REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 323 OF 2017

EDGAR-GEAR INVESTMENTS LIMITED.................................PLAINTIFF

VERSUS

1. GUIDO PALLADA

2. KIKAO PROPERTIES LIMITED...DEFENDANTS

JUDGMENT

1. The application for determination is the Notice of Motion dated 4th March 2020 brought under Sections 1A, 1B, 3A, 63 and 80 of the Civil Procedure Act, and Order 1 Rule 10 (2), Order 45 Rules 1, 2 and 3 and Order 51 Rule of the Civil Procedure Rules and all other enabling provisions of the law. The Applicants are seeking the following Orders:

1. Spent

2. That this Honourable Court be pleased to stay and set aside the judgment and decree date 29th May, 2019 and all ensuing orders and directives pending the hearing of this application.

3. That this Honourable Court be pleased to review, vary and/or amend its judgment and decree dated 29th May 2019 and all ensuring orders and directives and hear this matter afresh.

4. That this Honourable Court be pleased to grant leave to the Applicants to enjoin the suit as defendants and to defend their interest

5. That the costs of this application be provided for.

2. The application is premised on the grounds thereon and supported by the affidavits of Marie Rose Degryse and Bruyneel Angelo Achille sworn on 4th March 2020. The applicants, Marie Rose Degryse, Helena Brutsaert and Juliematisse Kenya Ltd aver that they are the owners of KWALE/DIANI COMPLEX/756, 757,758 and 759 respectively which they purchased on diverse dates between 2002 and 2019. That the plaintiff failed to disclose to this court that the subject access road is not a public access but was only a private access of the subdivision adjacent to it and failed to disclose that there was no through way using the said access road. That the plaintiff excluded the applicants who own property adjacent to the subject road from the suit. That the defendants do not own any property adjacent to the subject access road. The applicants further aver that the plaintiff’s property is not a beach property and therefore the owners thereof are not legally entitled to use the subject road and that the plaintiff’s property has several alternative accesses to the beach road. That the action of the plaintiff of demolishing the perimeter wall has threatened the houses adjacent to the subject access to security incidents. The applicants have annexed copies of certificate of Lease for Properties known as KWALE/DIANI COMPLEX/756, 957, 758 and 759 as well as mutation forms. They aver that no road was created in the process, adding that it appears from the mutation forms that someone irregularly and illegally without the applicants consent, knowledge or authorization purported to open an access road sometime in 2012, which action the applicants term was fraudulent. That this is the access road that the plaintiff requested the court to declare a public road and to demolish the perimeter wall that protected the applicants properties in a gated community.

3. In her written submissions filed on 3rd December, 2020, Ms. Katisya, the applicants’ advocate submitted that despite the plaintiff knowing of and mentioning the applicants’ properties in its letters to the surveyor dated 30th March 2017 and the demand letter dated 18th April 2017, it deliberately failed to notify the applicants of this suit despite being alive to the fact that it would affect them. That the plaintiff deliberately excluded and shut out the majority of property owners in the aforesaid gated community who are directly affected by the prayers in the suit. It was submitted that the plaintiff deliberately sued the defendants knowing that they had sold their land and no longer had an interest in the

properties adjacent to the subject access road. It was submitted that the right to be heard is a fundamental tenet in the administration of justice encapsulated in Articles 47, 48 and 50 of the Constitution. Further, that Article 40 of the Constitution requires that a person with an interest in property of any description not to be deprived of that interest except by due process as provided in Article 40 (3) (b) (ii) which includes the right of access to a court of law. That the applicants were never notified of this suit and did not participate in any proceedings thereby causing grave injustice to them.

4. The applicant advocate referred to Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules and relied on the case of Accredo Ag & 3 Others –v- Steffano Uccelli & Another (2017)eKLR and submitted that the applicants fall within the category of aggrieved parties and are entitled to seek for review on the ground of new and important evidence.

5. On the prayer to be enjoined to the suit as defendants, the applicants relied on the case of **Merry Beach Limited –v- Attorney General & 18 Others (2018) eKLR and JMK –v- MWM & Another (2015) eKLR.** The applicants submitted that the court is not *functus officio* and relied on the case of **Peterson Ndugu & 5 Others –v- The Kenya Power & Lighting Co. Ltd. Civil Appeal No.208 of 2015**. The applicants submitted that they approached the court promptly. On the plaintiff contention that the applicants should have filed a fresh suit, the applicants submit that no cause of action can lie against acts conducted in obedience to a judgment of court. The applicants further submitted that the plaintiffs replying affidavit is bad in law and offends the provisions of Order 19 of the Civil Procedure Rules as it is not based on facts within the personal knowledge of the deponent who is the Advocate of the plaintiff.

6. The plaintiff opposed the application and filed a replying affidavit sworn by its advocate in which it is contended that the court is functus officio, that the applicants came to court after undue delay and that the applicants should have filed a fresh suit. In their submissions filed on 8th March, 2021, the plaintiffs advocates, Ms. John Bwire & Associates Advocates submitted that the already demolished wall was on the PROPERTY TITLE NUMBER KWALE/DIANI COMPLEX/953 and 523 belonging to the defendants and not TITLE NUMBERS KWALE/DIANI COMPLEX/756, 757,758 ad 759 belonging to the applicants, and therefore the applicants are not aggrieved parties within the meaning of Order 45 Rule 1 and cannot therefore review the judgment of the court. It is submitted that there is no material placed before court indicating that the road in question is private (road of access) as provided for under Section 9 of the Public Roads and Roads of Access Act. The plaintiffs advocates relied on the case of **Mary Njeri Gatuha & 3 Others –v- George Muniu Mungai & 3 Others (2015)eKLR; Homescope Properties Ltd & Another –v- David Gachuki & Pamela Odera** sued as **Chairman & Secretary of Ken Ngong View Estate & Another (2014)eKLR**. It was further submitted that if the Applicants were aggrieved by the person who made the application that made the subject road a public road, recourse should not be, and cannot be, by filing a review of the judgment, but the remedy, if at all, should be by way of filing a fresh suit. The plaintiff's submissions is that there is no new evidence disclosed since the documents relied on by the applicants were prepared in 2012 and were in possession of the District Surveyor who was summoned by the court and who testified confirming that the road was surrendered during subdivision and is therefore a public road. The plaintiff's advocates relied on the case of **D. J. Lowe & Company Ltd –v- Bangue Indosuez (1998) eKLR;** and **Rose Kaiza –v- Angelo Mpanju Kaiza (2009)eKLR**. The plaintiff's submission is that the applicants have not shown to be necessary parties to the suit and relied on the case of **Joseph Njau Kingori –v- Robert Maina Chege & 3 Others (2002)eKLR.**

7. I have considered the application and the submissions made. The central issues for determination is whether the applicants are necessary parties within the meaning of Order 1 Rule 10 (2) of the Civil Procedure Rules and whether the application has met the threshold for review within the meaning Order 45 Rule 1.

8. Joinder of parties is governed by Order 1 of the Civil Procedures. Rule 10 (2) provides as follows:

> **"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined whether as plaintiff or defendant , or whose presence before the court may be necessary in order to enable the court effectually and completely to abdicate upon and settle all questions involved in the suit, be added."**

9. From the above provision, it is clear that joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same transaction is alleged to exist, whether jointly, severally, or in the alternative, where if such person brought separate suits, any common question of law or fact would arise. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. A party can be joined as plaintiff or defendant if he or she is a necessary party, and this may be done at any time, whether on application or suo moto. However, joinder of parties may be refused whether such joinder will lead into practical problems of handling the existing cause of action together with one of the party being joined; is unnecessary or will just occasion unnecessary delay or costs on the parties in the suit.

10. In the case of **JMK –v- MWN & Another (2015)eKLR**; the Court of Appeal stated thus:

> **"Order 1 Rule 10 (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit, to be added as party. Commenting on this provision, the learned authors of Sarker's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol.1P 887, state that:**
>
> **"The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties." This court adopted the same approach in Central Kenya Ltd –v- Trust Bank & 4 Others, CA No.222 of 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties that:**

“All amendments should be freely allowed and at any stage of the proceedings, provided that the amendments or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

We would however agree with the respondent that Order 1 Rule 10 (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the court. Sarkar’s Code (supra) quoting as authority, decisions of Indian courts on the provisions, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in Tang Gas Distributors Ltd –v- Said & Others (2014) EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes in applicable; and that a party can even be added at the appellate stage…..”

11. In this case, the applicants have indicated that they are aggrieved by the judgment of this court delivered on 29th May, 2019 and the subsequent order to demolish the wall enclosing the subject access road on the ground that they had exclusive use of the said access road which served various homes within a gated community. They contend that the road is a private access road used by the applicants and other property owners in the gated community. Whereas this by all means seems to be credible argument by the applicants to be enjoined as defendants, it is however not lost to this court that this application has been brought after judgment was delivered and decree executed. In this case, there are no longer any proceedings pending before this court since the decree has already been executed and the subject wall demolished. There is nothing left to be done in this case and there is no pending proceeding before this court to which the applicants can be made parties, the judgment having been delivered and the decree fully executed. I am therefore not persuaded that this is a proper case for joinder of the applicants as defendants.

12. The other issue for determination is whether the applicant has met the threshold for review and specifically whether there is new and important evidence within the meaning of Order 45 Rule 1. Order 45 Rule 1 provides that:

“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 of 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”

13. It is the applicants argument that they have discovered that an application was made by unknown persons to open the subject access road without their knowledge or consent. The applicants claim to be the owners of properties known as Kwale/Diani complex/756, 757,758 and 759. Judgment was entered in favour of the plaintiff for demolition of the wall on properties Kwale/Diani complex/953 and 523 allegedly belonging to the defendants. It is clear from the foregoing that the judgment and decree sought to be reviewed relates to different titles while the applicants claim to own totally different properties. Whereas the main issue might be said to be the road of access, the applicants in their own pleadings are admitting that there was an application made by unknown persons to open the access road sometime in 2012. The unnamed persons are not said to be the plaintiff or the defendants, and therefore are not parties to this suit. I am therefore in agreement with the plaintiff’s submission that no proper basis has been laid to review the judgment herein. The applicants can still pursue for redress by filing a separate suit against the unnamed person who is alleged to have irregularly and illegally purported to open an access road on the applicant’s properties some time in 2012.

14. For the foregoing reasons, I find that the notice of motion dated 4th March 2020 as lacking in merit and hereby dismiss it with costs to the plaintiff.

15. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at MOMBASA 20th day of May 2021

____

C.K. YANO

JUDGE

<u>IN THE PRESENCE OF:</u>

Yumna Court Assistant

C.K. YANO

JUDGE