REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 19 OF 2014 (O.S)

VERONICA NALIAKA PETER.....PLAINTIFF

VERSUS

CHEMA HOLDINGS LIMITED.....DEFENDANT

RULING

1. By a Notice of Motion dated **14/12/2020** which was filed in court on **16/12/2020** and which was brought under **Order 9 Rule 9 (a)** and **10, Order 45 Rule 1** and **5, Order 42 Rule 6** and **Order 51 Rule 1** of the **Civil Procure Rules**, **Section 1A, 1B, 3A** and **80** of the **Civil Procedure Act Cap 21 Laws of Kenya**, the defendant/applicant seeks the following orders:

(a) …spent

(b) …spent

(c) …spent

(d) The honourable court be pleased to review and set aside the entire proceedings and judgment of the honourable court dated and delivered on 18/7/2019, and all other consequential proceedings and orders, and direct that the plaintiff's suit be heard afresh.

(e) That this honourable court be pleased to grant such other orders or further orders as it may deem it and just to grant.

(f) That costs be provided for.

2. The application is supported by the affidavit of **Nancy Atsango Chesoni**, the manager of the defendant sworn on **14/12/2020**. The grounds upon which the application is based on are that there are good and sufficient reasons to set aside the proceedings and judgment of this honourable court dated **18/7/2019** and to have the matter heard afresh; that the judgment is incapable of being given effect because of a fundamental error in the proceedings that is also reflected on the face of the judgment; that by an Originating Summons the plaintiff sought to be registered as an owner of **2.3 Acres** of under the doctrine of adverse possession; that the Originating Summons was heard and judgment delivered on **18/7/2019** wherein this honourable court made a declaration that the plaintiff had been in possession of **LR. No. 6650** openly, continuously and peacefully for a period in excess of **12 years** and was therefore entitled to be registered as proprietor thereof under the doctrine of adverse possession; that the court also granted an order extinguishing defendant/applicant's alleged title to **2.3 acres** of **LR. No. 6650**; that there is a patent and self-evident error on the face of the record which is that **LR. No. 6650** does not exist as one un-subdivided parcel of land owned by one person; that **LR. No. 6650** is subdivided into many parcels that are owned by different persons including **Gabriel Otieno Odinyo** who owns **LR. No. 6650/1** and **LR. 6650/2** and **Basio Limited** which owns **LR No. 6650/3, 6650/4, 6650/5/6650/8/6650/9/6650/10, 6650/11, 6650/12,** that **Gabriel Otieno Odinyo** and **Basio Limited** were not parties in the proceedings and were never aware of the existence of these proceedings; that that **LR. No. 6650** does not exist as one undivided parcel of land owned by one person was made known to the court during the proceedings by the plaintiff; that the applicant has discovered a new and important matter or evidence which was not within its knowledge during trial or at the time the judgment was made; that the residual portion of **LR. No. 6650** after the excision of the subdivided portions belonging to persons not parties to the suit is **0.791 acres** and on that premise, the order vesting **2.3 acres** in the plaintiff is clearly unenforceable and was made in error which is so fundamental that it vitiates the judgment, that judgment cannot be enforced as against third parties namely **Gabriel Otieno Odinyo** and **Basio Limited** who own **LR. No. 6650/1, 6650/2, 6650/3, 6650/4, 6650/5, 6650/8, 6650/9, 6650/10, 6650/11, 6650/12** and who were not heard by court, that the Plaintiff in fact does not occupy and has never been in physical possession of any of the subdivided portions of **LR. No. 6650**, owned by the named third parties, including the residual portion owned by the defendant/applicant, that the doctrine of adverse possession requires that the disseisor must be in physical control and exclusive possession of the land and must prove that he took physical control and exclusive possession in question *nec vim*, *nec clam*, *nec precario* that is without force, secrecy or without permission; that since the plaintiff has never been in physical possession of any of the subdivisions of **LR. No. 6650**, including the residual portion owned by the defendant/applicant, an order extinguishing the defendants/applicants title to the residue could not therefore issue; that the proceedings and judgment in this suit are tainted with a fundamental error as they relate to land that did not exist as one un-subdivided whole, owned by one person; that the error apparent in the

proceedings and which has found its way to the judgment is substantial as it goes to the root of a claim for adverse possession; that judgment dated **18/7/2019** is incapable of correction by mere modification as the proceedings are defective, that the only remedy available is to set aside the proceedings and judgment and the matter heard a fresh;

