Mwirigi & another v Mwirigi (Environment and Land Appeal E017 of 2020) [2023] KEELC 16168 (KLR) (8 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16168 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E017 OF 2020

CK YANO, J

MARCH 8, 2023

BETWEEN

PETER MURITHI MWIRIGI ..... 1ST APPELLANT

DORCAS MUCEE ..... 2ND APPELLANT

AND

WILFRED MWIRIGI ..... RESPONDENT

(Being an appeal from the judgment/decree of Honourable E.M AYUKA Senior Resident Magistrate delivered on 10th day of December, 2020 in Nkubu PMCC NO. 21B of 2019)

JUDGMENT

Introduction

1. The appellants Peter Murithi Mwirigi & Dorcas Muceefiled this appeal against the judgment of Hon. E.M AyukaSRM in Nkubu PMCC No. 21B of 2019 delivered on the 12th March 2020 and set out the following 9 grounds of appeal-;

    i. The learned trial magistrate erred in law in failing to find that the application dated 4th November, 2020 had not met the threshold required in order to be granted an order of review as sought by the respondent.

    ii. The learned trial magistrate erred in law and in fact in ordering that the suit land be subdivided into two portions and one of the portions be subdivided and transferred to the appellants: orders that were not sought either in a counter claim or a standalone suit.

    iii. The learned trial magistrate erred in law and in fact in setting aside its judgment based on an application for review, thus essentially sitting on appeal of its own judgment.

iv. The learned trial magistrate erred in law in and in varying and declaring an administrative act of the land registrar as improper despite lacking the jurisdiction to do so.

v. The learned trial magistrate erred in law and in fact in declaring that the suit land be subdivided and a portion transferred to the appellants which two orders are materially contradicting and bound to cause confusion and anarchy.

vi. The learned magistrate erred in law and in failing to find that an act of subdivision of the suit land by the respondent would interfere with the appellant's quiet user and occupation of the suit land

vii. The learned magistrate erred in law and in fact in failing to find that the application dated 4th November, 2020 and 5th October, 2020 were thinly veiled attempts by the respondents to have the trial court sit on appeal of its own judgment.

viii. The learned trial magistrate erred in law and in fact by varying and or quashing his own judgment instead of interpreting it as prayed.

ix. The learned trial magistrate erred in law and in fact unilaterally framing new issues for determination not pleaded or responded to by any of the parties.

2. The appellants prayed for the appeal to be allowed and the ruling/order of trial court dated 10th December, 2020 be set aside and the judgment dated 12th March 2020 be upheld, and that the respondent bears the costs of this appeal.

Background Of The Appeal

3. Vide a plaint dated 20th March 2019, the appellants sought inter alia a declaration that the respondent holds land parcel No. Abogeta/u-kithangari/2911 in trust for the appellants and EValyn Gakii and FIdelia Muthoni, an order that the respondent do transfer land parcel No Abogeta/u-kithangari 2911 to the appellants to hold on their behalf and in trust for Evalyn Gakii and Fidelia Muthoni and in default the Honourable court do empower its executive officer to sign all the necessary documents/ instruments to effect transfer, a permanent injunction restraining the respondent, his servants and or assigns from interfering with the appellants and Evelyn Gakii's And Fidelia Muthoni's peaceful user, occupation and enjoyment of land parcel No. Abogeta/U-Kithangari/2911, any further or better relief and costs of the suit.

4. In the plaint the appellants averred that they are son and wife of the respondent respectively and that in the year 2012, the respondent chased away the appellants from the matrimonial home that was located on land parcel No. Abogeta/u-kithangari/691 along with the 1st appellant's other siblings to wit Evelyn Gakii And Fidelia Muthoni.

5. The appellants averred that land parcel no. ABogeta/u-kithangari/691 was registered in the names of the respondent's father one M'ItongaM'Murungiwho died on the 25th day of July 1998 and his son by the name Joseph Kithinji applied for grant of letters of administration in Meru HC succ. No. 101 of 2001 which upon conclusion the respondent as a beneficiary being the son of the deceased M'Itonga M'Murungi got four (4) acres which upon subdivision of LR NO. Abogeta/U-Kithangari/691 was given no Abogeta/U-KithangarI/2826.

