REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 66 OF 2015

CONSOLIDATED WITH 36 OF 2015

AMIR AHMED AND 2 OTHERS.....PLAINTIFFS

VERSUS

KATANA CHAI AND 55 OTHERS.....DEFENDANTS

RULING

1. Before me for determination are two applications. By the 1st application dated 15th July 2019, the 197 Defendants herein pray for an order that this Court be pleased to review and/or set aside its Judgment delivered herein on 9th April 2019.

2. The application which is supported by an affidavit sworn by the 31st Defendant Said Abeid Said is premised inter alia on the grounds that:-

a) On 9th April 2019, this Court delivered Judgment dismissing the Defendants' Originating Summons and directing them to vacate and demolish any unauthorized structures erected on the suit property within 45 days;

b) In arriving at the Judgment, the Court relied on Entry No. 10 of the Certificate of Title and the evidence of the 1st Plaintiff to the effect that the Plaintiffs had purchased the suit property from the Estate of Said Mbarak Said;

c) The Defendants have now come into possession of material indicating that the suit property was never at any single time owned by the said Estate and the Succession Cause No. 331 of 2009 captured at Entry No. 7 of the Certificate of Title relates to a different Estate;

d) The Defendants have in their possession new evidence showing that the Plaintiffs obtained authority to pursue this suit fraudulently and that the Sale Agreement was executed by an illegible person and hence the same and the subsequent transfer is illegal *ab initio****;***

e) The Defendants have further learnt that the 1st Plaintiff only obtained ownership of the suit property on 28th March 2014 and not 2009 as he alleges.

f) There is also evidence to show that prior to the transfer of the property to the Plaintiffs, no rates Clearance Certificates were issued by the County Government of Kilifi and the suit property measuring 339 acres was transferred for a mere Kshs 5,000,000/-.

g) The Defendants did not participate in the proceedings before as they were never issued with any Summons to enter appearance or file a defence and they could not therefore have discovered the evidence sought to be introduced through this application with reasonable diligence;

h) Even if the evidence aforesaid could have been discovered with reasonable diligence, the circumstances of this case including the admission by the Learned Judge that there are 150 households, 540 houses, churches, mosques and schools are sufficient to warrant a consideration of the new evidence;

i) In addition, there are a number of errors apparent on the face of the record including the fact that eviction orders had been sought against 55 and not the 197 Defendants; a number of Defendants were deceased at the time of the hearing and no substitution was made; and the fact that the eviction orders did not comply with the mandatory provisions of Section 152 a(1) of the Land Act; and

j) The application has been brought without inordinate delay and therefore no real prejudice will be suffered by the Respondents if the

application is allowed. Any delay, if at all, was as a result of lack of knowledge of the Judgment by the Defendants which delay is excusable.

3. In a lengthy Replying Affidavit to the 1st application sworn and filed herein by the 1st Plaintiff Amir Marei Ahmed on 14th October 2019, the Plaintiffs aver that the application is misguided and a sham as the same is introducing new matters which did not form part of the Defendants' claim.

4. The Plaintiffs aver that the Defendants claim was for adverse possession and not ownership and that they are therefore estopped from challenging the proprietorship of the suit property once they advance their claim based on the prescriptive right of adverse possession. The Plaintiffs assert that the claim for adverse possession is otherwise extinguished the moment the Defendants acknowledge that they are not certain of the registered owner of the suit property.

5. The Plaintiffs further aver that the Defendants have not attempted to demonstrate and/or proved the challenges they faced in accessing and adducing the additional evidence which they intend to introduce through their application. The Plaintiffs further assert that the contention by the Defendants that there were errors on the face of the record are not true and aver that the issues listed do not qualify as ground for review as provided by law.

6. In addition to their response to the Defendants' application, the Plaintiffs have also filed the 2nd application herein dated 30th July 2019. By the said application, the Plaintiffs urge the Court to issue an order restraining the Defendants from re-erecting the already demolished structures and/or erecting new ones on the suit land.

7. The Plaintiffs' application, again supported by an Affidavit sworn by the 1st Plaintiff is premised on the grounds inter alia, that:-

> ***a) This Court granted orders of stay of execution ex-parte for a period of 14 days;***
>
> ***b) The effect of the said order was to stop the process of execution of the Judgment but were not a license for the defendants to erect new structures on the suit land; or to re-erect those that had been brought down in the process of execution which had commenced; and***
>
> ***c) The Defendants have on the contrary embarked on a process of rebuilding and erection of new structures on the suit property.***

8. In response to the Plaintiffs' application, the Defendants through a Replying Affidavit sworn on their behalf by the 31st Defendant and filed herein on 23rd October 2019 aver that contrary to the Plaintiffs' contentions, none of the Defendants herein have ever re-erected any demolished structures. They aver that those whose houses were demolished are now living in Kadzhoni Primary School where they sought refuge.

9. I have perused and considered the two applications and the responses thereto. I have equally considered in detail the written and oral submissions as canvassed before me by the Learned Advocates for the parties as well as the authorities to which they referred me.

10. In regard to the 1st application Section 80 of the Civil Procedure Act (Cap 21 of the Laws of Kenya) provides as follows:-

"Any person who considers himself aggrieved-

> ***a) By a decree or order from which an appeal is allowed by the Act, but from which no appeal has been preferred….***
>
> ***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"***

11. In this regard, it was the Plaintiff's case that the Defendants had preferred an appeal to the Court of Appeal against the decree or order which by this application they now apply to review. Accordingly and in terms of Section 80 of the Civil Procedure Act aforecited, the Plaintiffs submitted that the Defendants having preferred the Appeal were ineligible to make this application and that the Court had no jurisdiction to entertain the same.

