



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC CASE NO. 169 OF 2013**

**FLORA CHERONO.....PLAINTIFF**

**VERSUS**

**MARY NJIHIA.....<sup>st</sup> DEFENDANT**

**GRACE ABENI.....<sup>2nd</sup> DEFENDANT**

**HAMISI SUMBA.....<sup>3rd</sup> DEFENDANT**

**WAWERU NYAGA.....<sup>4TH</sup> DEFENDANT**

**JOSEPH BARASA NYONGESA.....<sup>5TH</sup> DEFENDANT**

**THE LAND REGISTRAR TRANS NZOIA.....<sup>6TH</sup> DEFENDANT**

**ABUBAKAR TEMBULA CHANGE.....<sup>7TH</sup> DEFENDANT**

**KESOGON MOSQUE COMMITTEE.....<sup>8TH</sup> DEFENDANT**

**AND**

**DANIEL NYAGA MUNYAMBO & 7 OTHERS.....APPLICANTS**

**RULING**

**The Application**

1. By a Notice of Motion dated 22<sup>nd</sup> December, 2020 brought under Section 80 of the Civil Procedure Act, Order 45 Rule of the Civil Procedure Rules 2020 and Section 19(3) (f) of the Environment and Land Act 2011, the 1<sup>st</sup> - 8<sup>th</sup> Applicants jointly sought for orders that:-

1. ...spent

2. That while pending the *interpartes* hearing and determination of this application, this Hon. Court be pleased to stay the enforcement of its judgment of 31/07/2019.

3. That the Honourable Court be pleased to review and set aside its judgment of 31/07/2019 to the extent that:

(a) The Court declared that the creation of all titles that resulted from the subdivision of Titles Nos. Sinyerere/Kipsaina Block 2/410 and 411, were irregular, null and void, and incapable of reducing the original size of parcel Nos. Sinyerere/ Kipsaina Block 2/77 and 87.

(b) That court ordered that parcels Nos. Sinyerere/ Kipsaina Block 2/77 and 87 shall retain their original acreage in the RIM obtaining, before the amendment of the same by the Director of Survey.

**(c) The Court ordered that the cancellation of Titles Nos. Sinyerere/Kipsaina Block 2/410 and 411 and all their resultant subdivisions, and further that the Land Register and the Registry Index Map be rectified accordingly by the Land Registrar and the Director of Survey.**

**4. That the costs of the application be provided for.**

2. The grounds on which the applicant relies are as follows: that the applicant No. 2 is the registered owner of the parcel registered as **Sinyerere/Kipsaina Block 1/Kesogon/548** while the 1<sup>st</sup>, 3<sup>rd</sup> and 6<sup>th</sup> are the registered owners of Parcel Nos. **Sinyerere/Kipsaina/Block 2/Kesogon /427, 547,440 and 493** respectively. The 7<sup>th</sup> and 8<sup>th</sup> applicants are the personal representatives of **John Kiige Murugu** the registered owner of land Parcel No. **Sinyerere/Kipsaina Block 2/Kesogon/494**; that the applicants are in occupation of the above mentioned parcels of land; that Parcel Nos. **Sinyerere/Kipsaina Block 1/548 and Block 2/427, 547, 440, 493 and 494** were created from the subdivision of Parcel Nos. **Sinyerere/Kipsaina Block 1/Kesogon 417 and Block 2/415, 417, 420 and 416** respectively; that the court in its judgment of **31/7/2019** cancelled all the applicants titles mentioned above and further ordered the rectification of the respective registers and amendment of the RIM in order to vest the applicants parcels to the plaintiff; that the court has deprived the applicants of the land comprised in their respective titles; that the applicants have not been parties to the suit; that they have been condemned unheard contrary to the rules of natural justice, and that there is an error apparent in the face of the record; that although the 4<sup>th</sup> applicant had been named in the original plaint as plaintiff No. 20, by the time the case against her got withdrawn on the **23/09/2015**, she had not yet been served with the summons to enter appearance and the plaint; that although the late **John Kiige Murugu** represented by the 7<sup>th</sup> and 8<sup>th</sup> applicants had been named as a party in the original plaint, the case was withdrawn while the late **John Kiige Murugu** had not been served with the summons to enter appearance and the plaint; that the applicants have developed their respective parcels and some have charged their titles with banking institutions; that the applicants will be subjected to very substantial losses if the judgment gets enforced before the hearing and determination of this application and that there is sufficient reason to warrant the issuance of the orders sought.