6. The appellants pleaded that the respondent quickly subdivided land parcel No. abogeta/U-Kithangari/ 2826 into land parcel No. Abogeta/U-Kithangari/2910 and 2911 without consultation with the family members and had already sold LR NO. Abogeta/U-Kithangari/2910 (0.81 HA or

2 acres) to one Mutuemeri Bernard Gitonga and was sourcing for a buyer for the remaining parcel No. Abogeta/U-KithangarI/2911, prompting the appellant to place a caution thereon on 10th January, 2019.

7. The appellants further averred that the original parcel No. Abogeta/U-Kithangari/2826 and the resultant subdivisions were ancestral land which the respondent held in trust for the appellants and their other siblings. The appellants, therefore accused the respondent for acting in breach of the trust. The appellants itemized the particulars of the alleged breach of trust. The appellants were apprehensive that the respondent could sell off the remaining portion in further breach of trust and to their prejudice.

8. The respondent entered appearance and filed his statement of defence dated 24th April 2019 wherein he admitted that the 1st appellant was his son. The respondent however denied that the 2nd appellant was his wife and averred that he separated with her in the year 2004 whereby the 2nd appellant remarried. The respondent accused the 1st appellant and her other siblings for going away alongside the 2nd appellant who had asserted that he could not live with the respondent and always shielded him from seeing his children.

9. The respondent further averred that the subject parcel was registered in his name and thus could subdivide and transfer the same as he wished. The respondent accused the appellants of plotting to eliminate him, forcing him to sell a portion of the suit property to enable him purchase another parcel of land. The respondent denied that he held the suit land in trust for the appellants.

10. The matter proceeded to hearing wherein the 1st appellant and one Joseph Kithinji who is a brother to the respondent and an uncle to the 2nd appellant testified on behalf of the appellants. On the part of the defence, the respondent was the sole witness.

11. After considering the evidence tendered and the submissions of the parties, the trial court found that the principal issue for determination was whether the respondent holds the suit land for himself and in trust for the appellants. The learned trial magistrate found that the appellants had proved their case against the respondent on a balance of probabilities and entered judgment accordingly as follows-;

> "(1) A declaration that the defendant holds land parcel No. LR. No. Abogeta/U-Kithangari/2911 in trust for the plaintiffs.
>
> 2. A permanent injunction restraining the defendant from interfering with the plaintiff's peaceful user, occupation and enjoyment of land parcel LR NO. Abogeta /U-kithangari/2911.

12. Prayer (b) of the plaint was declined and the court further ordered that each party shall bear their own costs of the suit.

13. Thereafter, the respondent approached the trial court with two applications. The first application dated 5th October, 2020 basically sought lifting and discharging of inhibition orders and any encumbrance lodged against LR NO. Abougeta/u-kithangari/2911 and any other orders as shall meet the ends of justice. The second application dated 4th November, 2020 sought the following prayers:

    1. Spent

    2. That this Honourable court be pleased to grant leave to the firm of Muchoma Law Advocates to come on record for the defendant/applicant after judgment.

3. That this Honourable court be pleased to interpret its judgment delivered on 12th March 2020 and more particularly on whether there was an order for registration of the trust interest in the land register against LR No Abogeta/U-Kithagari/ 2911 and whether the declaration of trust excluded the defendant from the trust as holding LR. NO. Abogeta/u-kithangari/2911 in trust for himself and the plaintiff's respondents and whether (c) in the plaint as sought and granted restrains the defendant from subdividing and transferring to the plaintiff's their appropriate share in LR. NO. Abogeta/u-kithangari/2911 in line with the declaration of trust.

4. That this Honourable court be pleased to review its judgment dated 12th March 2020 in line with the prayer (3) above and further grounds adduced in the applicant's evidence.

5. That costs of this application be provided for.

14. Both applications were opposed. Upon considering the two applications, the trial magistrate in the ruling dated 10th December, 2020 found them merited and granted the orders prayed in entirety. For the avoidance of doubt, the trial court interpreted its judgment delivered on 12th March 2020 and the order issued therein as hereunder;

> " 1. A declaration that the defendant holds land parcel Abogeta/U-Kithagari/2911 in trust for himself and the plaintiffs.
>
> 2. An order of permanent injunction is hereby issued restraining the defendant from interfering with the plaintiff's user and or occupation of land parcel No. Abogeta/U-Kithangari/2911.
>
> 3. Each party shall bear their own costs."

