REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 798 of 2013

ALICARANDA WATHITHA GATEI.....PLAINTIFF

VERSUS

ZIPPORAH WANGECHI MUTURI .....1ST DEFENDANT

PATRICK MUTURI IHUNGI.....2ND DEFENDANT

JOYCE MUTHONI MURIUKI..... SUBSTITUTE

RULING

1. By a Notice of Motion application dated 13th November 2019 and supported by the affidavit of the 2nd Defendant/Applicant and Jane Nginda Kariithi, the Applicants herein approached the court seeking the following orders:

1. Spent;

2. That leave be granted to the firm of M/S Apollo Muinde & Partners Advocates to come on record on behalf of the 1st and 2nd Defendants herein in place of the firms of M/S Wanjiru Wambugu Advocates and Magee Law LLP, respectively, and the notice of change of advocates filed herewith be deemed to have been filed and properly on record upon payment of the requisite fees;

3. That this honourable court be pleased to grant an order of stay of execution of the Judgement and/or decree of this court made on the 28th day of June 2019 together with all other consequential orders pending the hearing and determination of this application;

4. That this honourable court be pleased to review, vary and/or set aside its judgement and/or decree made on the 28th day of June 2019 and substitute the same with an order dismissing the Plaintiffs case with costs;

5. That this honourable court be pleased to make such other and/or further orders as it may deem fit in the circumstances of this case;

6. That costs of this application be provided for.

7. The Applicants' prayers are grounded on the following premises:

1. That the Applicant is aggrieved by the Order and/or judgement made on the 28th of June 2019 and an appeal has been proffered to the Appellant court;

2. That there are sufficient facts and grounds to warrant review and setting aside of the orders and/or judgement made on the 28th of June 2019; viz

1. The real former wife of the late James Kariithi Muturi, to wit, Jane Nginda Kariithi has now come forward and been sworn an affidavit setting the record straight;

2. In these proceedings, the Plaintiff appears to question how the mother title block was split into two then narrows down to claim a portion of the land that was registered into the 1st Defendant's name and letter transferred into the second Defendant's name.

3. That there are several mistakes/ errors apparent on the face of the record:

1. The Plaintiff pleads that she is a distant cousin to the 1st Defendant and yet she testifies that she is a wife;

2. It was never proven beyond reasonable doubt that she was a wife of the 1st Defendant's son;

3. No evidence of fraud was adduced to the required standard of proof even though the same had been pleaded;

4. The 1st Defendant is 'not dead' she is only old. This has been recorded to the contrary in this judgement under review something which has really traumatized her;

5. No evidence of the paternity of the Plaintiff's children has been adduced and yet it wasn't shown that they ever lived together;

6. For the court to assert that only the deceased could prove that he wasn't married to the Plaintiff is in itself a fallacy and not anchored on sound jurisprudence and can only lead to an absurd conclusion as it happened herein.

7. That another reason why the judgement ought to be set aside is that, the Plaintiff cannot purport to set up a claim as a beneficiary of the estate of a deceased person-in this case James Kariithi Muturi without first attaining a grant of letters of administration intestate whether full or limited;

8. That moreover, if anyone has committed fraud and been part of a criminal enterprise over the issue it is the Plaintiff. This is so when you consider:

1. In 2016 while this case was in court, she connived with her son to transfer the deceased's tea account into her son's name;

2. She has been withdrawing substantial amounts of money from the deceased's tea account without anyone's consent and/or lawful excuse;

3. She lied about her marriage to James Kariithi Muturi in order to supplant his relatives after he had been murdered in cold blood.

4. That it is therefore only fair in the interests of justice, fairness, equity, constitutionalism, principles of the rule of law and natural justice and protection of fundamental rights and freedoms enshrined in the Constitution of Kenya, 2010 that this application ought to be allowed as prayed;

5. That this application is made timeously and any delay occasioned is inadvertently and explainable.

On 01st July 2019, the Applicants filed their notice of appeal. The said notice of appeal was however withdrawn on 27th August 2019.

6. The Applicants' application is opposed. Vide a replying affidavit filed on 19th March 2021, the Respondent herein avers that land parcel Ngariama/Kabare/249 was originally registered in the name of MuturiIbungi who later subdivided the parcel into two and transferred the resultant Ngariama/Kabare/413 to LoiceWambura and Ngariama/Kabare/414 to the 1st Defendant/Applicant to hold in trust for their respective families. That the 1st Defendant/Applicant fraudulently transferred her share to the 2nd Defendant/Applicant. That judgement in the matter was entered against the Defendants on 28th June 2019. That aggrieved with the decisions, the Defendants/Applicants filed a notice of appeal on 01st July 2019 and later withdrew it on 27th August 2019. That the application is intended to adduce further evidence in the case through the back door. She reiterates that she was the wife of the deceased James Kariithi and that she at no time indicated that the deceased was her cousin. That the application does not reflect any errors apparent on the face of record to warrant a review. That reliance on the affidavit filed by Jane Nginda would be prejudicial to her case, as she has no opportunity to cross examine her. In the end, she prays for the application to be dismissed.

7. The Applicants filed their submissions on 5th May 2021. They identified three issues for determination as follows:

1. Whether there was a mistake/error apparent on the face of the record when this honourable court presumed that there existed a marriage relationship between the Plaintiff/Respondent and the late James Kariithi;

2. Whether there was a mistake/error apparent on the face of the record when this honourable court declared that the suit property was fraudulently transferred to the 2nd Defendant;

3. Whether there was a mistake/error apparent on the face of the record when this honourable court awarded half of the suit property to the Plaintiff despite finding its subdivision was suspect.

They cite various provisions touching on the procedure and considerations for a review exercise by courts in Kenya, including *Order 45 Rule 1 of the Civil Procedure Rules, 2010; Francis Njoroge Vs Stephen Maina Kamore [2018] e KLR; Muyodi Vs Industrial and Commercial Development Corporation & Another [2006] 1 EA 243 and JMK Vs MWM & Another [2015] e KLR.* On the first issue for determination as to the presumption of marriage between the Respondent and the late James Kariithi, they rely on Raphael *Ratemo & Another Vs Emily Nakhanu Musinai [2017] e KLR; Phyllis Njoki Karanja & 2 Others Vs Rosemary Mueni Karanja & Another [2009] e KLR; PKA Vs MSA [2014] e KLR; Joseis Wanjiru Vs Kabui Ndegwa Kabui & Another [2014] e KLR and Mbogo Vs Muthoni & Another [2008] 1 KLR* to the

effect that the court erred in finding there to have existed a marriage. On the question as to whether there was a mistake/error apparent on the face of the record when the court declared that the suit property was fraudulently transferred to the 2nd Defendant, reliance is placed on *Kinyanjui Kamau Vs George Kamau [2015] e KLR* to the effect that the Respondent failed to meet the required threshold of proving the existence of fraud. On the last question on whether there was a mistake/error apparent on the face of the record when the court awarded half of the suit property to the Plaintiff despite finding its subdivision suspect, it is the Applicants' submission that a bad title nullifies all subsequent transaction on the related parcel of land. That now with the emergence of James Kariithi's *bonafide* wife, the court's decision has disinherited her children and condemned them unheard.

The Respondent did not file her submissions within the timelines agreed by the parties.

4. The court has considered the application, rival affidavits and the applicant's submissions.

The relevant provisions in law dealing with the review function of court are captured under ***Section 80 of the Civil Procedure Act, Cap 21*** *and* ***Order 45 of the Civil Procedure Rules, 2010*****.** Given that the entire application turns on these provisions, the same have been captured hereunder verbatim.

Section 80 of the Civil Procedure Act, Cap 21-

> ***"****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.'*

[Order 45, rule 1.] **Application for review of decree or order.**

> *1. (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.*

From the get go, an application for review becomes inaccessible where an appeal has already been preferred. The first prayer upon which the Applicants' application is grounded, and which has not been amended reads as follows:

> 1. *That the Applicant is aggrieved by the Order and/or judgement made on the 28th of June 2019 and an appeal has been proffered to the Appellant court;*(Emphasis, mine)

Immediately following this ground is the second reason for the orders sought, which reads:

> 2. *That there are sufficient facts and grounds to warrant review and setting aside of the orders and/or judgement made on the 28th of June 2019; viz* (Emphasis, mine)
>
> 3. The real former wife of the late James Kariithi Muturi, to wit, Jane Nginda Kariithi has now come forward and been sworn an affidavit setting the record straight;
>
> 4. In these proceedings, the Plaintiff appears to question how the mother title block was split into two then narrows down to claim a portion of the land that was registered into the 1st Defendant's name and letter transferred into the second Defendant's name.

It was at this early point that the competence of the firm of advocates who drew and filed the notice of motion started to come into question. Indeed, a notice of appeal had been filed on 01st July 2019. The said notice was however withdrawn on 27th August 2019, prior to the filing of the notice of motion on 13th November 2019. However, the notice of motion still reads that a notice of appeal has been proffered to the Appellate court.

As the filed notice of appeal has been withdrawn, the court will now analyze the issues framed for determination.

As already observed, from ***Section 80 of the Civil Procedure Act, Cap 21*** *and* ***Order 45 of the Civil Procedure Rules, 2010,*** an application for review is required to meet any of the three criteria set out thereunder, to wit:

> *1. Where there has been a discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced by them at the time when the decree was passed or the order made;*

2. *On account of some mistake or error apparent on the face of the record;*

3. *For any other sufficient reason.*

The case of ***Paul Mwaniki Vs National Hospital Insurance Fund Board of Management [2020] e KLR*** provides useful amplification on the matters to be considered as qualifying for review.

> *"i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.*
>
> *ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.*
>
> *iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.*
>
> *iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.*
>
> *v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.*
>
> *vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.*
>
> *vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.*
>
> *viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.*
>
> *ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.'*

Of the three grounds upon which an application for review can be premised, the Applicants foundtheir application on an error apparent on the face of the record. Various decisions have sought to unpack the contours of this specific ground. See ***Muyodi Vs Industrial and Commercial Development Corporation & Another [2006] 1 EA 243,*** *where the Court of Appeal adopted the decision in* ***Nyamogo & Nyamogo Vs Kogo (2001) EA 174*** in describing an error apparent on the face of the record 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 left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of 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 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."* (Underline, mine)

In ***Attorney General & Others Vs Boniface Byanyima, HCMA No. 1789 of 2000***, the court citing ***Levi Outa Vs 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."*

More recently in ***Republic Vs Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] e KLR,*** the court held as follows:

> *"Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review…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."(*Underline, mine*)*

The Applicant's application must thus be held under the light of the foregoing provisions in statute and case law to evaluate whether or not it is properly founded. By way of recapitulation, the Applicants' grounds for review are as follows:

1. Whether there was a mistake/error apparent on the face of the record when this Honourable court presumed that there existed a marriage relationship between the Plaintiff/Respondent and the late James Kariithi;

2. Whether there was a mistake/error apparent on the face of the record when this Honourable court declared that the suit property was fraudulently transferred to the 2nd Defendant;

3. **Whether there was a mistake/error apparent on the face of the record when this Honourable court awarded half of the suit property to the Plaintiff despite finding its subdivision was suspect**.

The three grounds upon which the application for review is made clearly call for, and already have, in the nature of the responses filed by the Respondent in her replying affidavit, required lengthy reasoning and counter arguments. It is interesting to the court that the Applicants in their submissions cited ***Muyodi Vs Industrial and Commercial Development Corporation & Another [2006] 1 EA 243,*** where the Court of Appeal adopted the decision in ***Nyamogo & Nyamogo Vs Kogo (2001) EA 174*** in describing an error apparent on the face of the record 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 left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of 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 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us." (Underline, mine)

It is baffling how after looking at this decision, the Applicants still maintain that their grounds are errors on the face of the record. The very submissions filed by the Applicants have gone into painful detail to explain the matters to be considered in presuming the existence of a marriage, the requisite threshold of proof where fraud is alleged and the manner in which the court ought to deal with a fraudulently obtained title. This is the long drawn out process of reasoning that the court of appeal was referring to, that could possible qualify an erroneous decision but cannot under any circumstance underlie an error on the face of the record.

In answer, the Respondent maintains that she is the wife of the deceased James Kariithi (that at no time did she suggest that he was her cousin), that she rightfully acquired ownership and possession of the suit land and that the said James Kariithi had never married Jane Nginda. The grounds set out by the Applicants have opposing views from the Respondent, disqualifying them from errors apparent on the face of the record.

The Court associates itself with the Court of Appeal **decision in *Pancras T. Swai Vs Kenya Breweries Limited [2014] e KLR*** adopting ***Francis Origo & another Vs Jacob Kumali Mugala C.A Civil Appeal No. 149 of 2001*** where it expressed itself as follows: -

"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal."

See also ***National Bank of Kenya Ltd Vs Ndungu Njau {1996} KLR 469*** where the Court of Appeal at ***Page 381*** as cited in the case of ***Stephen Gathua Kimani Vs Nancy Wanjira Waruingi t/a Provident Auctioneers [2016] e KLR held:***

"In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue" In my opinion the proper way to correct a judge's alleged

misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose." (Underline, mine)

In my opinion, the upshot of the foregoing analysis is that the Applicant's application fails and is dismissed with costs.

RULING READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 23RD DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Mr. Ndana holding brief for Mr. Apollo Mwende*

2. *Mr. Asiimwe holding brief for Ngigi Gichoya*

3. *Kabuta – Court clerk.*