3. The application is supported by the Affidavit of **David Nyaga Munyambu** sworn on the **22<sup>nd</sup> December, 2020** on his own behalf and on behalf of the other seven co-applicants. It is further supported by the annexures in the application. The affidavit largely reiterates the grounds in the application.

**The Response**

4. The application is opposed. The Plaintiff/Respondent filed her Replying Affidavit “*under protest*” dated **22<sup>nd</sup> January 2021**. Her response is that the application is a mere afterthought to deny her the enjoyment of the fruits of judgment as the applicants have all along been aware of the case and chose not to enter appearance or file Defence; the applicants had been served before she withdrew the suit against some of the them; that in respect of plot **No. 415**, the owner of the parcel of land who effected sub-divisions has been a party in the suit; that **Josephat Muthee Njihia** (Deceased) owner of plot **No. 415** was represented by **Mary Njihia** the 1<sup>st</sup> Respondent ; that the applicants purchased their portions of land from the 1<sup>st</sup> Defendant/Respondent who since inception of the case has been well informed of the case and was even present when the surveyors visited the suit land on **30<sup>th</sup> January, 2019**; that there is a clear likelihood of conflict of interest in this matter since the firm who are currently on record for the instant applicants have acted for the respondent before the Senior Resident Magistrates Court at Kitale over the same subject matter and involving the same parties; that there is nothing filed on the record to demonstrate ownership of the purported sub-divisions giving rise to the titles that are to be affected by the judgment delivered on **31/7/2019** other than mere averments; that the law aids the vigilant not the indolent; that as the applicants had been duly served and were fully aware of the case in court they cannot now awake from slumber to allude to having charged their titles or established their homes thereon when they were occasioned time within which to participate in the suit and that the application is an abuse of the court process, the same is unmerited and it should be dismissed with costs. No further affidavit was filed by the applicants to controvert the matters in the replying affidavit.

5. The parties were directed to file their respective submissions which they did.

**Analysis, Issues and Determination**

6. I have perused the Application, the Supporting Affidavit, the Replying Affidavit and the Submissions filed by the parties herein and the main issue for determination is whether the court should review and set aside judgment dated **31/07/2019**.

7. On the issue of delay, I find that Judgment was entered on the **31/07/2019** and the application was filed on the **22/12/2020** this is duration of **1 year 5 months** after the judgment was delivered. I find that to be unreasonable delay. The delay has not been explained by the applicants.

8. On the issue of substantial loss, I note that the applicants are owners of titles which have been declared to have been obtained irregularly and this court’s finding has not been set aside or quashed. Further the applicants have not demonstrated how they would suffer substantial loss in their Supporting affidavit.

9. The applicants have invited the Honourable court to review and set aside its judgment date **31/07/2019**.

10. **Section 80** of the **Civil Procedure Act** provides as follows:

**“Any person who considers 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 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.*

11. The power of the court to issue review orders is unfettered.

12. **Order 45 Rule 1(1)** of the **Civil Procedure Rules** provides as follows:

*1) any person considering himself aggrieved-*

*a) by a decree or order from which an appeal is allowed but which no appeal is preferred; or*

*b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of a 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.*

13. **Order 45** of the **Civil Procedure Rules 2010** is very explicit that a court can only review its orders if the following grounds exist:

*(a) There must be discovery of a new and important matter or evidence which after the exercise of due diligence was not within the applicants knowledge and which could not therefore produce at the time the order was made; or*

