lost. The applicants contended that in the Ndhiwa DM's case, Rispa's husband was ordered to vacate the parcel of land now comprised in the title of the suit property and his appeal to the High Court in Kisumu in, Kisumu High Court Civil Appeal No. 5 of 1970 aforesaid was

dismissed. The applicants' contended that Rispa was registered as the proprietor of the suit property through concealment of material facts concerning these cases the existence of which should have been disclosed to the District Land Adjudication Officer, Homa Bay District. In this case(Kisii HCCC No. 125 of 1995), the applicants sought; the cancellation of Rispa's title over the suit property, her eviction from the suit property, the division of the suit property between the applicants, and an injunction restraining Rispa from entering or dealing with the suit property in any manner whatsoever. This suit was dismissed for want of prosecution on 1st October 2001. It is after the dismissal of this suit that the applicants brought the originating summons to seek a portion of the suit property through adverse possession as stated above.

3. A few months after the applicants brought the originating summons, Rispa brought a counter suit against the applicants namely, **Kisii HCCC No. 100 of 2008**, **Rispa Obonyo Ajwang –vs- John Odero Okombo & Another** (hereinafter referred to as "**Kisii HCCC No. 100 of 2008**" or "**the respondent's suit**"). In **Kisii HCCC No. 100 of 2008,** Rispa contended that she is the registered proprietor of the suit property having been registered as such on 19th January 1984 following the adjudication and demarcation process and that on or about 8th January 1998, the applicants jointly and severally without any lawful cause, basis or right trespassed on the suit property and erected temporary structures thereon and started cultivating the same. Rispa sought as against the applicants; a declaration that she is the registered proprietor of the suit property, an order for the eviction of the applicants from the suit property, a permanent injunction restraining the applicants from re-entering, trespassing into, interfering with and/or in any manner whatsoever dealing with the suit property and general damages for trespass. The applicants filed a joint statement of defence on 14th October 2008 to Rispa's claim. On 14th April 2010, Rispa made an application seeking an order that the originating summons by the applicants (Kisii HCCC No. 10 of 2008 (O.S)) and the respondent's suit (Kisii HCCC No. 100 of 2008) be consolidated and heard together. Although the applicants filed a replying affidavit in opposition to the application, when the application came up for hearing before Musinga J. on 18th June 2010, the 1st applicant indicated to the court that he had no objection to the respondent's application. The court therefore made an order consolidating the two (2) cases with Kisii HCCC No. 100 of 2008 as the lead file on which further proceedings were to be undertaken.
4. Upon consolidation, the two cases were listed for hearing on 13th July 2010. When the consolidated suits came up for hearing on that day before Makhandia J., the advocate for the respondent is recorded to have told the court that the respondent was ready to proceed with the hearing and that there were three (3) witnesses ready to testify. On his part, the 1st applicant notified the court that the 2nd applicant was sick and that he had authority from him to represent him (the 2nd respondent). He told the court that he was ready for the hearing. Before the hearing commenced, the 1stapplicant is recorded to have told the court further that he was wrongly sued for occupying the suit property. The 1st applicant is recorded to have told the court that he was occupying a parcel of land known as **LR. No. Kanyamwa/Kochieng/Komungu/Kakaeta/1152** (hereinafter referred to as "**Plot No. 1152**") in respect of which he had a title. He is recorded further to have confirmed to the court that indeed, the suit property belongs to the respondent. In response to the 1stapplicant'saddress to the court, the respondent's advocate urged the court to grant prayers 1, 2 and 3 in the respondent's plaint filed in Kisii HCCC No. 100 of 2008 together with the costs of the suit. After hearing both parties, the court (Makhandia J.) entered a consent judgment for the respondent against the applicants in terms of prayers I, II, III of the plaint filed in Kisii HCCC No. 100 of 2008. The court thereafter ordered the applicants to vacate the suit property within 60 days in the event that they were in occupation thereof failure to which the respondent was at liberty to have them evicted. It was ordered further by consent that the applicants originating summons namely, Kisii HCCC No. 10 of 2008 (O.S) be marked as withdrawn with no order as to costs.
5. **The application before the court;**

