



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCC No. 117 OF 2017**

**MESHAK SHAMALA MASINDE.....PLAINTIF**

**VERSUS**

**BONIFACE MASINDE SAGULA.....1<sup>ST</sup> DEFENDANT**

**MUHATIA ANDIKA.....2<sup>ND</sup> DEFENDANT**

**JOTHAM ANDIKA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This matter was referred to court annexed mediation at the request of parties. The mediation was successful and the parties executed a mediation settlement agreement dated 19<sup>th</sup> December 2019. The terms of the agreement were as follows:

*1. The parties have agreed that the government land surveyor to be invited to go to the site and confirm the boundary under dispute between Mr, Meshack Shamala Masinde - Land R. No South Kabras/Shamberer/494 and Mr. Jotham Andika Anunda L.R. NO. South Kabras/Shambere/694.*

*2. The parties have agreed that Mr. Meshack Shamala Masinde will bear the costs for Survey.*

*3. The dispute between Meshack Shamala Masinde and Bonface Masinde Sagula is about completion of the uncompleted purchase price and have agreed that instead of Meshack Shamala Masinde giving Mr. Bonface Sagula 2 acres, he will give him 1 ½ acres to cover the purchase price paid as per agreement.*

*4. The case or dispute in question before this court be deemed as fully settled and no appeal against the settlement.*

2. The settlement was endorsed by the court and judgment entered in terms of the settlement. The first defendant later filed Notice of Motion dated 27<sup>th</sup> October 2021, seeking the following orders:

1. [Spent]

2. THAT the judgment herein be reviewed to the extent that the orders should read –

*1. The parties have agreed that the government land surveyor to be invited to go to the site and confirm the boundary under dispute between Mr, Meshack Shamala Masinde 694 and Jotham Andika Anunda - land R No. South Kabras/Shamberere/1942.*

*2. The parties have agreed that Mr. Meshack shamala Masinde will bear the costs for survey.*

*3. The dispute between Meshack shamala Masinde and Bonface Masinde Sagula is about completion of the uncompleted purchase price and have agreed that instead of Meshack Shamala Masinde giving Mr. Bonface Sagula 2 acres, he will give him 1 ½ acres to cover for the purchase price paid as per the agreement.*

*4. The case or dispute in question before this Court be deemed as fully settled and no appeal against the settlement.*

5. THAT any other order that this Court may deem just and expedient to grant.

3. The application is supported by an affidavit sworn by the first defendant. He deposed that there is an error on the order of the court as the land in question is L.R No. South Kabras/Shamberere/1942. He urged the court to rectify the error so that a decree that does not conflict with his claim may be extracted.

4. Although served, the plaintiff did not respond to the application despite being given time to do so. Consequently, the applicant relied on the material on record and urged the court to allow the application.

5. I have considered the application and the supporting affidavit. The applicant seeks review of the order issued pursuant to the settlement agreement. The law relating to review is found at **Section 80** of the **Civil Procedure Act** which provides:

*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.*

6. Further provisions on review are found at **Order 45 Rule 1** of the **Civil Procure Rules** which provides as follows:

*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.*

7. The applicant contends that there is an error apparent on the face of the record, the error being that the plot number referred to at clause 1 of both the settlement agreement and the ensuing court order should read L.R No. South Kabras/Shamberere/1942.

8. The law is that to qualify for review under the limb of an error apparent on the face of the record, the error must be self-evident and must not require detection by a long-drawn process of reasoning. See Nyamogo & Nyamogo vs. Kogo [2001] EA 174 and Mary Wambui Njuguna vs. William Ole Nabala & 9 others [2018] eKLR.

9. I have perused the plaint filed herein and I note that the suit property stated in the plaint is L.R No. South Kabras/Shamberere/1942. In the circumstances, I find merit in the application.

10. Consequently, the judgment given herein pursuant to the mediation settlement agreement, is hereby reviewed and the final orders will now read as follows:

**1. The parties have agreed that the government land surveyor to be invited to go to the site and confirm the boundary under dispute between Meshack Shamala Masinde - L.R No. South Kabras/Shamberere/1942 and Jotham Andika Anunda - land R No. South Kabras/Shamberere/694.**

**2. The parties have agreed that Mr. Meshack Shamala Masinde will bear the costs of survey.**

**3. The dispute between Meshack Shamala Masinde and Bonface Masinde Sagula is about completion of the uncompleted purchase price and have agreed that instead of Meshack Shamala Masinde giving Mr. Bonface Sagula 2 acres, he will give him 1 ½ acres to cover for the purchase price paid as per the agreement.**

**4. The case or dispute in question before this Court be deemed as fully settled and no appeal against the settlement.**

11. Each party shall bear own costs of Notice of Motion dated 27<sup>th</sup> October 2021 and own costs of the suit.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 1ST DAY OF FEBRUARY 2022.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the defendants/applicants

No appearance for the plaintiff/respondent

Court Assistant: E. Juma