15. Further, the learned magistrate made specific orders as follows-;

> " 1. The law firm of Muchomba Law Advocates is hereby granted leave to come on record for the defendant after judgment has been entered.
>
> 2. The court does interpret and review its judgment of 12th March, 2020 as hereinabove (supra)
>
> 3. The court does issue an order lifting, setting aside and or discharging inhibition orders or any encumbrances placed on LR No. Abogeta/U-Kithangari/2911.
>
> 4. The defendant does sub-divide the land parcel No. Abogeta/U-Kithangari/2911 into two equal portions and effect transfer of one half to the plaintiffs.
>
> 5. The plaintiffs to avail to the defendant all the necessary documents as may be required to effect the transfer in (4) above, failure to which the court administrator to sign such documents"

16. In arriving at its decision, the trial court found that there exists an ambiguity that required clarification and that there was an error apparent on the record that required to be rectified. The learned magistrate made reference to the provisions of Section 99 of the *Civil Procedure Act*.

17. Further, the court stated, that bearing in mind that in its judgment neither ordered for the registration of a trust in respect to the land in question nor did it sanction registration of any encumbrances thereon, if any such trust or encumbrance is thus registered on the premises of the judgment of the

court, then the same was misconceived and ought to be cancelled and expunged from the record and or lifted. Lastly, the trial court stated that as held in the said ruling, the judgment of court under reference did not whatsoever restrain and or stop the respondent herein from subdividing and or transferring the land in question to the appellants. The court further noted that after observing the demeanor of the parties who are of nuclear family, there existed bad blood between them. In the circumstances, and in order to give effect to the orders of court, the learned trial magistrate found it prudent to order the sub-division of the suit land into two equal portions and for the respondent to effect transfer of one half to the appellants.

18. Being aggrieved by that ruling, the appellants filed the present appeal. The appeal was canvassed by way of written submissions. The appellants filed their submissions dated 27th October, 2022 through the firm of Kiautha Arithi & Co. advocates while the respondent filed his dated 20th December, 2020 through the firm of Muchomba Law Advocates.

The Appellant's Submissions

19. With regard to grounds 1, 2 and 3 of appeal, the appellants submitted that the subordinate court erred in law and in fact in holding that the application dated 4th November, 2020 had met the threshold required in order to be granted an order for review as sought by the respondent. The appellants cited the provisions of Order 45 which states-;

> 1. Application for review of decree or order [Order 45 rule 1]
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> 1. 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 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.
>
> 2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when being respondent, he can present to the Appellate Court the case on which he applies for the review.
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> 2. To whom application for review may be made [order 45, Rule 2]
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> (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is

referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

3. When court may grant or reject application [Order 45, Rule 3.)

(1) Where it appears to the court that there is no sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted it shall grant the same,Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

20. The appellants relied on the case of Evan Busire V Andrew Aginda Civil Appeal No. 147 of 2006 cited in the case of Stephen Githua Kimani Vs Nancy Wanjira Waruingi T/a Providence Auctioneers (2016) eKLR in which the Court of Appeal held as follows:

> " An application to review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising diligence."

21. The appellants stated that the respondent sought to review on the ground that he had obtained custody of his other son and the appellants questioned whether that was new evidence that would warrant the court to grant orders of review. It was the appellants' contention that that was not the case. The appellants argued that when prosecuting his case the respondent was aware that he had a son and was seeking physical custody of him.

22. The appellants submitted that there was no error apparent on the face of record that would warrant the court to review its decision as the respondent did not show to the court any error apparent on the face of record.

23. The appellants submitted that the trial court erred in law and in fact in ordering that the suit land be subdivided into two portions and one of the portions be subdivided to the appellants, orders that were not sought in a counter claim or standalone suit.

24. With regard to grounds 4, 5 and 6 of the appeal, the appellants submitted that the trial court lacked jurisdiction to determine that the administrative act of the land registrar was improper.

25. The appellants relied on the case of Owners of Motors Vessel "Lillian S" Vs Caltex Oil (Kenya) Limited [1989] KLR in which the court expressed itself as follows on the issue of jurisdiction;

> " Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings."

26. The appellants also relied on the Court of Appeal case in Kakuta Maimai Hamisi Vs Peris Pesi Tobiko & 2 others (2013 eKLR that stated that-;

> " So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain."