The applicants were aggrieved by the said consent judgment and order by Makhandia J made on 13th July 2010 and brought the present application by way of Notice of Motion dated 27th December 2012 seeking to have the same reviewed and set aside so that Kisii HCCC No. 100 of 2008 and Kisii HCCC No. 10 of

2008 (O.S) may be heard afresh. The applicants' application was brought on the grounds set out in the body thereof and in the two (2) supporting affidavits that were sworn by the 1st applicant on 27th December 2012 and 13th June 2013 respectively. In summary, the applicants' application was brought on the grounds that; since the entry of the consent judgment aforesaid, the applicants have discovered a new and important matter of evidence which justifies the review of the said judgment. In the alternative, the applicants contended that looking at the case as awhole; there exists sufficient reason to review the said judgment.

6. In the grounds set out in the body of the application and in the two affidavits filed in support of the application by the 1st applicant, the applicants have contended that prior to the filing of Kisii HCCC No. 10 of 2008 (O.S) and Kisii HCCC No. 100 of 2008 in which the judgment sought to be reviewed was made, the respondent's deceased father one, **Jared Ajwang** and the 1st applicant's deceased father, one, **Thomas Omolo** were involved in three (3) civil suits namely, **Ndhiwa DMC Land Case No. 54 of 1962**, **Kisii RMC Land Case No. 1 of 1968** and **Kisumu HC Civil Appeal NO. 5 of 1970** (hereinafter referred to as "**Ndhiwa Land Case**", "**Kisii Land Case**" and **Kisumu Land Case respectively**) which I have mentioned above. The applicants have contended that the three cases concerned a parcel of land that later on gave rise to the suit property during the land adjudication. The applicants have contended that the respondent's said father lost in all the cases and as such, Rispa was not entitled to be registered as the proprietor of the suit property. The applicants have contended that the said three cases were litigated by the applicants' and the respondent's predecessors in title. The applicants have contended that the issue as to who between the applicants and the respondent is the lawful proprietor of the suit property was determined by the said courts which were courts of competent jurisdiction and as such was *res judicata* and could not be made the subject of any new court case.
7. Due to the foregoing, the applicants have contended that the consent judgment that was entered in Kisii HCCC No. 10 of 2008 (O.S) and Kisii HCCC No. 100 of 2008 was made in suits which were *res judicata*. The applicants have contended that if the court's attention had been drawn to the three (3) earlier suits mentioned above, the court would not have entered the consent judgment complained of. The applicants have contended that that the existence of these suits was not within the knowledge of the applicants when the consent judgment was made and as such the applicants could not have brought the same to the attention of the court. The applicants have contended that the fact that the parties predecessors it title had been involved in the earlier cases on the same issues and over the same subject matter is a new and important matter of evidence which justifies the setting aside of the consent judgment aforesaid. The applicants have contended further that looking at the circumstances under which the said consent judgment was entered as a whole, there exists sufficient reason to set the same aside.
8. The applicants' application was opposed by the respondent through grounds of opposition dated 12th February, 2013 which was filed in court on the same date. In his grounds of opposition, the respondent contended that the applicants' application is misconceived, irregular, illegal and legally untenable. The respondent contended that the applicants' application is *res judicata* a similar application having been brought and prosecuted in Kisii HCCC No. 100 of 2008. The respondent contended further that the court has no jurisdiction to entertain the application and that the application does not meet the conditions necessary for review under Order 45 of the Civil Procedure Rules. The respondent contended further that the applicants' application was brought after unreasonable delay and that the same is frivolous, vexatious and an abuse of the process of the court.
9. On 18th June 2013, the parties agreed to argue the applicants application by way of written submissions. The respondent filed his written submissions on 19th September 2013 while the applicants filed their submissions on 27th September 2013. I have considered the applicants' application together with the two affidavits filed in support thereof. I have also considered the grounds of opposition filed by the respondent in opposition to the application and the respective submissions by the advocates for the parties. What I need to determine in the application before me are the following:-

a. **Whether the applicants have demonstrated that they have discovered a new and important**

matter of evidence which was not within their knowledge when the consent judgment was entered and which even after exercise of due diligence they could not place before the court.

b. **Whether there exists any other sufficient reason that would justify the setting aside of the consent judgment entered herein.**
c. **Whether the applicants' application is properly before the court.**

The applicants' contention as I have stated earlier in this ruling is that; the existence of Ndhiwa DM's case, Kisii RMC's case and Kisumu HC's case is a new and important matter of evidence which the applicantshave discovered since the entry of the consent judgment aforesaid which evidence was not within their knowledge when the consent judgment was entered. I am in agreement with the submissions by the respondent's advocate that the above mentioned cases were well within the knowledge of the applicants when the consent judgment sought to be reviewed was entered on 13th July 2010.

