REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC CASE NO. 59 OF 2015

THOMAS KIMAGUT ARAP SAMBU.....1ST PLAINTIFF

MICHAEL NAL KIPKIRUI.....2ND PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KERICHO.....1ST DEFENDANT

BEST CONTRACTORS.....2ND DEFENDANT

RULING

1. I am called upon to determine the motion on notice dated 15th July, 2019 and filed here on 16th July, 2019. It is expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act (cap 21), Order 45 Rule 1, and Order 50 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling law. The applicants – **THOMAS KIMAGUT SAMBU** and **MICHAEL NAL KIPKIRUI** – are the plaintiffs in the suit while the respondents – **COUNTY GOVERNMENT OF KERICHO** and **BEST CONTRACTORS LIMITED** – are the defendants.

2. The application came with three prayers, which are as follows:

> Prayer (i): The Joint Survey Report undertaken by the District Surveyor, KERICHO and the KERICHO COUNTY SURVEYOR dated 21/2/2019 be expunged from the records of this honourable court.
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> Prayer (ii): That this honourable court be pleased to review its orders given on 1/2/2019 directing the district surveyor, KERICHO, and the KERICHO COUNTY SURVEYOR, to prepare a joint survey report.
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> Prayer (iii): That costs of the application be provided for.

3. The grounds on which the application is anchored indicate that the order requiring a site visit was made on 21st January, 2019, with the District Surveyor, Kericho, being required to go to the site and ascertain the width of the road and the extent of encroachment alleged by the applicants. The District Surveyor did so on 1st February, 2020 but was assisted by one other person, a Mr. John Mibei, who turned to be the County Surveyor, Kericho. The said John Mibei was said to be 1st respondent's witness and, owing to that, was therefore an imposter. His participation was allegedly not authorized by the court and was without knowledge and/or consent of the applicants.

4. Further, the involvement of the said John Mibei in the exercise was said to be a calculated conspiracy meant to obstruct or defeat justice. Since there was no mention of him in the order authorizing the site visit, and as there were no summons issued directing him to participate and/or make a report, there was allegedly an error or mistake on the face of the record. The applicants feel that there will be miscarriage of justice if the report filed by the District Surveyor and the said Mibei is allowed to form part of court records. In their view, the report should be expunged.

5. The supporting affidavit that came with the application reiterate and amplify the grounds advanced.

6. Both respondents replied to the application by way of filing grounds of opposition. The 1st respondent filed its grounds of opposition on 19th September, 2019 while the 2nd respondent filed its own on 23rd October, 2019. According to the respondents, the application "*serves to confuse and waste court's time*" and is "*moot, superfluous and an abuse of the court process*." The site visit was said to have been agreed upon by all parties, with presence of John Mibei being known by the applicants, who were present and didn't raise any objection regarding his participation.

7. The application was said to be diversionary and meant to delay the suit. The applicants were said not to have shown any error or mistake on the face of the record and the participation of the County Surveyor was said to have been directed by the court and not the District Surveyor. The exercise carried out was in any case said to be a physical one done in the presence of both the court and all parties, with both surveyors being said to be in agreement regarding the measurements taken. The two surveyors were also said to be intending to appear in court to explain and/or interpret the report and the applicants therefore will have opportunity to question or cross-examine them.

8. The application was canvassed by way of written submissions. The applicants' submissions were filed on 13th March, 2020. The applicants recapitulated the substance of both the application and the responses. They then posited that two issues require to be determined. The issues were put forward thus:

a. Whether or not the application meets the threshold requirements under Order 45 of the Civil Procedure Rules.

b. Whether the grounds of opposition adduced by the respondents are sufficient rebuttals or challenge to the applicants' affidavit evidence.

9. On the first issue (issue (a)) it was submitted interalia, that the person authorized to undertake the exercise was the district surveyor; that the County Surveyor was an impostor; and that the court acted in error to allow the County Surveyor to participate and ordering thereafter that the same surveyor participates in the preparation of survey report. The County Surveyor was said to be likely working "*in cahoots with some cartels*" and "*must have orchestrated a well calculated scheme with the sole purpose of interfering with the survey exercise*". As a witness of the 1st respondent, the County Surveyor, John Mibei, was said to be conflicted and therefore not suitable to participate in the exercise.

10. Regarding the second issue (issue (b)) the respondents were faulted for responding to the application by way of grounds of opposition instead of filing replying affidavits. Grounds of opposition were said to be insufficient as they are ordinarily meant to raise issues of law while the applicants herein have also raised factual issues. According to the applicants, the factual issues raised in the application remain un-addressed and therefore unopposed as the grounds of opposition filed are unsuitable to address them. The court was ultimately asked to allow the application.

