



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 412 OF 2012

KIMITI OLE NKAANGI.....PLAINTIFF/APPLICANT

VERSUS

DAVID MUTUKU KILONZI1ST DEFENDANT/RESPONDENT

PRISCILLA K. MUTUKU2ND DEFENDANT/RESPONDENT

RULING

1. In the Notice of Motion dated 17th September, 2018, the Plaintiff is seeking for the following orders:

- a. That the law firm of O.P. Ngoge & Associates Advocates be granted leave forthwith to act for the Plaintiff/Applicant herein in this matter in place of the Law firm of Kibatia & Company Advocates in line with Order 9 Rule 9 of the Civil Procedure Rules.**
- b. That upon granting prayer 2 above, the Judgment delivered herein on the 13th day of April, 2018 by the Hon. Mr. Justice Angote be reviewed and set aside ex-debito justitiae owing to a grave error apparent on the face of records which renders the said Judgment unconstitutional and a nullity.**
- c. That upon granting prayer 3 above, Judgment be given in favour of the Plaintiff/Applicant herein as sought in the Plaintiff.**
- d. That further or in the alternative, upon granting prayer 3 above, further hearing of this suit be stayed pending the hearing and determination of a suit which the Plaintiff/Applicant herein intends to institute against the Land Control Board to have the purported unlawful consents quashed via prerogative orders of certiorari.**
- e. That the costs of this Application and the costs of the suit be awarded to the Plaintiff/Applicant herein, in any event.**

2. The Application is premised on the ground that there is a serious error apparent on the face of the record which renders the Judgment of 13th April, 2018 unconstitutional and a nullity.

3. The Application is supported by the Affidavit of the Plaintiff who has deponed that neither his wife nor himself sold the suit land to the Defendants; that neither himself nor his wife appeared before the Land Control Board at Machakos or at all to seek the consent of the Land Control Board to sub-divide his unsurveyed land into two equal portions and thereafter transfer one portion to the Defendants and that he will seek the quashing via prerogative orders of certiorari the consent of the Board dated 24th October, 1988.

4. According to the Plaintiff, the purported Sale Agreement of 23rd December, 1987 is null and void having been made outside the requisite period of six (6) months and that he is likely to be deprived of the suit land permanently contrary to Articles 27 and 40 of the Constitution as read with Article 14 of the African Charter.

5. In her response, the 2nd Defendant deponed that the Application does not meet the requirements for review of a Judgment; that the Plaintiff extensively submitted on the issue of the consent of the Land Control Board and that an error on the face of the record must be self-evident and should not require an elaborate argument to be established.

6. The 2nd Defendant finally deponed that the allegation that the sale transaction was not valid should be a ground of Appeal; that the 1st Defendant has a Certificate of Title which the court upheld and that the Application for review is frivolous, vexatious and amounts to abuse of the court process.

7. In his submissions, the Plaintiff's advocate submitted that from the Defendants' submissions, they admitted that they applied for the consent of the Land Control Board to sub-divide the suit land and transfer the same on 26th September, 1988; that the said Application for the consent of the Board was done outside the requisite period of six (6) months contrary to Section 8 of the Land Control Act and that the entire transaction was null and void.

8. The Plaintiff's counsel submitted that the handwritten Agreement of 23rd December, 1987 omitted to include the completion date contrary to the Law Society Conditions of Sale; that the Sale Agreement did not clearly describe the suit land and that the variances and discrepancies in the land being sold coupled with lack of a completion date in the Sale Agreement are errors on the face of the record.

9. The Plaintiff's counsel finally submitted that this court has the inherent jurisdiction to review the Record of proceedings and materials on record for apparent errors and mistakes and declare the Sale Agreement of 23rd December, 1987 null and void.

10. The Defendants' advocate submitted that the issues raised by the Applicant in his Application do not fall within the ambit of Order 45 of the Civil Procedure Rules; that the issue of when the consent of the Board was obtained was widely canvassed at the hearing and that the Plaintiff never raised the issue of the consent of the Board having been obtained outside the requisite period of six (6) months.

11. The Defendants' counsel submitted that the Applicant has not proven that there was an error apparent on the face of the record; that the Applicant has introduced new issues for determination and that the Applicant did not attach the order or decree being reviewed.

12. The Defendants did not oppose the Plaintiff's Application dated 17th September, 2018 in respect of leave being granted to the firm of O.P Ngoge and Associates Advocates to come on record for the Plaintiff. That prayer is therefore allowed.

13. The Plaintiff is seeking for the review of and setting aside of the Judgment delivered by this court on 13th April, 2018. The ground on which the Application is premised on is that there are serious errors apparent on the face of the records. According to the Plaintiff, the serious errors apparent on the face of the record include:- the grant of the consent of the Land Control Board to sub-divide and transfer the suit land to the Defendants after the lapse of six (6) months from the date of the Agreement; the failure to state the completion date in the Sale Agreement of 23rd December, 1987; and the variances and discrepancies in the description of the property being sold. In essence, the Plaintiff is asking the court to re-evaluate the evidence that was produced by the parties and arrive at a different finding.

14. Order 45 Rule 1 and 2 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 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.”

15. The courts have on several occasions defined what an error on the face of record means. In the case of *Nyamogo & Nyamogo vs. Kogo (2001) EA 170*, the court held 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 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 on points where there may conclusively 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 possible. Mere error or why view is certainly no ground for review though it may be one for Appeal.”

16. The testimony by the Plaintiff in this matter was that he never entered into a formal Sale Agreement with the Defendants. Indeed, in his Plaint dated 31st October, 2012, the Plaintiff alleged that the suit land had been transferred to the Defendants fraudulently and without his knowledge.

17. The issue of whether the Sale Agreement between the Plaintiff and the Defendants had a completion date, or whether the same was null and void for want of the consent of the Land Control Board was never raised by the Plaintiff. Indeed, although the Defendants produced the Minutes of the Land Control Board and the consent, the Plaintiff did not raise the issue of the said consent being invalid for having been issued after six (6) months of the date of the Agreement.

18. Considering that the issues being raised in the current Application were not issues before the court, and indeed were never addressed in

the Judgment of 13th April, 2018, the Plaintiff cannot now pray that those issues be addressed by the court. In fact, what the Plaintiff is asking this court to do is to either sit on its own Appeal or at worst, conduct a mini-trial by relooking at the documents on record and then make a different finding on the same.

19. Having not raised the issues raised in the current Application at the hearing, and the court having not addressed its mind on those issues, I find that the Plaintiff's recourse is in the Court of Appeal. The issues that the Plaintiff is asking this court to re-evaluate cannot fit in the description of what an error apparent on the face of the record is. Indeed, any attempt to answer the question of whether the Sale Agreement between the Plaintiff and the Defendants is a nullity or not at this stage will be tantamount to the court conducting an Appeal on a matter that it is *functus officio*.

20. For those reasons, I dismiss the Application dated 17th September, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE