REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 530 OF 2012

DANSON K CHEBOI & 5 OTHERS ..... PLAINTIFFS

(Suing on their own behalf and in a representative capacity on behalf of Kaptobon Clan members numbering at least 84)

VERSUS

CHESANG KIPTALAI & 10 OTHERS ..... DEFENDANTS

(Suing on behalf of Kaptabon Clan)

RULING

[NOTICE OF MOTION DATED 16TH SEPTEMBER 2020]

1. The Plaintiffs moved the court through the notice of motion dated the 16th September, 2020 that is brought under **Articles 22, 23, 28, 40, 43, 45, 48, 50, and 159 of the Constitution of Kenya**, **Sections 1A,1B, and 3A of the Civil Procedure Act** and **Order 45 Rules 1, 2, and 5 of the Civil Procedure Rules**, seeking for the following orders, *inter alia*:

i. That the firm of Kenei & Associates Advocates LLP be granted leave to come on record on behalf of the Plaintiffs.

ii. That there be a stay of the ruling of this Court delivered on 29th September, 2017 and that the Defendants be restrained from interfering with the Plaintiffs' possession, occupation and use of the parcels of land known as ***Kiborok, Cherelabei*** and ***Kapmigandi***, pending hearing and determination of this application.

iii. That the ruling of this Court delivered on 29th September, 2017 be reviewed thereby dismissing the Defendants' Preliminary Objection and fixing the matter for hearing and determination on its merits.

2. The application is based on the nine **(9)** grounds on its face and supported by the affidavit of **Danson K. Cheboi**, the 1st plaintiff, sworn on the 16th September, 2020. It is the plaintiffs case that their suit was dismissed through the ruling of 29th September, 2017 for being *res judicata*. That there is an error apparent on the face of that ruling for holding that the issues in this suit are similar to those in **SRMCC Land Case No, 62 of 1986** and **Eldoret HCCA No. 3 of 1987**. That the latter two suits dealt with only one parcel of land known as ***Kapkira***. That the other parcels of land are under the possession, occupation and use of the plaintiffs but the defendants are using the 2017 ruling to encroach onto them. That the error in the ruling was occasioned by the courts failure to understand the difference between Kapkira land from the other parcels. That there is therefore need for the court to receive evidence from the elders who made the initial award before arriving at a determination on the application.

3. The defendants opposed the application through the replying affidavit sworn by **James Yano Kiptalai** on 28th October, 2020 in which he *inter alia depones that;*

i. There is no error apparent on the face of the record to necessitate the grant of orders of review.

ii. The application for review has been brought 3 years after the delivery of the ruling that forms the basis of the review and is therefore untenable.

iii. That the issues raised in the application are matters to be determined in the pending appeal.

iv. That the defendants are in actual occupation of the suit lands, and the prayer for injunction cannot issue against them.

v. That the defendants land is separated from that of the plaintiffs by a 1.5 kilometres strip of land belonging to Kaptirot, Kapchemwei and Kamurwonget clans and that the claim of encroachment cannot arise.

vi. That the lands known as Kiborok, Cherelabei and Kamigandi are part and parcel of the disputed land, but the plaintiffs have numerously attempted to use names of smaller rivers and villages within the land to found new claims in the already heard and determined matter.

4. The learned counsel for the Plaintiffs filed their submissions dated 2nd March 2021 in support of the application. It is their submission that the gist of the instant suit is a claim over four parcels of land known as Kiborok, Cheralabei, Kapmigandi and Kapkira. That there is an error apparent on the face of the ruling of 29th September, 2017 and the same can be gleaned from the fact that the court indicated that the issues in the instant suit, and the issues in **Eldoret SRM Land Case No. 62 of 1986** and **Eldoret HCCA No. 3 of 1987** are similar. That the Plaintiffs contend that the three parcels of land known as Kiborok, Cherelabei and Kapmigandi have never been adjudicated upon in the previous suits, and therefore there is no bar to the instant suit in relation to those parcels of land. That the error apparent in the ruling that the Plaintiffs wishes to review is self-evident, such that a cursory look at the ruling and the pleadings is sufficient to establish it, and no further enquiry is necessary. The learned counsel relied on the case of ***Muyodi vs. Industrial and Commercial and Development Corporation &Another [2006] 1 EA 243***, where the Court of Appeal described an error apparent on the face of the record as follows:

> **"In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 the Court said that an error apparent on the face of the record cannot be defined precisely and 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 a 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 a 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."**

The counsel cited the decision in **CHANDRAKHANT JOSHIBHAI PATEL V. R (2004) TLR, 218**, where it was held that an error stated to be apparent on the face of the record:

> **"...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reading on points on which may be conceivably be two opinions"**

The learned counsel urged this Court to apply the overriding objectives to facilitate the just, expeditious, proportionate, and affordable resolution of disputes. That to allow this application for review would uphold the provisions of **Article 50(1) of the Constitution of Kenya**, which provides for the right to fair hearing, and **Article 48**, which places a duty on the Court to facilitate the right of access to justice. That the Plaintiffs conceded that their application for review has been brought 3 years after the ruling in issue was delivered, but submitted that notwithstanding, the Defendants have not shown what prejudice would be occasioned to them. That to disallow their application for review on the basis of the delay would be placing reliance on a technicality which is a contravention with the provisions of **Article 159 of the Constitution of Kenya**.