12. In support of that contention, the Plaintiffs have annexed to their Replying Affidavit a Memorandum of Appeal and a Letter dated 15th July 2019 addressed to the Registrar of the Court of Appeal seeking to withdraw an application before that Court as annextures "AMA1" and "AMA2" respectively.

13. Having perused the two annextures, I am in agreement with the Defendants that those documents refer to an Appeal filed by the Defendants in regard to the decision to strike out their Statement of Defence made by this Court on 5th December 2018 and not in regard to the Judgment delivered by this Court on 9th April 2019 to which there is so far no appeal preferred.

14. That being the case, this Court is properly seized of the Defendant's application for review. In that respect, Order 45 Rule 1 of the Civil Procedure Rules sets out the grounds upon which this Court can consider an application for review 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 ben 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."

15. A clear reading of the above provisions reveal that while Section 80 of the Civil Procedure Act generally grants the Courts the mandate to review its decisions, Order 45 of the Civil Procedure Rules sets out the parameters within which those powers can be exercised. The jurisdiction and scope of review is thus limited under Order 45 to the following grounds:-

a) Where there is 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;

b) On account of some mistake or error apparent on the fact of the record, or;

c) For any other sufficient reason.

16. As I understood it, the discovery of any new matter or evidence necessarily has to be in reference to an important or relevant material to such an extent that if it had been brought on record at any time before the Judgment was delivered or the decree issued, it would have had a material impact and could have altered the decision.

17. Furthermore, the absence of such important matter or evidence at the time of the decision must not be the result of some negligence on the part of the applicant. That must be the reason the applicant is required by law to strictly prove that such matter or evidence was not within his knowledge or could not be adduced even after exercising due diligence.

18. In their application before me, the Defendants assert that in the Judgment delivered herein on 9th April 2019, this Court relied on an Entry No. 10 in the Certificate of Title to the effect that the Plaintiffs are the registered proprietors of the suit property. It is their case that they have since come into possession of material indicating that the suit property was never owned by the Estate of one Said Mbarak Said from whom the Plaintiffs' purported to have purchased the same.

19. The Defendants further assert that they have since come across evidence indicating that the vendor who sold the land to the Plaintiffs had no Letters of Administration and thus was ineligible to execute the Sale Agreement. They have also since discovered that contrary to the Plaintiffs' assertions that they have been the owners of the property since the year 2009, the Plaintiffs only obtained ownership thereof of 28th March 2014 upon payment of a Paltry Kshs 5,000,000/- to the transferee.

20. As it were, the Defendants have not told this Court what efforts they made and the challenges they faced in accessing their alleged additional evidence prior to the making of the decision herein.

21. Indeed while they now contend that the Plaintiffs are not the rightful owners of the suit property, the very basis for the Defendants existence in these proceedings is their own claim for adverse possession against the Plaintiffs. In their Originating Summons filed herein on 10th March 2015, they claim to have occupied the suit property registered in the Plaintiffs' name for a period exceeding 12 years.

22. They accordingly urge the Court to have themselves registered as the proprietors of the suitland on the ground that by virtue of their continuous and uninterrupted occupation, the Plaintiffs' title thereto has since been extinguished by operation of the law.

23. In this respect, it is my considered view that the Defendants application in this regard is completely misconceived and unhelpful to their cause. They cannot be allowed to approbate and reprobate. The moment they contend that they are not certain as to who the registered owner of the suitland is, their claim for adverse possession against the Plaintiffs disintegrates and since they have not challenged the Plaintiffs' title to their pleadings herein, they nolonger have any cause of action against the Plaintiffs.

24. At paragraph 40 of the Supporting Affidavit of Said Abeid Said, he deposes on the advise of his Counsel on record that the following errors are also apparent on the face of the record:-

a) Defendants numbers 2, 5, 7, 11, 19, 24, 29, 41, 46 and 50 were deceased at the time of the hearing of the suit and no substitution was made by the Plaintiffs as is required by the law.

b) The Plaintiffs did not purchase the land in 2009. The alleged transfer to the 1st Plaintiff was registered in Entry 11 on 23rd March 2014 and not 10 referred to in the Judgment of the Learned Judge;

c) The suit property was never owned by the Estate of Said Mbarak Said as indicated in the Learned Judge's Judgment.

25. I have already addressed myself to the question of the challenge to the Plaintiffs' title and I find not need to re-address them as raised at Paragraph 40 (b) and (c) of the Supporting Affidavit. In regard to the alleged deaths of the ten or so Defendants, there is nothing on record to show that the Defendants ever brought the same to the notice of the Court prior to the Judgment. Even now that they have had time to consider the same, there is absolutely no evidence placed before the Court to demonstrate that the mentioned parties are deceased. The Defendants have not annexed any death certificate, burial permit or even a letter from the Chief from which this Court could make a

deduction that the Defendants are indeed dead and/or that they died prior to the hearing of the suit.

26. As the Court of Appeal stated in ***National Bank of Kenya Ltd –vs- Ndungu Njau(1997)eKLR:-***

> *"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. It will not be sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provisions of the law cannot be a ground for review."*

27. I think I have said enough to demonstrate that I am not persuaded that the Defendants have offered grounds within the meaning of the provisions of Section 80 of the Civil Procedure Act or Order 45 Rule 1 of the Civil Procedure Rules to warrant a review of my Judgment as delivered on 9th April 2019.

28. Having so found, and in the absence of any further stay herein, it follows therefore that the Plaintiffs' application dated 30th July 2019 succeeds as there was no basis for the Defendant's to erect any or any new structures on the suit premises.

29. In the premises, the Defendant's application dated 15th July 2019 is dismissed with costs.

30. I make no order on costs in regard to the Plaintiffs' application dated 30th July 2019.

Dated, signed and delivered at Malindi this 6th day of May, 2020.

J.O. OLOLA

JUDGE