3. The application is strenuously opposed by the respondent in a **22 page** affidavit sworn on **28/1/2021** and filed on the same date. Her response is that the application is an afterthought, calculated to vex her with endless litigation, frivolous, misconceived, devoid of any merit and an abuse of the court process; that the same was not filed in good faith and is tainted with falsehoods; that the defendant/applicant has come to court with unclean hands; that the defendant/applicant is not specific on the orders or decree to be reviewed; that the Defendant's arguments in the application ought to have been argued in its submissions which it failed to file; that there have been excisions of land which was initially **791 acres** with that the remainder being **690 Acres** at the defence hearing; that there it has not been shown that the whole of **LR. No. 6650** has been subdivided and registered in the names of third parties or otherwise wholly disposed of; that **LR. No. 6650** still runs into hundreds of acres and that has not changed since the proceedings were closed; that the subject portion of **2.3 acres** which the original plaintiff presented to the court remains intact and no person has purchased it and there are no subdivision to any third parties; that the alleged third parties are unknown and non-existent and are invoked by the defendant to defeat the ends of justice and that nothing stopped the defendant from seeking joinder of the third parties to the suit; that the portion claimed was clearly identified to court and remained so available on the ground; that there is no error in the proceedings; that the right of adverse possession is an overriding statutory interest which cannot be defeated by the mere fact that there has been a transfer of title to a different person; that the defendant has not denied its registered ownership of **LR. No. 6650**; that the defendant did not raise in its pleadings and evidence the allegations of third parties and its right to do so were extinguished and cannot introduce such defence post judgment since the time for pleadings was closed; that there is no new and important evidence to warrant a review; that there is no error on the face of judgment; that the court is *funtus officio* and has no jurisdiction to revisit its conclusion; that the defendant did not exercise due diligence by failing to conduct a search during the hearing of the suit property prior to the delivery of judgment.

4. I have carefully considered the applicant's application, the supporting affidavit and the annextures all dated **14/2/2020**, the plaintiff's replying affidavit dated **28/1/2021** and submissions dated **9/2/2021**.

DETERMINATION AND ANALYSIS

5. The issue for determination arising out of the instant application is whether the applicant has satisfied the threshold for the grant of review orders.

6. Section 80 of the **Evidence 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."***

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

8. 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 judgement to the court which passed the decree or made the order without unreasonable delay.***

9. The conditions for the grant of orders of review are as follows:-

> **(a) There is discovery of 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) Some mistake or error apparent on the face of the record or,**
>
> **(c) Any other sufficient reason.**

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

11. The application of review can be entertained when the conditions set in **Paragraphs 8** and **9** are satisfied by the applicant.

12. Has the applicant satisfied the above conditions to warrant the court to issue orders for review and setting aside judgment dated

18/7/2018?

13. I will begin by analyzing the first limb of the conditions precedent for the court to grant review orders.

14. Whether there was discovery of new and important matter or evidence which after the exercise of due diligence was within the applicant's knowledge. The case of **Republic -v- Advocates Disciplinary Tribunal *Ex parte* 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."***

15. The applicant's contention is that there is new evidence is **LR. No. 6650** is subdivided into many parcels owned by different people therefore does not exist as one un-subdivided parcel of land owned by one person. I have carefully perused through the court file and found that the Certificate of Title which was produced in court at trial shows that the land was already subdivided to other people. At the hearing, **DW1** confirmed that the remaining portion comprising of **LR. No. 6650** was **690 acres**. The same was confirmed in cross-examination. This therefore does not constitute new and important matter or evidence to warrant the court to review its judgment.

16. The other new evidence according to her, is that the search certificate issued by the Registrar on **24/08/2020** shows that the residual portion of **LR. No. 6650** after the excision of the sub-divided portions belonging to the persons not parties to the suit is **0.791 acres** and on that premise the order vesting **2.3 acres** to the plaintiff is clearly unenforceable and was made in error which is so fundamental that it vitiates the judgement. The applicant has the duty to demonstrate and satisfy the court that indeed the new and important evidence was not within in his knowledge even after exercising due diligence to obtain the evidence at trial. However, the fact of subdivision was within the knowledge of the defendant who also admitted through its manager that out of the larger parcel, **690** acres remained as at the time of the defence hearing and this allegation can not support an order of review.