10. As I have stated above,before the applicants filed Kisii HCCC No. 10 of 2008 (O.S), they had filed Kisii HCCC No. 125 of 1995 against the respondent. The plaint for that case is found at pages 31 to 33 of the applicant's present application. In paragraphs 5 and 6 of the said plaint, the applicants mentioned the Ndhiwa DM's case and the Kisumu HC's case. It follows therefore that the applicants were aware of the existence of these cases as at 24th March 1995 when Kisii HCCC No. 125 of 1995 was filed. These cases cannot therefore amount to some new pieces of evidence which have just been discovered by the applicants. Due to the foregoing, it is my finding that the applicant's application has no basis to the extent that it is hinged on the alleged discovery of new and important matter of evidence. I would wish to add that even if the applicants had established that the cases that I have referred to hereinabove were not within their knowledge when the consent judgment was recorded,I am of the opinion that the existence of the earlier decisions inthe three (3) cases would not have made the court to have a different view of the applicant's case that was before it to justify the review sought. The applicants have contended that Kisii HCCC No. 100 of 2008 and Kisii HCCC No. 10 of 2008 (O.S) in which the consent judgment sought to be reviewed was made were *res judicata* having regard to the fact that the issue of the ownership of the suit property which was in dispute in Kisii HCCC No. 100 of 2008 and Kisii HCCC No. 10 of 2008 (O.S) had been heard and determined in the Ndhiwa DMC's case, Kisii RMC's case and Kisumu HC's case. I am not persuaded that Kisii HCCC No. 10 of 2008 (O.S) and Kisii HCCC No. 100 of 2008 were res judicata.
11. From the material before me, Rispa was registered as the proprietor of the suit property on a first registration under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed) on 19th January 1984. It follows that the suit property was not in existence prior to 19th January 1984 and as such could not have been the subject of litigation between Rispa's deceased husband and the 1stapplicant's deceased father. I may add that the Rispa was registered as proprietor of the suit property in her own right and not in her capacity as the legal representative of her deceased husband. A suit instituted by Rispa to vindicate her own right as the proprietor of the suit property cannot therefore be said to be *res judicata* on account of the said cases in which her deceased husband had been involved in over a parcel of land a portion of which was later adjudicated and registered in the name of Rispa on a first registration as a foresaid.
12. I have observed further that only the 1st applicant's father was involved in the Ndhiwa DM's case, Kisii RM's case and Kisumu HC's case. The 2nd applicant was not involved in any of those cases either in person or through a representative. The applicants have not explained how the 2nd applicant would fit in the applicants'*res judicata* argument. I am of the view that the applicants have not met the threshold for *res judicata* set out in section 7 of the Civil Procedure Act, Cap. 21 Laws of Kenya.The cases of **Daniel Kirui & Another vs. Monica W. Macharia & Another, Civil Appeal No. 261 of 2002** and **Kenya Commercial Bank Ltd. vs. Muiri Coffee Estate Ltd. & 3 Others** cited by the applicants are of little assistance to the applicants as they are both distinguishable. Due to the foregoing, I am not convinced that if the applicants had placed the decisions made in Ndhiwa DM's case, Kisii RM's case and Kisumu HC's case before the court on 13th July 2010, the court would have been convinced that Kisii HCCC No. 100 of 2008 and Kisii HCCC No. 10 of 2008 (O.S) were*res judicata*.