27. The appellants submitted that they successfully prosecuted their case and obtained a decree which was then presented to the Registrar of lands in order for him to be aware of the interest the appellants had on that land. That the registrar then registered the decree and that in the event that the respondent was dissatisfied with the action of the registrar, the respondent ought to have instituted a claim against the registrar in the appropriate forum for the land registrar to explain his decision.

28. The appellants submitted that the court lacked jurisdiction to determine that the Administrative Act of land registrar were improper adding that the respondent did not plead that he be included as a beneficiary of the trust and did not plead that he had another son or that the interest of that said son would be affected. The appellants submitted that the respondent was estopped from bringing up new claims that were not pleaded and that the court erred in ordering for the subdivision of the suit land and for a portion to be transferred to the appellants. The appellants argued that these two orders are materially contradicting and bound to cause confusion and anarchy.

29. On grounds 7, 8 and 9 of the appeal, the appellants submitted that the trial magistrate framed new issues for determination that were not pleaded or responded to by the parties, thus violating the principles of fairness and justice.

30. The appellants referred to a passage in Bullen and Leake and Jacob's precedents of pleadings, 12th Edition, London Sweet and Maxwell, where the learned author declared that:

> " The system of pleadings operate to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective case and upon which the court will be called upon to adjudicate between them. It thus serves the two fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at trial and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial court and which the court will have to determine at the trial."

31. The appellants submitted that the question of which party bears the evidentiary burden in civil proceedings is well settled and cited section 107, 108 and 109 of the *Evidence Act*, Cap 80 Laws of Kenya which state as follows-;

> " 107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> 108 The burden of proof in a suit or proceedings lies on the parson who would fail if no evidence at all were given on either side."
>
> 109 Proof of particular fact
>
> "The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person."

32. The appellants relied on the case of Kenya Power & Lighting Company Limited Vs Pamela Owino Ogunyo [2015] eKLR in which the court held as follows-;

> " A party who asserts or alleges that certain facts exist has a legal burden to prove those claims – Section 107 – 109 of the *Evidence Act* which place a legal burden of proof or what may be called evidential burden of proof on the party making the assertion."

33. The appellants submitted that the respondent need to prove some of the allegations he made before the court granted the orders he sought. Consequently, they submitted that the respondent failed to prove his allegation and has already subdivided parcel LR. NO. Abogeta/u-kithangari/2826 and sold a part of it all the while disregarding the fact that the land he is selling is family land in which he owes a duty of care as a trustee for the next generation of the family.

34. It is therefore the appellants' submission that the trial court's decision was biased and against the weight of the evidence produced by the appellants, and prayed that the appeal be allowed as prayed.

Respondent's Submission

35. The respondent identified five issues for determination, the first being whether the trial court had powers to remove inhibition, restrictions and such encumbrances registered against the suit land, the second is whether the application dated 5th November, 2020 met the threshold for granting orders of review as sought by the respondent, thirdly, whether the trial court had powers to interpret its judgment and make orders accordingly, fourthly, whether the interpretation of the judgment was functus officio and amounted to varying and quashing the judgment, and lastly, whether the appeal is merited.

36. The respondent submitted that Section 78 of the *Land Registration Act* empowers a court to remove inhibitions, restrictions and such other encumbrances registered against a parcel of land and as such the Honourable court was within its powers to remove them. The respondent pointed out that the inhibition were registered vide the order of the said court and as such nothing could prevent the court from removing them if it finds it appropriate and therefore the administrative action of the registrar was subject to the orders of the court as expressly stated in Section 78 of the *Land Registration Act*.

37. Regarding the issue whether the application dated 4th November 2020 met the threshold for granting orders of review as sought by the respondent, the respondent submitted that Section 99 of the *Civil Procedure Act* provides that clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either on its own motion or on the application of any of the parties and that Order 45 (1) further outlines the grounds for review. Consequently, the respondent argued that the court has inherent powers to amend a judgment where there is an error out of an accidental slip or omission and that the ambiguity in the trial court's judgment was both an omission and an error/mistake apparent on the face of the record.

38. The respondent stated that in its judgment the court appreciated the fact that there was ambiguity as to the judgment it rendered in terms of the rights of the parties in relation to the suit land and as such it was imperative to review the judgment upon specifying those rights in its interpretation for the purpose of the clarity of the decree and submitted that the court was therefore within its powers to review the judgment for the reasons brought forth by the respondent and upon interpretation.

