REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 50 OF 2014(O.S)

FRED WASONYOKHA NASOKHO.....PLAINTIFF

VERSUS

DAVID JOHNSTONE INYUNDO MUTALI.....DEFENDANT

R U L I N G

By an Originating Summons dated 25th February 2014 and filed herein on 6th March 2014, **FRANCIS WASONYOKHA NASOKHO** (the plaintiff herein) sought against **DAVID JOHNSTONE INYUNDO MUTALI** (the defendant herein) the substantive prayer that he had acquired by way of adverse possession the land parcel **NO NDIVISI/NDIVISI/1126** (the suit land).

The defendant appears not to have filed any replying affidavit to the Originating Summons. At least I could not trace any in the file.

What the defendant did however was to file a Notice of Motion dated 4th December 2015 seeking to have the Originating Summons dismissed for being Res – judicata and an abuse of the process of the Court since the suit land had been the subject of **BUNGOMA HIGH COURT CIVIL CASE No 39 of 2007** involving the same parties herein.

The record shows that when the matter was placed before **MUKUNYA J** on 4th November 2015, **MR MUNYENDO** holding brief for **MR KHAKULA** then appearing for the plaintiff informed the Court that the defendant had not entered appearance. Indeed, the record shows that on 25th August 2015, Counsel for the plaintiff had requested that interlocutory Judgment be entered against the defendant. That request appears not to have been acted upon by the Deputy Registrar. However, on 24th March 2016, Counsel for both parties agreed that the suit be heard on 14th September 2016. When the case came up on 14th September 2016, in the presence of both **MR KISUYA** then acting for the plaintiff and **MR OMUKUNDA** for the defendant, the Court was informed that the plaintiff had not filed any response to the defendant's application dated 4th December 2015. **MUKUNYA J** therefore allowed the said application as prayed. The result therefore was that the plaintiff's Originating Summons was dismissed with costs for being res – judicata and an abuse of the process of this Court.

The plaintiff has now moved this Court by his Notice of Motion dated 14th September 2018 and filed herein on 9th November 2018 seeking the following two orders: -

> **1. That this Honourable Court be pleased to review and set aside orders made on 14th September 2016 and proceed to hear the substantive suit herein on merit.**
>
> **2. That costs of this application be provided for.**

The application is predicated on the grounds set out therein and is also supported by the plaintiff's affidavit of even date.

The gist of the application is that what was coming up for hearing on 14th September 2016 by consent of the parties was the main suit. However, rather than hearing the main suit, the Court proceeded to hear and allow the application dated 4th December 2015. That this was a mistake on the face of the record. That the Court should therefore review and set aside the orders made on 14th September 2016 and allow the suit to proceed on it's merit.

The application is opposed and in his replying affidavit dated 5th February 2019, the defendant has deponed, inter alia, that there is no new matter disclosed in this case and in any event, this suit is res – judicata and nothing can change it.

On 8th October 2020, I directed that the application be canvassed by way of written submissions. The plaintiff was to file and serve his submissions within 21 days. However, by 4th November 2020, the plaintiff had not filed his submissions. His Counsel **MR BISONGA** informed the Court that he needed a further 14 days to do so arguing that he had been unable to reach his clients for instructions. That request was rejected and a ruling date set for 10th December 2020.

I have considered the application and the rival affidavits.

The application is premised on **Section 3A** of the **Civil Procedure Act** and **Order 45 Rule 1 of the Civil Procedure Rules**. **Order 45 Rule 1(1)** of the **Civil Procedure Rules** provides that: -

> ***"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, may apply for a review of Judgment to the Court which passed the decree or made the order without unreasonable delay."*** Emphasis added.

While **Order 45 Rule 1(1)** of the **Civil Procedure Rules** sets out the rules for review, **Section 80** of the **Civil Procedure Act** donates the powers for review. It is therefore clear from the above that a party who seeks the review of an order or decree must prove the following: -

> ***"1: The discovery of new and important matter or evidence which, even after the exercise of due diligence, was not within his knowledge or could not be produced at the time the order or decree was made.***
>
> ***2: That there is some mistake or error apparent on the face of the record.***
>
> ***3: Any other sufficient reason.***
>
> ***4: That he has filed the application without unreasonable delay."***

The plaintiff has put forward the main ground of review of the order dated 14th September 2016 that there was an error on the face of the record because, instead of hearing the suit on the merits, the Court proceeded to hear the defendant's application dated 4th December 2015 which sought the dismissal of the suit for being res – judicata and allowed it. The record confirms that indeed although the main suit was slated for hearing on 14th September 2016, a date that had been taken by the parties themselves in the registry on 24th March 2016, the Judge proceeded to allow the application dated 4th December 2015. The suit was accordingly dismissed. I have no doubt in my mind that that was a mistake or error apparent on the face of the record. In **NYAMOGO & NYAMOGO .V. KOGO 2001 E.A 174**, the Court of Appeal described an error apparent on the face of the record in the following terms: -

> ***"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."***

By entertaining the application by the defendant dated 4th December 2015 and allowing it when what was coming up was the hearing of the main suit, that was an obvious error apparent from the record and which would entitle the plaintiff to orders of review.