5. The learned counsel for the Defendants filed their submissions dated the 5th February 2021. They submitted that orders of review can only be issued in the circumstances set out in **Order 45 Rule 1 of the Civil Procedure Rules, 2010**, that were discussed in the case of ***Republic vs Public Procurement Administrative Review Board & 2 others [2018] eKLR***. The learned counsel argued that the Plaintiffs have not shown or proved the existence of an error apparent on the face of the ruling in issue herein, and submitted that the Court was right in making the determination that the issues raised in the instant suit are similar to the issues raised in **SRMC Land Case No. 62 of 1986** and **Eldoret HCCA No. 3 of 1987**. The counsel cited the decision in **Republic vs Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR**, where the court quoted the case of ***Attorney General & O'rs v Boniface Byanyima***, the court citing ***Levi Outa v Uganda Transport Company***, which 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 definite and capable of ascertainment."**

The court went ahead and stated that:-

> **"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... "**

The counsel urged the court to dismiss the Plaintiffs' application noting that they failed to attach copies of the judgment in **SRMC Land Case No. 62 of 1986** and **Eldoret HCCA No. 3 of 1987**. That although the Plaintiffs have not raised the discovery of a new and important matter or evidence as the basis of this application for review, that ground would still have failed as was held in the case of **Executive Committee Chelimo Plot Owners Welfare Group & 288 Others vs Langat Joel & 4 Others (Sued as The Management Committee of Chelimo Squatters Group) [2018] eKLR,** where the Court quoted the case of ***Evan Bwire V Andrew Aginda Civil Appeal No. 147 of 2006*** cited in the case of **Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR,** where the Court of Appeal stated that:-

''An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, 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 due diligence."

The learned counsel urged the court to dismiss the Plaintiffs' application noting that allowing it would have the effect of reopening the claim, yet this court has not been furnished with reasons to review the orders. The defendants counsel urged the court to find that the delay of 3 years before filing the application is unreasonable, and that no explanation for the delay has been offered by the Plaintiffs. The counsel urged this Court to find that the delay was prejudicial to the defendants since it is a deliberate attempt by the Plaintiffs to delay the course of justice. The counsel relied on the case *of* ***Judiciary of Kenya vs Three Star Contractors Ltd [2020] eKLR***, where the court stated as follows:

"The instant motion was filed on 2nd November 2020. In other words, the Respondent/Applicant took about 3 years and 8 months from the date of judgment to file the instant motion. I have carefully perused the supporting affidavit sworn by Mr. Ashoya Biko and it is clear that there is no single paragraph the deponent offered to explain why it took the Respondent/ Applicant more than three years to file an application for review. The record shows the advocates from both sides were present when this court delivered its judgment on 31st March, 2017. In the absence of any explanation for the delay for 3 years 8 months, I am convinced that the instant motion was filed after unreasonable delay hence it should not be entertained. "

6. The following are the issues for the court's determinations;

(a) Whether the plaintiffs have established the existence of an error apparent on the face of the ruling (record).

(b) Whether the plaintiffs filed their application without unreasonable delay.

(c) Who pays the costs of the application.

7. I have considered the grounds on the application, the affidavit evidence, the submissions by the learned counsel, the superior courts decisions cited, the record and come to the following findings;

a. That **Section 80 of the Civil Procedure Act, Chapter 21 of Laws of Kenya**, and **Order 45 of the Civil Procedure Rules** provide the jurisdiction and the scope of orders of review. That **section 80 of the Civil Procedure Act** provides as follows:

"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."

That in the case *of* ***Richard Francis Malelu v Odhiambo Asher & Another [2020] eKLR***, the court made the following observation regarding the contents of **Section 80 of the Civil Procedure Rules**:

"It is clear that section 80 of the Civil Procedure Act, unlike the provisions of Order 45 aforesaid, does not prescribe the conditions upon which an application for review may be granted. In the case of Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs. Firestone EA (1969) Limited Civil Appeal No. 172 of 1998, the Court of Appeal held that section 80 of the Civil Procedure Act enables a court to make such orders on review application which it thinks just so that the words "or any sufficient reason" as used in Order 44 Rule 1 of the Civil Procedure Rules are not ejusdem generis with the words "discovery of new and important matter" etc. and "some mistake or error apparent on the face of the record" and that those words extend the scope of the review. Accordingly, the said court held that there is no reason why "any other sufficient reason" need be analogous with the other grounds in the Order because clearly section 80 of the Civil Procedure Act confers an unfettered right to apply for review."