39. On the issue whether the trial court had powers to interpret its judgment and make orders accordingly, the respondent submitted that the courts have been time and again called upon to interpret their judgments when the parties find them ambiguous for the purposes of execution and application and that in the instant application, the respondent sought to know whether the declaration of trust excluded him from the suit land as holding in trust for the applicants and for himself, whether there was an order for registration of trust in the land's record and whether prayer (c) in the plaint as sought and granted restrains the defendant from subdividing and transferring to the plaintiffs their appropriate share in LR.NO. Abogeta/u-kithangari/2911.

40. The respondent relief on the case of Karino Ole Nakuro & 5 others Vs Ngati Farmers Co-op. Society & 7 others [2015] eKLR in which the court had the following to say while directing that the parties to file an application for interpretation of judgment.

> "I can see where both Prof. Ojienda on one side and Mr. Karanja and Mr. Imende on the other side, derive their respective positions. The judgment did not particularly specify that judgment was entered for the maasai in respect of certain specified portions, but decree did, and it is open to conjecture whether the decree as extracted agrees with the judgment. There is of course controversy as to how the judgment of Rimita J. ought to be interpreted. But I do not think that the proper way of resolving that controversy is by filing a constitutional petition seeking, especially, declarations of adverse possession over the same suit properties that were subject to litigation before. The avenue is to file an appropriate application for interpretation of the judgment and/or decree before the court that issued that judgment and or decree. The question is in fact well answered by the provisions of Section 34 of the *Civil Procedure Act*."

41. The respondent urged the Honourable court to be persuaded by the aforementioned authority and Section 34 of the Civil Procedure Rules and find that the trial court was within its inherent residual powers to interpret its judgment and render the ruling accordingly.

42. On the issue whether the interpretation of the trial court's judgment was functus officio and amounted to varying and quashing of the judgment, the respondent submitted that the trial court interpreted the judgment as requested and determined the respondent's appropriate share as half share and no further evidence was taken nor anything outside the ambit of the court and that the judgment was considered. The respondent argued that the court cannot be said to have been funcus officio. The respondent relied on Local Authorities Pensions Trust (Laptrust) Vs Chairman Retirement Benefits

appeal Tribunal & 2 others [2019] eKLR in which the Court of Appeal in dismissing an appeal against Tribunal's interpretation of its judgment had the following to say:

> " The scope of the functus officio doctrine was explained in the Raila Odinga & 2 Others case (supra) which made the following pronouncement:
>
> "It is a legal and constitutional obligation of any court, from the basic level to the highest level, to preserve and protect the adjudicatory forum of governance, and to uphold decorum and integrity in the scheme of justice-delivery. It follows that the court's jurisdiction, in oversight of the question of conscientious and dignified management of the Judicial process, and in safeguarding the scheme of the rendering of justice, will not be exhausted until the court is satisfied and it declares as much. Even though, therefore, the court concluded the hearing of the petition by delivery of judgment, its jurisdiction for upholding the dignity of the judicial process, and in relation to the proceedings of the petition, remained uncompromised. The court therefore could as it did issue summons in the cause of its orders made during the pendency of the main hearing.
>
> This court in the Telkom case (supra) explained it further, thus; "The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit based decision re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in Jersey Evening Post Limited vs A1Thani [2002] JLR 542 AT 550: also cited and applied by the Supreme Court; "A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality."

43. The respondent submitted that failure to interpret the judgment would bring confusion as to whether the respondent being the registered owner was merely holding the suit land in trust for the appellants or whether he still maintained a stake therein in as much as declaration of trust was made and that as such the judgment of the Honourable court had not been perfected.

44. The respondent submitted that it is not strange for the courts to apportion the stake in trusts and consequently that the trial court properly defined the appropriate shares/rights of the parties as requested in its interpretation and apportioned half share for each party.