17. This matter was filed way back on the **23/01/2014** and the defendant entered appearance on **25/03/2014**. All along the defendant was represented and he and his advocates were aware of the case and that the land had already been subdivided and parts of it transferred to other people. The subdivisions that it relies on in the instant application show that the same was effected on the **12/2/1993**; the excisions were made in relation to the third parties who were not part of the proceedings were made on the **12/2/1993**. At the hearing, the defendant was alive to the fact that the land was subdivided but did not mention that the **2.3 acres** claimed by the plaintiff was part of those sub-divisions. The land which was for disposal was **691 acres**. I do not find anything new in evidence as regards subdivisions that existed at the hearing.

18. Regarding the Certificate of Official Search, I am guided by the decision the case of ***Rosemary Wanjiru Njiraini V Officer in Charge of Station Molo Police Station & Another (2019) eKLR*** where it was held as follows:-

> ***"An application for review is not one aimed at allowing a party to fill in gaps in her evidence which may have led to the said party losing the suit. It is incumbent upon every party to present and table all their evidence at the trial, for a trial is only done once. A party is not allowed to present half its evidence, and after losing the case seek a review, so that it can now present the other half of its evidence, when all along this evidence was available and could have been presented during the trial of the case. If that were allowed, parties would litigate in piecemeal ad infinitum and there would be no end to litigation leading to a total breakdown of the judicial process."***

19. The Certificate of Official Search which the Applicant considers its new evidence was obtained on the **18/8/2020** from the Lands Registry. The Applicant has not shown or explained why the same was not availed in court during trial. Indeed the applicant knew that the search certificate was an important document for his case but it did not exercise due diligence to obtain it at the Lands Registry where the same was readily available. The deponent has not explained the efforts he made in obtaining the document or the frustrations and challenges he faced in his bid to obtain the document. Nothing hindered him from obtaining the document which was readily available in a public office 5 years on after the case was filed. I find that the applicant did not exercise due diligence to obtain the document thus does not meet the threshold for the grant of review orders. The law does not aid the indolent, it aids the vigilant and litigation has to come to an end. I decline to allow the application on that ground.

20. Regarding the third parties, the Applicant was fully aware that the land had already been sold to third parties mentioned in the application but did not bother to enjoin them in the suit at the hearing. The defendant therefore cannot therefore try to bring in the issue of third parties, whose authorization to it has not been demonstrated anyway, when this court has already delivered its judgment. The court is *funtus officio* and cannot re-open the case on that ground. The court cannot aid a litigant to fill gaps in his case. Furthermore, the defendant has not demonstrated that **2.3 acres** allocated to the plaintiff forms part of the subdivided portions alleged to have been transferred to the third parties.

21. The applicant also contents that there is a fundamental error on the face of the proceedings.

22. 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. In the case of **Kipkolum Kogo v Nyamogo & Nyamogo Advocates [2004] eKLR,** in discussing what constitutes an error on the face of the record, the court rendered itself as follows:-

> ***"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 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 an error apparent on a substantial point of law stares on 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 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 is a view adopted by 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."

23. Similarly in the case of **National Bank of Kenya -v- Ndungu Njau Civil Appeal No. 211/1996 (1997) eKLR** the Court of Appeal pronounced itself thus:-

"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 any elaborate argument to be established."

24. Having perused the court file entirely, I find no fundamental error on the face of the record. I would dismiss the application on this ground.

25. I will now turn to evaluate the issue of delay. An application for review must be made without unreasonable delay.

26. The judgment in this suit was delivered on **18/7/2019** whereas the instant application was filed on the **14/12/2020**. Simple mathematics translates that the delay amounts to **1 year, 4 months** and **27 days**.

27. The defendant does not advance any reasons for the delay. It does not explain why it failed to file the instant application in time. The deponent to the supporting affidavit only states that the application has been brought without unreasonable delay by the incoming advocate. That is not sufficient to explain delay. I find that the delay of **1 year, 4 months** and **27 days** unreasonable delay. On this limb too I would dismiss the application.

28. For the reasons advanced, I find the application dated **14/12/2020** devoid of merit and I proceed to dismiss it in its entirety with costs to the respondent.

It is so ordered.

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

MWANGI NJOROGE

JUDGE, ELC, KITALE.