*(b) There was a mistake or error apparent on the face of the record; or*

*(c) There were other sufficient reasons*

14. Further that the application for review must be made without unreasonable delay.

15. The pertinent issue for determination herein therefore, is whether the applicants have established any of the above grounds to warrant an order of review:

16. In **Muyodi -v- Industrial and Commercial Development Corporation & Another (2006) 1 EA 243**, the Court of Appeal described an error apparent on the face of the record as follows:

*“...in Nyamogo & Nyamogo -v- 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....”*

17. The applicants contention is that they were not parties to the suit and they have been condemned unheard contrary to natural justice. I do not find this an error on the face of the record. The fact that they were not parties to the suit does not amount to an error apparent on the face of the record.

18. They have not requested the court to enjoin them as defendants and they have not demonstrated that they intend to file any defence.

19. The applicants herein have not demonstrated that they have discovered new and important matter or evidence which after the exercise of due diligence was not within their knowledge. The case of **Republic -v- Advocates Disciplinary Tribunal Exparte Apollo Mboya [2019] eKLR** the court held that:-

*“For material to qualify to be new and important evidence or matter, it must be of such a nature that could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court.”*

20. I have carefully perused the application, the supporting affidavit of **Daniel Nyaga Munyambo** and the applicants' submissions. I find that there is nothing advanced by the Applicants in respect to discovery of new and important matter or evidence which after the exercise of due diligence was not within their applicant knowledge at the time of the trial to warrant this court to review its judgment.

21. A court has unfettered discretion to set aside its judgment. In the case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75:**

*“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, the defence on the merits does not mean , in my view a defence that must succeed, it means as Sheridan J. put it “ a triable issue” that is an issue which raises a*

*prima facie defence and which should go to trial for adjudication.”*

22. The main ground relied upon by the applicants in seeking for the order to review and set aside the impugned judgment is that they were not parties to the suit since they were not served by the Respondent.

23. The respondent on the other hand confirms that applicants were aware of the suit since its inception and chose not to enter appearance or file defence, that they were represented by **Mary Njihia** who is the 1<sup>st</sup> Respondent. The Respondent has annexed an affidavit of service dated **20<sup>th</sup> February, 2014** as evidence of service, a fact which was not controverted by the Applicants.

24. Further the 1<sup>st</sup> Respondent is a representative of the estate of **Josphat Njihia** who sold the parcels of land to the applicants. The 1<sup>st</sup> Applicant having been served and participated in the proceedings ought to have enjoined the purchasers of the parcel of land or notified them of the suit as it was already within her knowledge that the land had been sold to other parties.

25. This is a court of justice and must consider whether there are other grounds upon which the judgment may be set aside. The presence of a defence on the merits on is essential and the applicants have not exhibited what they deem as their appropriate defence to the suit. They did not file any draft defence at all. Their main ground is non-service which they have failed to prove. The applicants have failed to demonstrate that they intend to be enjoined in the suit for purposes of being parties to the suit to enable them file their defence if any.

26. In the case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75** the Court observed that the defence on the merits does not mean defence that must succeed, but one that in my understanding raises a triable issue.

27. From the judgment, the applicant's titles were a product of an illegality involving irregular subdivisions which have for a long time denied the Respondent her constitutional right to enjoy her rightful property. The mother titles having been cancelled on the basis of illegality as held by the court ultimately affects all other resultant titles including that of the applicants herein. This court finds no defence upon which the applicants may rely even if the judgment were set aside as prayed. It would be an exercise in futility. It follows therefore that there is no sufficient reason to warrant this court to review its judgment. The defence of the applicants being non-service does not raise any triable issue; their titles go to the substratum of the mother titles which were obtained illegally and were declared so.

28. As a result, I find no basis for allowing the application dated **22/12/2020**. The same lacks merit and is hereby dismissed with costs to the Respondent/Plaintiff.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 26<sup>th</sup> day of February, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**