45. Similarly, the respondent relied on Mukangu V Mukangu (Environment & Land case 88 of 2015 [2022]KEELC 14787 (KLR) (16 November, 2022 (judgment) and Gladys Njeri Muhura Vs Lispa Wagaturi Muthiguro [2019] eKLR where the court ordered for subdivision of the suit land upon declaration of trust and apportioned each of the parties half share. The respondent further submitted that the trial court was right in doing so as the contrary would have rendered the respondent vagabond and occasion immense hardship on him since the suit land is his only source of income and that that is why the trial court declined to grant prayer (b) of the appellant's plaint in its judgment which could have totally stripped the respondent of all the rights in regard to the suit land since it sought an order that the respondent does transfer the whole of the suit land to the appellants.

46. The respondent submitted that in view of the foregoing, the instant appeal is unmerited and urged the Honourable court to dismiss it with costs to the respondent.

Analysis And Determination

47. I have perused the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusion reached by the learned magistrate was justified on the basis of the evidence presented and the law. The issue for determination in this appeal as I can deduce from the grounds of appeal are-;

    i. Whether the trial court had powers to review its judgment/ruling and or orders.

    ii. Whether the trial court had powers to interpret its own judgment.

    iii. Whether a court can grant orders that are not sought in the pleadings.

    iv. Whether the appeal is merited or not.

Whether the trial court had powers to review its judgment/ruling or orders

48. In this case, the respondent sought orders to review the orders that were made by the trial magistrate vide the judgment delivered on 12th March 2020. Section 80 of the *Civil Procedure Act* gives power of review while order 45 of the Civil Procedure Rules sets out the rules.

49. Section 80 of the *Civil Procedure Act* provides as follows;

> " 80. Any person who considers himself 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 a 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'.

50. Order 45 Rule 1 of the Civil Procedure Rules states as follows-;

> " 1(1) 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 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."

51. From the above provisions of the law, the rules in my view restrict the grounds of review and lays down this jurisdiction and scope of review limiting it to the following grounds-;

    i. 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

    ii. On account of some mistake or error apparent on the face of the record, or

    iii. For any other sufficient reason and whatever the ground, there is a requirement that the application has to be made without unreasonable delay.

52. In the application dated 5th October 2020, the respondent herein principally sought for orders that:

    " The court does order for the lift, discharge, and or set aside inhibition orders and any other encumbrances lodged against LR. NO. Abogeta/U-Kithangari/2911"

53. In the application dated 4th November, 2020, the respondent sought for orders inter alia, that-;

    " b) That the court does interpret its judgment delivered on the 12th March, 2020 particularly whether there was an order for registration of a trust and whether the declaration of trust excluded the defendant from the trust.

    c. That the court does review its judgment dated 12th Marcy, 2020 in light of prayer (b) above.

54. Upon considering the two applications which were opposed by the appellants herein, the court allowed the applications and made the following specific orders-;

    1. The law firm of Muchomba Law advocates is hereby granted leave to come on record for the defendant after judgment of 12th March, 2020 as herein above (supra).

    2. The court does interpret and review its judgment of 12th March 2020 as herein above (supra)

    3. The court does issue an order lifting, setting aside and or discharging inhibition orders or any encumbrances placed on LR No. Abogeta/U-Kithangari/2911.

    4. The defendant does sub-divide the land parcel No. Abogeta/u-kithangari/2911 into two equal portions and effect transfer of one half to the plaintiffs.

    5. The plaintiffs to avail the defendant all the necessary documents as may be required to effect the transfer in (4) above failure to which the court administrator to sign such documents."

55. As indicated above, a review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed. The underlying object of this provision is neither to enable the court to write a second judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.

56. Where an applicant in an application for review seeks to rely on the ground that there is discovery of new and important evidence, one has to strictly prove the same. In the case of Stephen Wanyoike

Kinuthia (suing on behalf of John Kinuthia Marega (deceased) – vs Kariuki Marega & another (2018) eKLR the Court of Appeal stated as follows;

> " We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation."

57. In the same breadth the Court of Appeal in the case of Rose Kaiza – V- Angelo Mpanju Kaiza (2009 eKLR held that not every new fact will qualify for interference of the judgment.

58. On whether there was an error apparent on the face of record, in Muyodi Vs Industrial and Commercial Development Corporation & another EALR [2006] 1EA 213 and cited in Muhamed Mungai Vs Ford Kenya Election and Nomination Board and another Nairobi High Court Judicial Review Misc. application No. 53 of 2013 the court inter alia went on to state.