11. The respondents' submissions were filed on 24th September, 2020. The respondents cited the law applicable as found in Section 80 of the Civil Procedure Act (cap 21) and Order 45, Rule 1 of Civil Procedure Rules, 2010. They submitted that the law requires discovery of new and important matter. They observed that the applicants are merely alleging that the County Surveyor who participated in the survey was unknown to them at the time. This, in the respondent's view, is not a ground for review but possibly only a ground for appeal. And so also is the prayer by the applicants that the survey report should be expunged from the record. That, again, would be a ground for appeal, not review. The applicants were said to have failed to demonstrate that there was an error on the face of the record, or that they have discovered a new matter or evidence and/or that they have sufficient reason to warrant or justify a review. The court was urged to reject the application.

12. Both sides cited decided cases, with the applicants citing the case **of COFTEA MACHINERY SERVICES LTD VS AKIBA BANK LTD & 2 OTHERS (2004)** to make the point that if affidavit evidence is not controverted then it is presumed to have been admitted. The respondents on the other hand cited the cases of **T.SWAI VS KENYA BREWERIES LIMITED (2014)eKLR**, and **ABAS BELINDA VS FREDRICK KANGAMU & ANOTHER (1963) EA 557**, among others, to make the point that the applicants recourse, if any, lies in appeal, not review.

13. I have perused the proceedings in this matter. The need to do so arose from the fact that what is being challenged arose from the conduct of the proceedings. I have also considered the application, the responses made and the rival submissions. My understanding is that the application before me is essentially one of review. I say this well aware that apart from the prayer for review, there is also a prayer to expunge a record from the proceedings. It is however clear that expunging of the records is solely dependent on the outcome of the prayer for review.

14. There are two crucial dates mentioned in the application. They are 21st January, 2019 and 1st February, 2019. On 21st January, 2019 the court expressed its intention to visit the site. The visit was to take place on 1st February, 2019. The court required the District Land Surveyor to accompany it. The mission was to ascertain measurements to some parcels of land named in the proceedings. The District Surveyor was required to carry the Registry Index Map (R.I.M). This directive was made in presence of all counsel, the applicant's counsel included.

15. The site visit took place as scheduled on 1st February, 2019. Before the visit the record of proceedings shows the applicant's counsel addressing the court, telling it, interalia, that particular day was for site visit and that the District Surveyor was available while the County Surveyor would be coming in a short while. The record shows further that the site was visited and measurements were taken as intended. The court is also recorded directing the District Surveyor and the Court Surveyor to prepare a joint report relating to the exercise.

16. Court proceedings after that show the parties engaged in a tussle relating to the applicants' desire to amend plaint. The applicants had filed an application to that effect and despite opposition from the respondents, they had their way and they amended the plaint. After crossing that hurdle, the application now under consideration was filed.

17. I have devoted time and space to highlight these aspects of the proceedings because some pertinent concerns about them are supposed to inform my decision. I may need to add that John Mibei, County Surveyor, Kericho, is shown to have filed his statement as witness for 1st defendant on 13th March, 2017.

18. I now deem it necessary to have a look at the law relating to review as found both in statutory and case law sources. The statutory anchorage is to be found in Section 80 of the Civil Procedure Act (cap 21) and Order 45 of the Civil Procedure Rules, 2010.

Section 80 states as follows:

> "80. Any person who considers himself aggrieved:
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> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been proffered; or
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> a. *by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."*

19. For our purposes, the relevant part of Order 45 of Civil Procedure Rules, 2010, is to be found in Rule 1, subrules (a) and (b), which are as follows:

> 45 (1) Any person considering himself aggrieved:
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> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or
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> 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 sufficient reason, desires to obtain a review of the decree, may apply for a review of the judgement to the court which passed the decree or made the order without unreasonable delay.

20. The case law relating to review is generally as explicated by the respondents in their submissions. I may add that the law relating to review follows a beaten path. In **NYAMOGO & NYAMOGO VS KOGO (2001) EA 170** the court expressed itself as follows while interpreting the statutory law:

> "An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where 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 can be established by a long drawn process of reasoning 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 apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

Nyamogo's case (*supra*) was cited with approval later by the Court of Appeal in **MUYODI VS INDUSTRIAL & COMMERCIAL DEVELOPMENT & ANOTHER: (2006) 1EA 243**. The respondents themselves partially echoed this position when they cited **T.Swai's case** (*supra*) and **Abas Belinda's case** (*supra*)

21. More recently, the scope of review was captured well by Mativo, J in **Republic Vs. Advocates Disciplinary Tribunal Exparte Apollo Mboya Misc. Appl. No. 317 of 2018 (2019)eKLR**. The court pointed out that the applicant must demonstrate:

> 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;
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> b. That there was a mistake or error apparent on the face of the record; or
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> c. For any other sufficient reason.