13. The next issue for consideration is whether apart from the applicant's contention about the discovery of new and important matter or evidence which I have rejected, there exists any other sufficient reason that would warrant the review of the consent judgment entered herein on 13th July 2010. Order 45 Rule 1 of the Civil Procedure Rules under which the applicants' application was brought empowers the court to review a decree or order on account of mistake or error apparent on the face of the record or for any other sufficient reason. In the case of **National Bank of Kenya Ltd –vs- Ndungu Njau**, **Court of Appeal Civil Appeal No. 211of 1996 (unreported)** which was cited with approval in the case of **Mumby's Food Products Ltd & 2 Others –vs- Co-operative Merchant Bank Ltd,Court of Appeal Civil Appeal No. 270 of 2002 (unreported)** that was relied on by the respondent in support of his submissions, the court stated 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 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 the law. Misconstruing a statute or other provisions of law cannot be a ground for review."**

14. In the case of,**Nairobi City Council –vs- Thabiti Enterprises Ltd**, **Court of Appeal, Civil Appeal No. 264 of 1996** (unreported), the court stated that;-

> **"The current position would then appear to be that the court has unfettered discretion to review its own decree or orders for any sufficient reason."**

Apart from their contention that they have since the entry of the consent judgment come across a new and important matter and/or evidence, the applicants have also contended that the consent judgment lacked unanimity in material respects. The applicants have contended that when they entered into a consent with the respondent, they had misapprehended and/or were ignorant of some material facts relating to Kisii HCCC No. 100 of 2008 and Kisii HCCC No. 10 of 2008 (O.S) in which the said consent judgment was entered. The applicants argued that the 1st applicant thought that he was all along in occupation of his own parcel of land namely, Plot No. 1152 and not the suit property that was registered in the name of Rispa. The applicants argued that this explains why the 1st applicant expressed surpriseabout the suit that had been lodged against him by Rispa(Kisii HCCC No. 100 of 2008)overthe suit property. The applicants' have contended that they were not aware of the fact that what the 1st applicant had considered to be part and parcel ofPlot No. 1152 was infact a portion of the suit property that was registered in the name of Rispa.

15. The applicants have contended that if they were aware that the portion of land that they were occupying was in fact a portion of the suit property, they would not have entered into the consent of 13th July 2010 as they had no intention whatsoever of relinquishing their rights to the portion of the suit property that was in their possession. I am unable to accept this argument by the applicants which I find completely unconvincing. The argument does not find support in the pleadings on record. It is clear beyond doubt from the originating summons that was lodged by the applicants in Kisii HCCC No. 10 of 2008 (O.S) that the applicants were well aware that they were occupying a portion of the suit property which portion they sought to have registered in their names on account of adverse possession. The applicants who had claimed a portion of the suit property by adverse possession cannot convince me that they had thought all along that they were in occupation of the 1st applicant's plot No. 1152 or any other parcel of land for that matter and that this is what led them to agree to vacate the suit property. The 1st applicant has also not come out clearly in his affidavit in support of the application herein as to what led him to believe that he was occupying Plot No. 1152 and not a portion of the suit property. In the case of **Brooke Bond Liebig (T) Ltd –vs- Mallya [1975] E. A 266** that was cited by both parties, it was held among others that a consent judgment may only be set aside for fraud, collusion or for any reason which

would enable the court to set aside an agreement. If the applicants had satisfied me that they entered into the consent that was recorded herein as a judgment of the court through mistake, that would be a sufficient reason to justify the setting aside of the said consent judgment. I am not persuaded that the applicants consented to the judgment that was entered herein by mistake.

16. The applicants have contended further that the 1st applicant had no authority to represent the 2nd applicantin Kisii HCCC No. 100 of 2008 and Kisii HCCC No. 10 of 2008 (O.S) and as such,the 1st applicantcould not consent to judgment being entered against him (the 2nd applicant) in the two cases. The present application by the applicants has not been brought in Kisii HCCC No. 100 of 2008 where the consent judgment sought to be set aside was entered. I am therefore unable to confirm from the record whether the 2nd applicant had given the 1st applicant written authority to plead and appear in the two cases on his behalf. I would revisit this issue later in this ruling. I have noted from the material before me that the 2nd applicant did not appear in court on 18th June 2010 when Kisii HCCC No. 100 of 2008 and Kisii HCCC No. 10 of 2008 (O.S) were consolidated and on 13th July 2010 when the consent judgment was entered against both applicants. I will not comment on the non-appearance of the 2nd applicant on 18th June 2010 because the order of consolidation that was made on that day is not challenged in these proceedings. What is sought to be reviewed is the consent judgment that was entered on 13th July 2010.

