REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ELC CASE NO. 90 OF 2021

FRANCIS NYAUMA OBARE.....1ST PLAINTIFF/DEFENDANT

SAMWEL ONYINKWA OMASIRE.....2ND PLAINTIFF/RESPONDENT

THOMAS MOMANYI.....3RD PLAINTIFF/RESPONDENT

JOHN MUSUKO OBARE.....4TH PLAINTIFF/RESPONDENT

=VERSUS=

MAINA MARWANGA OMWAMIRE

PETER MAINA.....DEFENDANTS/APPLICANTS

RULING

To contextualize the instant Application, it is necessary to give a brief background of the matter.

The Plaintiffs/Respondents filed this suit against the Defendants/Applicants. In the suit the Plaintiffs/Respondents claimed that the 1st Plaintiff was the legal administrator of the Estate of the registered owner of the parcel of land NO. NORTH MUGIRANGO/BOISANGA/1485 whereas the 2nd, 3rd and 4th Plaintiffs occupied land parcels NORTH MUGIRANGO/BOISANGA/4361, 4362, 1494 and 1496 as Dependants of the registered owners.

The Plaintiffs/Respondents contended that the boundaries between the aforesaid parcel and the acreage as reflected on the register do not reflect the true position on the ground and that the physical boundaries existing have been in existence from the time of adjudication, a period of over 30 years.

The Plaintiff sought for the following Orders:

a) A declaration that Land Parcel NORTH MUGIRANGO/BOISANGA/1485, 4361, 4362, 1494 AND 1496 extend to where present physical boundaries are and that if the Registry Index Map does not reflect the then it is an error of the face of the record.

b) Cancellation and Rectification of registers to reflect the true positon on the ground of Land Parcel No. NORTH MUGIRANGO/BOISANGA/1485, 4361, 4362, 1494 AND 1496 and errors on the face of the record be rectified.

c) A permanent injunction to restrain the Defendants successors in title, assigns or however from interfering with the quiet possession and existing boundaries of the said land parcels.

d) Costs.

e) Any other relief that his Honourable court may deem fit and just to grant.

In response to the Plaint the Defendants/Applicants filed a Defence and denied each and every allegation contained in the Plaint.

The court heard the parties and made a final determination. On 17th February, 2017 the court decided the case in favour of the Plaintiffs/Respondents and made the following Orders: -

a) The Land Registrar, Nyamira County be and is hereby directed and ordered to visit Land Parcel NORTH MUGIRANGO/BOISANGA/1485, 4361, 4362, 1494, AND 1496 and establish and fix the boundaries on the basis of the boundaries established and maintained after the land adjudication process was completed.

b) Land Registrar be and is hereby directed and ordered to effect rectification of the registers of the said parcels of land (referred to in (1) above in case it is necessary) on the basis of the boundaries that he will have ascertained.

c) That the Land Registrar to cause the Registry Index Map (RIM) relating to the affected parcel of land to be appropriately amended.

d) The Land Registrar to implement orders (1) and (3) above within 180 days from the date of this Judgment.

e) Any party be at liberty to apply.

f) Each party to bear their own costs.

Up until the month of December 2019, the Land Registrar was yet to implement the Decree and Judgment of the Court given on 15th March, 2017. As a result, the Defendants/Applicants filed the Application dated 16th December, 2019 seeking that the Honourable court do issue a Notice to show cause to the Land Registrar – Nyamira County as to why he had not implemented the Decree and Judgment of this Court given on 15th March, 2017.

In response to the Application dated 16th December 2019, on 3rd February, 2020 the Land Registrar – Nyamira County filed in court a Surveyor's Report contents of which were to the effect that the Orders of the Court issued on the 15th March, 2017 were not implementable. The County Surveyor's Report is dated 30th July, 2018.

In view of the Surveyor's Report the Defendants/Applicants filed the Notice of Motion dated 28th April, 2021 seeking that the Honourable Court be pleased to review and/or vary its Orders issued on the 15th March, 2017, as the Court does not make orders in vain.

The Defendants brought this Notice of Motion dated 28/4/2021 asking for the following orders:

1. THAT this Honourable Court be pleased to review and/or vary its orders issued on the 17/2/2017.

2. THAT this Honourable Court be pleased to make any other suitable orders.

3. The costs of this suit and incidentals thereof.

The Defendants' submissions are that they discovered new and important evidence to the effect that the Judgment delivered on 17/02/2021 is ineffective. He also states that the Application was made timeously and finally that the said Surveyor's Report has brought sufficient reason for Review to be admitted as evidence and a fresh

determination be made taking into account the said Report.

The Plaintiffs' submissions are that there is no new evidence submitted and also the Surveyor's Report had no business being filed in court as no Order was made to that effect. The Plaintiffs also submitted they had not been served with the Surveyor's Report and therefore the Defendants are not being candid. Finally, they submitted that the Defendants' Application is an afterthought and which should accordingly be dismissed.

In the Decree as afore mentioned, the Court ordered that The Land Registrar do fix the boundaries and thereafter rectify the Registers and amend the Registry Index Map (RIM).

This Application is in the nature of challenging the legality of the Land Registrar complying with the said Decree.

