REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 46 OF 2019

JOSPHAT KAMAU GATIMU..........................1ST PLAINTIFF

JESSE MURIITHI GATIMU..........................2ND PLAINTIFF

PATRICK KANYUNYU GATIMU ....3RD PLAINTIFF

JAMES KARIUKI GATIMU..........................4TH PLAINTIFF

JOSEPH KARIUKI GATIMU ....5TH PLAINTIFF

ESTHER WANJIRU MUTUGI ....6TH PLAINTIFF

VERSUS

GRACE WAMUYU MUNYUA ....1ST DEFENDANT

FREDRICK MURIUKI KIBUCHI ....2ND DEFENDANT

EUNICE WAITHERA MUNYUA ....3RD DEFENDANT

RULING

1. By way of a Notice of Motion dated 27th April, 2021 brought under Order 51 Rule 1, Order 45 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A and 1B of the Civil Procedure Act and all enabling provisions of the law, the applicant is seeking the following prayers:

a. SPENT

b. That this Honourable Court be and is hereby pleased to review the Ruling of the Honourable Justice E. C Cherono, delivered on 12th March, 2021.

c. That costs of this Application be provided for.

2. It is premised on the following grounds on the face of the application: -

a. That there was an error apparent on the face of the record or on account of some mistake as the Applicants sought orders for reissuance of summons and not orders for extension or revival of expired summons as indicated in the ruling delivered on 12th March, 2021.

b. That the said ruling applies to an application for orders of extension of summons and therefore there is an apparent mistake or error that ought to be rectified by this Honourable Court.

c. That as a result of the said error, the Plaintiffs'/Applicants' prayer for Reissuance of Summons remains unaddressed.

d. That it is in the interest of justice that the said error or mistake be brought to the attention of this Honourable Court in order to be taken into consideration.

APPLICANTS' CASE

3. The application is supported by the affidavit of Catherine Wanjiku Kariuki – Advocate whereby she deponed as follows: -

a. In his ruling delivered on 12th March, 2021 the Honourable Justice E.C. Cherono found that the court has no power to revive court summons upon expiry of 12 months from the date of issue.

b. However, the Plaintiffs/Applicants did not seek Orders for the extension or revival of expired summons but the reissuance of summons.

c. In page 1 of the said ruling, this Honourable Court indicated that the Plaintiffs/Applicants sought an order that this Honourable Court be pleased to issue summons to enter appearance instead of Orders for Reissuance of Summons as indicated in prayer one of the Notice of Motion dated 13th November, 2020.

d. The said ruling applies to an application for orders of extension of summons and not to an application for reissuance of summons therefore there is an apparent mistake or error that ought to be rectified by this Honourable Court.

e. As a result of the said error or mistake, the plaintiffs'/applicants' prayer for reissuance of summons remains unaddressed.

f. The plaintiffs/applicants appreciate that in principle the court has the discretion to order for reissuance of summons even if the original summons have expired.

g. The plaintiffs/applicants have provided an adequate, plausible and reasonable explanation in their application dated 13th November, 2020 for the impediment in effective service of summons upon the 3rd Defendant because the issue of regularization of service of summons was address by the court on 12th November, 2020 more than a year since the issuance of the original summons.

h. The Plaintiffs/applicants filed their application seeking reissuance of summons promptly after the expiry of summons and after the court regularized the issue of summons on 12th November, 2020.

i. It is just and equitable that the orders sought be granted.

RESPONDENTS CASE

4. On 21st July, 2021 the 1st Respondent through his advocate on record indicated that he was not opposed to the application.

5. The 2nd Defendant did not file any document in opposition to the application.

ANALYSIS

6. I have considered the application, supporting affidavit and the list of authorities supplied by the applicant.

7. The applicants have brought their application under ***Order 45 Rule 1 of the Civil Procedure Rules*** which provides 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 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".

8. The basis of the applicants' case is that there is some mistake or error apparent on the face of the record in that this Honourable Court delivered a ruling on the extension or revival of expired summons yet they had sought reissuance of summons.

9. In the case of ***Republic Vs Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] e KLR,*** the Honourable Court held as follows pertaining the definition of a mistake or error apparent on the face of the record: -

> "17. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out. [10]
>
> 18. 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."

10. This Honourable Court correctly noted at page one of the impugned ruling that the applicants vide their application dated 13th November, 2020 prayed to be issued with summons to enter appearance as service upon the 3rd Defendant as the previous summons had expired on 5th November, 2020.

11. Upon making an analysis of the law and facts set out in the said application, this Honourable Court arrived at a conclusion that the same amounted to seeking revival of the said summons since by the time the said application was filed, there were no valid summons.

12. It is therefore not correct for the applicants to claim that their prayer for reissuance of summons was unaddressed.

13. Further it is evident that from the grounds and affidavit in support of the application, what the applicant is claiming to be a mistake or error apparent on the record, is this Honourable Court's disposition on the law and analysis of the facts put forth in the said application dated 13th November, 2020.

14. The same cannot therefore be held to be a mistake or error apparent on the face of the record as it requires examination and argument as correctly put in the case of ***Republic Vs Advocates Disciplinary Tribunal*** (supra) whereby the Honourable Court held that:

> "19. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it. [11] In the instant case therefore, I am not convinced that there is an error apparent on the face of the record. What the applicant is raising requires examination and argument. …."

CONCLUSION

15. In view of the foregoing I am of the view that the application lacks merits and the same is hereby dismissed with costs. It is so ordered.

RULING DATED, DELIVERD PHYSICALLY IN OPEN COURT AT KERUGOYA AND SIGNED THIS 22ND DAY OF OCTOBER, 2021

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Kariuki – present

2. Kabuta, Court Clerk –present.