22. Given the kind of order being challenged here, may be it is useful to expand the scope of review by pointing out that not all orders arising in proceedings can be reviewed. The express purport and thrust of the statutory law applicable require that only orders arising from reasoned judgements and/or rulings of the court can be reviewed. In other words, review should only apply to orders arising from critical decisional moments captured well in a ruling or judgement of the court. This, in my view, is the reason why the relevant statutory law starts with a requirement that a person be one who is aggrieved either by a decree – this one is supposed to arise from a judgement – or an order- which can emanate from a reasoned ruling of the court. The order being challenged here is an extempore one made in the course of proceedings. It did not arise from any ruling or judgement

23. Further, it is important to appreciate that the law requires that the person applying review should not pick any existing and/or petty matter or evidence as subject for review. What is required is new and/or important matter of evidence. And it is not enough that the matter or evidence is new or important. It is further required that the applicant should show that he didn't have knowledge of the matter or evidence and could not possibly have the knowledge even after exercise of due diligence.

24. If the applicant is relying on the reason of existence of an error or mistake apparent on the face of the record, the law – see **Nyamogo's case** (*supra*) – requires that such mistake or error be obvious and/or plain. It should not be one arrived at through laborious reasoning or through deployment of legal ingenuity. It should be one that is clearly noticeable through simple application of common sense.

25. The law requires that review can also be allowed for "*any other sufficient reason*." This has been explained to mean – see **Sir Dinshah**

Fardunji Mulla, **The Code of Civil Procedure, 18th Edition, Reprint 2012, at page 1147 or the old case of YUSUF VS NOKRACH (1971) EA 104** – that the reasons be analogous to the other grounds for review. But the position or approach by the courts seems to be ambivalent concerning this issue. In **SADAR MOHAMED VS CHARAN SINGH (1959) EA(1) 793**, the Court (Farrel J, as he then was) was of the view that the court had an unfettered discretion to make such orders as it thinks fit. The same position was later adopted by the Court of Appeal in the case of **WANGECHI KIMITA & ANOTHER VS MUTAHI WAKABIRU: CA NO. 80 OF 1985, NAIROBI** (unreported) where the court expressed itself thus:

> "any other reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by Section 80 of the Civil Procedure Act."

The more predominant position however, given the trend in recent cases, is that "*sufficient reason*" should be analogous to the other grounds for review.

26. I think I need to consider whether the application at hand is a proper or competent one before court. I will go further and find out whether it has merits if it were a proper or competent application. In this matter, the order being challenged did not arise from a judgement or ruling of the court. It was an extempore order made in the course of proceedings. More precisely, it was made during a site visit. As I pointed out earlier, not all orders made in proceedings are eligible for review. This law requires that a review be applied only to orders or decrees arising from judgements and/or rulings.

27. There are many processes in court proceedings. A review is only one of them. There are appeals. There is setting aside. It is very important that is understood which one applies where and when. A review is not a remedy for all stages and all occasions. The law is very clear as to when and where it can be invoked. The conditions for successful prosecution for an application for review are rather stringent and the scope is limited. It is therefore not open to a person to invoke it as and when he pleases. My position is that the applicants were wrong to approach the court by way of review at that stage. The court had not pronounced itself through a ruling or judgement. The order being challenged did not arise from a ruling or judgement. It was not therefore amenable to review. One could possibly apply to set it aside but it was not certainly an order that could be reviewed or appealed against. It fell outside the scope or ambit of review. To that extent therefore, the application is not properly before the court and is in my view incompetent.

28. But I need also to consider whether the application, if competent, has merits. As I pointed out earlier, the applicants counsel is shown addressing the court before the site visit. He and the applicants were aware of the presence of the County Surveyor. The County Surveyor did not participate in the exercise behind their backs. They did not raise any objection as to his presence and/or participation. When the court ordered that he and the District Surveyor make a joint report, they also didn't raise any objection. The County Surveyor was therefore present and participated with express or implied permission of the applicants. Alternatively, they acquiesced in what he did. Given this scenario, the application comes across very much as an afterthought.

29. But that is not all, the applicants are basing their challenge on the ground that the County Surveyor is a witness of the 1st respondent and has even recorded a witness statement. But records show that this is not a new or important matter coming to the knowledge of the applicants. The written statement was recorded way back in the year 2017. This was not a fact hidden from the applicants. Yet, knowing this, they allowed the County Surveyor to participate in the site exercise. They then belatedly turned around to allege he was conflicted. Question is: Where is due diligence on the part of applicants? Why couldn't they raise the issue on the spot. The truth is that the applicants had actual or inferable knowledge of the County Surveyor's witness statement and/or his participation in the survey exercise.

30. I think it would also have been proper for the applicants to demonstrate that because of the presence or participation of the County Surveyor, the work of the District Surveyor was unprofessionally done or that it is the input of the County Surveyor, not the District Surveyor, that went into the exercise and/or the subsequent report. It is not convincing to allege that the County Surveyor was a hand on hire by some cartels or that he was an imposter. Allegations of this kind are not enough. Some credible evidence would be required to prove them.

31. I think that it is now clear that the application would be one without merits even if one were to argue that it is properly before court. The upshot is that the application herein is one for dismissal, first because it is incompetent in the circumstances of this case, and, second, because it would be unmeritorious even if competent. I therefore dismiss it with costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 26TH DAY OF FEBRUARY, 2021.

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A. K. KANIARU

JUDGE