Review is anchored under S**ection 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules** provides as follows: -

Section 80 provides that:

"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—**
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> **(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"**

Order 45 of the Civil Procedure Rules states as follows:

Any person considering himself aggrieved—

> ***1.(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 above provisions, it is clear that while **Section 80 of the Civil Procedure Act** grants the court the power to make orders for Review, **Order 45** sets out the jurisdiction and scope of Review by hinging Review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason. Whether the Applicant should have appealed against the impugned order should also be the subject of this Application.

The statutory grounds upon which Orders for Review can be obtained are; firstly, there ought to exist an error or mistake apparent on the face of the record. Secondly, that the Applicant has discovered a new and important matter in evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time the order was made. Thirdly, that there is sufficient reason to occasion the review.

The Question to ask here is whether any of the conditions above mentioned has been satisfied. In the Defendants' Affidavit supporting the said Application sworn on 28/4/2021, they allege that the Report filed by the Land Registrar is at variance with the Surveyor's Report and that it would have been fair for the Land Registrar to re-establish the boundary taking into account the history and boundaries on the ground and amend the maps accordingly.

The Court of Appeal had the following to say in an Application for Review in the case of **National Bank of Kenya Ltd vs Ndungu Njau**:

> ***"……..….. It will not be a sufficient ground for Review that another Judge could have taken a different view of the matter. Nor can it be a ground for Review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for* Review."**

The Defendants/Applicants' Application is based on the fact that the Learned Judge's Decree is incapable of being executed. These are not grounds for Review but grounds for Appeal. Moreover, failure to analyze evidence properly is not a ground for Review.

As held by the Supreme Court of Kenya in ***Menginya Salim Murgani vs. Kenya Revenue Authority [2014] eKLR:***

> ***"It is a general principle of law that a Court after passing Judgment, becomes functus officio and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law."***

In the case of ***Peterson Ndung'u, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani vs. Kenya Power & Lighting Company Ltd [2018] eKLR the Court held:***

> ***"We therefore agree with counsel for the Respondent that the Applicant is seeking to make out a new case on the basis of an Application for Review."***

I take cognizance of the fact that the Applicants were for all the time represented by counsel and must therefore have exercised their options consciously.

In the case of ***Zablon Mokua v Solomon M. Choti & 3 others [2016] eKLR*** ***Kisii Misc. Application No. 57 of 2016*** **Justice Okwany** held that:

> ***"……..It is practically impossible to itemize what would be 'sufficient reason' for purposes of review under the courts' ''residual jurisdiction'' or inherent powers. The exceptional instances when obvious injustice would be worked by a strict adherence to the terms of the order or decree as originally passed are copious……..However, given that a Review Application is not an appeal and neither must it be allowed to be an appeal in disguise where the merit is revisited, 'sufficient reason' ought to include, in my view, the statutory grounds for review as outlined in the Civil Procedure Rules. That ought to be the starting point and a fine guideline……"***

If I would start sifting through the evidence adduced by the parties in this case and weigh it against the law, I would be sitting on Judgment against my brother's Judgment. This is not allowed by law. If the Judgment is incapable of being executed, the Court of Appeal would be able to see that and overturn the same and order for either a re-trial or a reversal of the entire Judgment. I even doubt that the Judgment is incapable of execution because if it were so, the Plaintiffs would have readily consented to this Application since it would have equally caused them difficulties. In fact in their Grounds of opposition dated 10th May 2021, the Respondents opposed the Application on *inter alia* the grounds that:

> ***"…….***
>
> ***2. THAT the Orders made by this Court are explicit and capable of implementation and have been implemented.***
>
> ***4. THAT this Judgment cannot be set aside after it has been implemented and parties shown their boundaries and a rectification of the Register done."***

What message would you be passing to the litigants if the Orders sought herein were to be granted? That litigation does not come to an end. It would also cause a lot of conflict on the ground since some acquired rights would be taken away by the same Court that granted them, without justification. Whenever a party comes to Court, he should do so with all his arrows in his quiver ready to shoot at the enemy without imagining that he will have another chance of coming back to the war field. You only have one chance to shoot and win or lose the battle. Anything else amounts to prosecuting one's case piecemeal.

I have said enough to demonstrate that the Applicant's Application is destined to fail for the reasons that I have outlined above. I must however observe that even if I did not dismiss the Application on the ground that I have extensively discussed above, the Applicant's Application would nonetheless have been unsuccessful on account of the fact that no sufficient cause has been demonstrated to show why the Application was filed more than 4 years after the Court's Decision.

The Defendants/Applicants have to satisfy **Order 45** of the **Civil Procedure Rules** that the Application has been made without undue delay. The Decision sought to be reviewed was delivered on **17th February 2017,** whereas the Application for Review was made on **28th April 2021**. The delay of more than 4 years is quite unreasonable, and failure to explain the said delay may nevertheless cause the delay to be construed as more unreasonable. Thus, the Defendants/Applicants have not given satisfactory explanation for the delay.

In the case of ***Abdulrahman Hassan V National Bank of Kenya Ltd HCCC No. 446 of 2001 (eKLR)*** **where the Court held: -**

> ***"The Court observed that "an unexplained delay in filing for review of more than three months was unreasonable."***

The upshot of this is that the Application dated 28/4/21 fails and is dismissed with costs to the Plaintiffs.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 16TH DAY OF DECEMBER, 2021.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiffs: Mr. Masese

Defendants: Mr. Momanyi holding brief for Mr. Bosire G.