> " For one to succeed in having an order reviewed for mistake or error apparent on the record, he must demonstrate that the order contains a mistake that is there for the whole world to see. It is not enough for an applicant to say that he is dissatisfied with the decision or that the same is wrong. Such opinion ought to be the subject of an appeal. The applicant before us has not established that there is an error or mistake in decision he has asked us to review. He has not even pointed out what in his opinion is the error or mistake in that decision. He has just told us to review the court's decision. That is not good enough, his dissatisfaction with the decision aforesaid notwithstanding. We therefore find no reason for reviewing the decision on the said ground."

59. Further in Attorney General & O'rs Vs Boniface Byanyima HCMA NO. 1789 OF 2020 the court citing Levi Outa Vs Uganda Transport company [1995] HCB 340 held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be defined and capable of ascertainment.

60. The term 'Mistake or error apparent" by its very connotation signifies an error which is evident per se for the record of the case and does not require detailed examination, scrutiny and elucidation either or the facts of the legal position. If an error is not self evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put differently, an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision. In this case, there was nothing that had been pleaded by the respondent herein to denote an error apparent on the face of the record since the judgment had been granted in terms sought by the appellants in their plaint, save for the prayers that were rightly declined by the court. It is therefore my opinion that what was required of the learned trial magistrate was merely to interpret its judgment as it did, and not to review it by granting reliefs such as an order for subdivision of the suit land and transfer of a portion to any party. These were prayers that were never sought by any of the parties in their pleadings.

Whether the trial court had powers to interpret its judgment as it did

61. Section 99 of the *Civil Procedure Act* provides that-;

> " Clerical or arithmetical mistakes in judgments, decrees, orders, or errors arising therein from any accidental slip or omission may at anytime be corrected by the court either of its own motion or on the application of any of the parties."

62. The judgment of the trial court delivered on 12th March 2020 was pursuant to the plaint filed by the appellants on 25th March 2019. Prayer (a) of the said plaint, and which was granted by the trial court was for an order of declaration that the respondent holds the suit parcel of land in trust for the appellants and Evelyn Gakii and Fedelia Muthoni. A reading of the prayers in the plaint shows that there was no order for sub-division. Indeed, even the respondent did not file a counterclaim seeking for subdivision. In my view, therefore, the trial magistrate in the course of interpreting its judgment as permitted by law, granted an order that was not sought and that order was not founded on the pleadings.

63. In the case of Caltex Oil (Kenya) Limited Vs Rono Limited [2016] eKLR, the Court of Appeal held that a court has no powers to grant an order that is not specifically sought in the pleadings before it. The logic behind that positon is clear enough, a party is bound by his/her pleadings and issues for determination by the court flow from the pleadings. Pleading go to the very core of justice since they give parties notice of the case they have to meet and with it the opportunity to prepare to answer the case.

64. It has to be remembered that the learned magistrate had already rendered himself on the case following evidence taken from the parties during the hearing. In so doing, the court became functus officio in so far as the matter was concerned. The only exception is when there was a proper application for review or for correction of the judgment under section 99 and 100 of the *Civil Procedure Act*. By going back to reconsider the case and delivering a ruling with further orders in addition to those given in the judgment, the learned magistrate misdirected himself and wrongly exercised discretion with the result that there was injustice to the appellants who are now saddled with an order which was not sought in the plaint, and which the parties were not given an opportunity to exhaustively address prior to its issuance. To the extent that the learned magistrate ordered for the sub division of the suit land into two equal portions and transfer to be effected to the appellants in respect of one half thereof, this appeal succeeds.

65. The court has however noted that the trial court while interpreting its judgment and decree dated 12th March 2020, held that it was not the intention of the court to issue an order that excluded the respondent and making him look as if he was merely holding the land in trust for the appellants. Accordingly, the declaration that the respondent herein holds parcel No. Abogeta/U-Kithangari/2911 in trust for himself and the appellants stands. The same also applies to the order no (3) for cancellation of encumbrances that did not form part of the judgment.

66. In the result, I allow this appeal and set aside the prayers (4) and (5) of the ruling delivered by the subordinate court on 10th December, 2020. The other prayers to wit (1), (2) and (3) are not affected by this appeal.

67. Considering the relationship of the parties who are close family members, I order that each party shall bear their own costs.

68. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF MARCH 2023.

In The Presence Of

C.A Kibagendi

Miriti for respondent

Muthomi Njeru for appellants

C.K YANO

JUDGE