17. According to the court proceedings of 13th July 2010, when the case was called for hearing, the 1st applicant herein notified the court that the 2nd respondent was sick and that the 2nd respondent's son was in court. The 1st applicant went ahead to tell the court that the 2nd applicant had authorized him to proceed with the case on his behalf. In the proceedings before me, the 2nd applicant has authorized the 1st applicant in writing to appear and plead on his behalf. The 2nd applicant has not sworn any affidavit to deny the fact that he had instructed the 1st applicant to conduct the casesin which the consent judgment was entered on his behalf. The 1st applicant who had told the court that he had instruction to act on behalf of the 2nd applicant has also not stated in his affidavit filed herein that he had no such instructions. This issue has only been raised in the applicants' written submissions. My take on this issue is that the 1st applicant having informed the court that he had instruction to conduct the case on behalf of the 2nd applicant and the 2nd applicant having not denied giving such instructions, the 1st applicant must be taken to have had such instructions the absence of a written authority notwithstanding.In the circumstances of this case, I would treat the requirement of such authority to be given in writing pursuant to the provisions of Order 1 Rule 13 (2) of the Civil Procedure Rules to be a matter of form which should not vitiate the proceedings that took place on 13th July 2010. I would have looked at the situation differently if the 2nd applicant had denied giving the 1st applicant authority to appear and conduct the case on his behalf which is not the case. From the foregoing, I am not satisfied that there exists any other sufficient ground to warrant the review of the judgment that was entered herein on 13th July 2010.

18. The last issue for my determination is whether the present application is properly before the court. Having reached the conclusion that the applicants have not made out a case for the review of the judgment that was entered herein, the determination of this last issue would be merely an academic exercise which I would not wish to engage in suffice to say that the applicants' application was brought in a rather strange manner. As it was held in the case of **Brooke Bond Liebig (T) Ltd –vs- Mallya**(Supra), a consent judgment can either be challenged in the suit in which the judgment was made or through a fresh suit. The applicants herein did neither of the two. Instead of filing the present application in Kisii HCCC No.100 of 2008 where the consent judgment was made or filing a fresh suit, the applicants decided to challenge the consent judgment through a miscellaneous application. This was an improper procedure because it denied the court the benefit of some of the proceedings in Kisii HCCC No. 100 of 2008 and Kisii HCCC No. 10 of 2008 (O.S) which would have enriched the courts understanding of the parties' respective cases. What the applicants placed before the court were selected pleadings and proceedings which did not give a complete picture of what transpired in the two cases. I would not however have dismissed the applicants' application herein on account of this irregularity in the form in which it was brought. The respondent did not suggest or argue that the form in which the application was

brought caused him any prejudice or injustice.

19. In the case of **Mawji –vs- Arusha General Store [1970] E. A 137** it was held that irregularity in relation to the rules of procedure do not vitiate proceedings if no injustice has been done to the parties. Sir Charles Newbold P. expressed himself on the issue as follows at page 138;

> **"We have repeatedly said that the rules of procedure are designed to give effect to the rights of the parties and that once the parties are brought before the courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in the vitiation of proceedings."**

I believe that the foregoing pronouncement is now well captured in Article 159 (2) (d) of our constitution. The respondent's objection to the present application on the ground of form is therefore overruled.

20. In conclusion, it is my finding that the applicants' application is not for granting. As I have stated above, the applicants have failed to prove the ground on which this application was brought namely that they have discovered new and important matter or evidence which was not within their knowledge when the consent judgment was entered. The applicants have also failed to convince me that there exists any other sufficient reason to warrant the review of the consent judgment that was entered herein. The upshot of the foregoing is that the applicants' application by way of Notice of Motion dated 27th December 2012 has no merit. The same is hereby dismissed with costs to the respondent.

Delivered, dated and signed at Kisii this 27th day of June, 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Applicants

Mr. Ochwang'i for the Respondent

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE