



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 235 OF 2018

SAMUEL UIRU.....PLAINTIFF /APPLICANT

VERSUS

GEORGE MBURU.....DEFENDANT/RESPONDENT

RULING

By a **Notice of Motion Application** dated 25th August 2020, brought under **Order 45 Rules 1,2,3,5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act**, by the **Plaintiff/Applicant** who seeks for orders that; -

- 1. The Judgement dated 23rd July 2020, be reviewed and/or set aside.**
- 2. That upon such review and/or setting aside, the Court do give directions on the rehearing of the case pursuant to Order 45 Rule 5.**
- 3. Costs of the Application.**

The Application is supported by the Affidavit of **Samuel Uiru, who** averred that pursuant to a Judgement at Nairobi in **Nairobi Hccc 648 of 2003**, the Defendant and himself were registered as joint proprietors of **Land Parcel No. Kiambaa/Ruaka/2448 and 2446**. That he occupies wholly **Parcel No. 2448**, while the Defendant occupies **Parcel No. 2446**. He further averred that the Defendant refused to execute documents to sever joint ownership. That on **23rd July 2020**, the Court delivered its judgement holding that he should have applied to the Registrar for partition.

That he is advised by his Advocates, which advice he verily believes to be true that under **Section 94 of the Land Registration Act**, one of the **owners in common**, can apply for partition and there is no corresponding provision for severance of joint proprietorship. That it is just and equitable that this Honorable Court do review its Judgement as prayed.

The Defendant/Respondent upon being duly served did not enter appearance nor file any response to the Plaintiff/Applicant Application. The Plaintiff/Applicant filed his submissions on **21st June 2021**, through the **Law Firm of Ndumu Kimani & Co. Advocates**, and submitted that severance of joint ownership under **Section 91(7) of Land Registration Act**, is done by proprietors, executing an Application in **Form LRA – 37**, signed by both proprietors. He further submitted that there is an error apparent on the face of the records to warrant review of the Judgement.

The Court has carefully considered the instant Application, pleadings and submissions filed and the main issue for determination is **whether the Plaintiff/ Applicant is deserving of the orders sought for review**.

The Application is brought under **Order 45 Rule 1 of the Civil Procedure Rules**, which provides that an **Order for Review** can be entertained when there is discovery of 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 him at the time when the **decree** was passed or **order** made.

There is no doubt that on **23rd July 2020**, the Court delivered a **Judgement** wherein it held as follows: -

“Under section 94 of the Land Registration Act, the power to partition held under common tenancy is given to the Registrars appointed under section 12 and 13 of the Land Registration Act, for the above reasons, this Court therefore finds that it cannot grant the orders sought of severing the common tenancy as there is a procedure set down in law”.

Order 45 Rule 1 of the **Civil Procedure Rules**, applies where there is **discovery of new and important matter** or evidence which after exercise of due diligence was not within the knowledge or could not be produced by the applicant at the time the order was

made. In the case of *Daniel Macharia Karagacha Vs Monicah Watithi Mwangi, Civil Appeal No. 159 of 2000*, the Court of Appeal held that:-

“Review is only available where there is an error of law apparent on the face of the record, or there is a discovery of new and important matter of evidence which the applicant could not by exercise of due diligence have placed in his pleadings or before the Judge when he heard the earlier application”.

In the instant matter, there is **no discover** of **new** or **important**

matter of evidence that Plaintiff/ Applicant could not have placed before the Court during the hearing of the case before the Judgement was delivered on **23rd July 2020**.

By bringing this Application for Review and asking the Court to grant prayer for joint proprietorship, that is tantamount to asking this Court to sit on its own Appeal.

The Plaintiff/Applicant herein has not shown that there has been discovery of new and important matter of evidence or **error apparent** on the face of record or any other sufficient reasons to warrant a review of the Court’s Judgment.

The second question that this Court ought to consider is whether there is any mistake or error apparent on the face of the record. The Plaintiff/Applicant maintains that under **Section 94 of Land Registration Act**, one of the owners in common can apply for partition and there is no corresponding provision for severance of joint proprietorship. However, the Plaintiff/ Applicant has not pinpointed the errors apparent on the face of the record.

In the case of *Nyamogo & Nyamogo v Kogo (2001) EA 170 cited in Veleo (K) Limited*, 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 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

Thirdly, the Court has to consider if there is sufficient reason to review the Court’s earlier Judgement. The Plaintiff/Applicant has not elaborated any sufficient reasons to warrant a review of the Court’s Judgement. If the Plaintiff/Applicant was dissatisfied with the said Judgement, then he could have Appealed against that Judgement rather than seek for Review.

The Order sought by the Plaintiff/Applicant are discretionally and the said discretion must be exercised judiciously. As provided by **Section 3A** of the **Civil Procedure Act**, the Court is enjoined to make Orders that are necessary for end of justice to be met and to prevent abuse of the Court process.

Having carefully considered the instant **Notice of Motion Application** dated **25th August 2020**, and having analyzed the Court’s findings as above, the Court finds and holds that the necessary Orders herein that would ensure that justice is met is to **disallow** the said Notice of Motion Application for Review.

Consequently, the Court finds the Plaintiff’s/Applicant’s Notice of Motion Application herein is **not merited**, and the same is **dismissed** entirely with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 30TH DAY OF SEPTEMBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Kuiyaki