However, the plaintiff was required to file the application for review ***"without unreasonable delay."*** He has not surmounted that hurdle. In **FRANCIS ORIGO & ANOTHER .V. JACOB KUMALI MUNGALA C.A CIVIL APPEAL No 149 of 2001**, the Court of Appeal stated thus: -

> ***"In an application for review, an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or would not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly, the applicant must make the application for review without unreasonable delay."*** Emphasis added.

The order sought to be reviewed was made on 14th September 2016. The application for review as filed on 9th November 2018 a delay of two (2) years. That delay is not only unreasonable but has also not been explained. In **JOHN AGINA .V. ABDULSWAMAD SHARIF ALWI C.A CIVIL APPEAL No of 1992**, the Court stated as follows: -

> ***"An unexplained delay of two years in making an application for review under Order 44 Rule 1 (now Order 45 Rule 1) is not the***

type of sufficient reasons that will earn sympathy from any Court."

Of course, what is or is not unreasonable delay will be determined by the peculiar circumstances of each case. Once a delay is established from the facts, the party approaching the Court for orders of review must offer an acceptable explanation for the same. Without that explanation, it would be difficult for any Court to exercise its's discretion in favour of granting any order for review. Neither on the face of the application nor in the supporting affidavit has the plaintiff offered any explanation as to why he took two (2) years to move this Court for orders of review. That is notwithstanding the fact that the orders issued on 14th September 2016 were made in the presence of both **MR KISUYA** for the plaintiff and **MR OMUKUNDA** for the defendant. Since his Counsel was present, the defendant, unless it can be demonstrated otherwise, is presumed to have been made aware of the decision made by the Court on 14th September 2016. In any event, the plaintiff has not suggested that he did not know about the orders made on 14th September 2016 until later, and if so, when. Clearly therefore, the application dated 14th September 2019 is anchored on quicksand and is bound to collapse since it does not meet the threshold set out in **Order 45 Rule 1(1) of the Civil Procedure Rules** which required the plaintiff to move to this Court without unreasonable delay. The delay of two (2) years is not only unreasonable. It has also not been explained.

Having said so, however, in response to the application, the defendant filed a replying affidavit dated 5th February 2019 in which he averred at paragraph 3 as follows: -

3: "That the application lacks merit as the fact that his case is res – judicata cannot change."

The moment a plea of res – judicata is raised, the Court must pause and consider if it has been raised on solid grounds. This is because, res – judicata is a complete bar to a suit and can even be raised suo – moto. **Section 7 of the Civil Procedure Rules** which provides for the doctrine of res – judicata reads: -

7 "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

The essence of the doctrine of res – judicata was expounded in the case of **JOHN FLORENCE MARITIME SERVICES LTD & ANOTHER .V. CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE & OTHERS 2015 eKLR** as follows: -

"The rational behind res – judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res – judicata ensures the economic use of Court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent Courts. It promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res – judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably." Emphasis added

If this suit is indeed res – judicata, it would be an extravagant use of this Court's limited resources to keep it pending. I must therefore investigate that issue even if it has not been raised in the application which is currently before me. Although **MUKUNYA J** in his orders issued on 14th September 2016 did not specifically deal with the issue of res – judicata, it is clear to me that had he done so, he would probably have arrived at the same conclusion that I am about to.

Annexed to the defendant's affidavit dated 4th December 2015 is a ruling of **W. KARANJA J** (as she then was) delivered on 27th May 2008 in **BUNGOMA HIGH COURT CIVIL CASE No 39 of 2007** involving the same land parcel **NO NDIVISI/NDIVISI/1126** and also involving the same parties. The Applicant in that case and who is the defendant herein sought the dismissal of the suit for being res – judicata. The Judge having considered other cases involving the same parties and subject matter up – held the application and said: -

"This suit is clearly a blatant abuse of the Court process. The Respondent (in the application) is a poor loser who does not want to accept defeat and is just clutching on straws to try and retain the suit in Court indefinitely. Litigation must come to an end and once a final decision has been made in a matter, the parties should have the spirit to accept tit gracefully and channel their efforts elsewhere instead of clogging non – sustainable claims."

In making a finding that the suit before her was res – judicata, the Judge considered that the subject matter in this case had been heard and determined by the Law Disputes Tribunal and an appeal at the Provincial Appeals Committee dismissed. The Judge then went on to state that: -

"Any other suit between the same parties would breach the res – judicata rule …….

The suit is clearly res – judicata."

No appeal was preferred against that ruling. There is no reason why this Court can depart from that finding.

The up – shot of the above is that this suit is res – judicata. Both the suit and the Notice of Motion dated 14th September 2018 are hereby struck out with costs to the defendant.

Boaz N. Olao.

J U D G E

18th January 2021.

Ruling dated, signed and delivered at **BUNGOMA** this 18th day of January 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

18th January 2021.