That **Order 45 Rule 1(b) of the Civil Procedure Rules** provides the circumstances and conditions to be met for the grant of orders of review as follows:

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 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;
- 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.

b. That the application herein is essentially based on the alleged fact that there is an error apparent on the face of the ruling delivered on the 29th September, 2017. That in an attempt to couch a definition for an error apparent on the face of the record, I am persuaded by the lengthy discussion that the Court had in ***Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] eKLR*** as follows:

"In Attorney General & O'rs v Boniface Byanyima HCMA No. 1789 of 2000, the court citing Levi Outa v 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 definite and capable of ascertainment." (emphasis mine)

The Court went on to make the following observation…

"17. **There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'**. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out, see the decision in **Thungabhadra Industries Ltd. v. Govt. of A.P.1**.

18. The term **"mistake or error apparent"** by **its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or 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.** To put it 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**." ***(emphasis mine)***

(c) That in the instant application, the Plaintiffs would be required to engage in a long debate or a long process of reasoning or in elaborate argument to establish the error that they allege exists in the ruling of this Court. I am convinced that the purported error cannot be said to be self-evident, thus it cannot rightfully be termed as an error apparent on the face of the record. I find that although the Plaintiffs have couched their application as one that seeks review orders, they in actual sense seem to be aggrieved by the fact that the court could have taken a different view instead of coming to the conclusion that the subject matter in the instant suit is the same in **SRMC Land Case No. 62 of 1986** and in **Eldoret HCCA No. 3 of 1987**. The Plaintiffs are also aggrieved that after the aforementioned determination, the Court went on to find that the instant suit was *res judicata*. I find that an appeal of the ruling of this court issued on 29th September, 2017 would be the appropriate route for the Plaintiffs to ventilate their grievances. That indeed the record shows that the plaintiffs filed a Notice of Appeal dated the 13th October, 2017 and lodged with the Deputy Registrar on the 24th October, 2017. That they should therefore follow up on their appeal with the Court of Appeal as this Court is *funtus officio*.

(d) That to show the incorrectness of the determination of the court that resulted in the dismissal of the Plaintiffs' claim for being *res judicata,* it would be necessary to examine the pleadings and the judgments of the Court in **SRMC Land Case No. 62 of 1986** and **Eldoret HCCA No. 3 of 1987**, which pleadings and decisions have not been annexed to the application. That even if the said pleadings and decisions had been availed to the court, I am of the view that their examination would amount to consideration of extraneous matters in a long process outside the scope required in an application for review, which should not be necessary in a matter where there is an error apparent on the face of the record.

(e) That the second issue for determination in the instant application is whether or not the Plaintiffs have provided the court with an explanation as to why they filed this application for review 3 years after the delivery of the ruling in issue. The Plaintiffs submitted that they are entitled to the orders of review since the Defendants have not outlined the prejudice that they will suffer if the application for review filed three **(3)** years after the date of the ruling is allowed. That the provisions of the law, specifically **Order 45 Rule 1 (b) of the Civil Procedure Rules**, do not require the respondents in an application for review, like the Defendants herein, to show what prejudice will be occasioned to them. That however the applicants, like the Plaintiffs herein, are required by the law to file their application for review, and to show the court that they did so without unreasonable delay. The Court of Appeal in ***Afapack Enterprises Limited v Punita Jayant Acharya (Suing as the Administrator of the Estate of the late Suchila Anatrai Raval) [2018] eKLR*** made the following observation while upholding a decision to dismiss an application for review that was brought 9 months after the decision was entered:

"It is also an important requirement that the application for review should be made without unreasonable delay. Although the appellant attributed his predicament to mistake of his counsel, what militated, against the exercise of discretion by the Judge in the appellant's favour was clearly the appellant's own conduct. The Judge found that the appellant "has not been diligent enough in pursuing its rights;" and that the appellant was guilty of inordinate delay in making the application for review. In the words of the Judge:

> **"An application for review ought to be made without unreasonable delay. Here the delay is spanning a period of nine months. Ordinarily nine months delay in an application for review, if no reasonable explanation is offered is inordinate." (emphasis mine)**

That in the circumstances of this case, I find that the Plaintiffs application for orders of review must fail since no reasons were furnished to the court to explain the 3 years delay in filing of the application, contrary to the requirement of **Order 45 Rule 1(b) of the Civil Procedure Rules**, that requires applications for orders of review to be filed without unreasonable delay.

8. That from the foregoing, the Plaintiffs application dated the 16th September, 2020 is without merit and is dismissed in its entirety with costs to the Defendants.

DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF MAY, 2021

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF;

PLAINTIFFS: ABSENT

DEFENDANTS: ABSENT

COUNSEL: MR. KENEI FOR THE PLAINTIFF

COURT ASSISTANT: CHRISTINE