REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 169 OF 2013

FLORA CHERONO.....PLAINTIFF/APPLICANT

VERSUS

MARY NJIHIA & 7 OTHERS.....DEFENDANTS

AND

DANIEL NYAGA MUNYAMBO & 7 OTHERS.....RESPONDENTS

RULING

1. The Plaintiff, **Flora Cherono**, brought an Application dated **28/7/2021** for determination, following what I understand to be the parties' implementation of the orders issued by this Court on **14/07/2021**. She has invoked **Sections 1A**, **1B**, **3A**, **80** of the **Civil Procedure Act**, **Chapter 21** of the **Laws of Kenya**, **Order 45** and **Order 51 (1)** of the **2010 Civil Procedure Rules** made thereunder and **Section 19 (3) (f) of the Environment and Land Court (ELC) Act, Act No. 19 of 2011**. The orders she sought were:

> **(1) That this application be certified as urgent suitable to be placed before the duty court immediately and service of the same be dispensed with at the first instance and Prayer No. 2 and 3 herein be granted in the interim.**
>
> **(2) That there be stay of enforcement of orders as issued on 14/7/2021 pending the hearing and determination of the application herein**
>
> **(3) That while pending *inter partes* hearing and determination of this application, this honourable court be pleased to issue orders that status quo currently existing be maintained by all parties.**
>
> **(4) That this honourable court be pleased to review, vary or clarify its orders as issued in the ruling delivered on 14/7/2021 as to its extent of application since there appears to be a lacunae with its interpretation following the judgment delivered on 31/7/2019 and eviction that was effected on 2/4/2021.**

2. The Application was supported by her Affidavit sworn on **28/07/2021** together with the annextures thereto and the grounds on the face of the Application. She deponed that the court, vide its judgment dated **31/7/2019**, granted her prayer for eviction of the defendants together with their agents, assigns, and or representatives from the suit land. She stated further that the said eviction was effected on the **2/4/2021**. She averred further that following the eviction, she repossessed the suit land and barricaded it with iron sheets. She then swore that on the **14/7/2021,** this court granted orders of stay of execution of its decree pending the hearing and determination of the Respondent's Appeal against its ruling dated **26/2/2021.** It is worth noting here that the Respondents were not parties to the suit but they moved the Court on **22/12/2020** for review of its judgment on grounds, among others that they were not parties to the suit, did not therefore participate in the proceedings leading to the judgment hence were condemned unheard.

3. It is common knowledge to the parties herein that the Ruling on the Application of **22/12/2020** was delivered on **26/2/2021**. They Applicants in the said Motion preferred an appeal from the said ruling and in the meantime sought stay of execution of the Court's judgment. In her understanding, the Orders of **14/7/2021** were for stay of execution apply **only** (*emphasis mine*) to the unexecuted orders of the decree emanating from prayers **i, ii, iii, iv** and **vi** of the Plaint since prayer **v** thereof which was for eviction of the defendants had already been effected vide the decree already executed in that manner. She deponed further that in the Orders of **14/7/2021** there is no order allowing the reinstatement of the respondents to the suit land. She went on to depone that she became aware of the intention of the Respondents to remove the barricade fence from the suit land and instructed counsel to file the instant application. She then deponed that if the order of **14/7/2021** are not reviewed, varied and clarified, they, as are, lead to various interpretations by parties to advance their positions as opposed to complying with the ruling to her has "a lacunae" (*sic*).

4. In opposition, the **Second** Respondent, **Peter Maina Mungai**, swore an affidavit on **10/9/2021**. In it he contended that on **14/7/2021** the court stayed the execution of the decree and judgment delivered on **31/7/2019** pending the hearing and determination of the intended appeal

against this court's ruling referred to herein**.** He argued that there is neither error nor mistake apparent on the face of the record to justify a review, variation or clarification of the order of **14/07/2021** since the ruling only restored the *status quo* which as it was prior to **31/7/2019** when the judgment was delivered. He then deponed that there was no need of any interpretation or clarification of the orders. He responded further that the issue of whether eviction had been effected or not had been raised and considered by the court before delivering its ruling. Lastly, he deponed that after the ruling the applicants are in occupation of their parcels and carrying on with their normal businesses.

5. Before this court proceeds to determine whether the application is or is not meritorious, it is worth giving the chronology of events leading to the instant application. On the **31/7/2019,** this court delivered judgment by which it found in favour of the Plaintiff. The prayers the Plaintiff had sought in her Plaint included the eviction of the defendants from the suit land and costs of the suit. On **22/12/2020**, the Respondents herein and who were not parties to the suit made an application for review of the judgment. The Application was declined. They then preferred an appeal against the ruling of this court dated **26/2/2021.** On **09/03/2021** the eight Respondents lodged a Notice of Appeal against the said Ruling. On **16/03/2021** they filed an Application dated the same date. By it they sought stay of execution pending the appeal they had preferred. The Application was placed before the duty judge on **23/3/2021**. The judge directed that it be served and heard on **28/4/2021**. Meanwhile, on **3/4/2021** an eviction order was issued pursuant to the judgment of this Court. It seems to me that this was the second time the eviction order was being extracted, one having been issued on **22/11/2019.**

6. It was the Application filed on **16/03/2021** that the Ruling delivered on **14/7/2021** relates to. It was allowed in terms stated hereafter. I summarize the relevant paragraphs thereof as follows: "***14.*** *The upshot of the foregoing is that the Application dated* ***16/3/2021*** *has merit and the same is hereby granted as prayed in* ***Prayers Nos. (3)*** *and* ***(4)*** *thereof*." It is important that I reproduce herein prayers **(3)** and **(4)** of the Application so that the parties and all and sundry may understand what was prayed for as I consider the prayers in the instant Application. Since justice should not only be done but to be seen to be done, the prayers should be reproduced word for word, and comparisons and interpretations thereon be given. The two prayers referred to in the said Application dated **16/3/2021** were:

> ***"3. That upon inter partes hearing and determination of the Application herein, this honourable Court be pleased to stay the enforcement of the judgment and decree of this court, issued on the 31/7/2019 while pending the hearing and determination of the intended appeal to the Court of Appeal, against this Court riling of 26/3/2021.***
>
> ***4. That the costs of this application do abide in the results of the intended appeal."***

7. Thus, in essence the Court stayed the execution of its judgment of **31/7/2019**. But, apparently before this court delivered its ruling on **14/7/2021,** the Plaintiff had commenced execution of the decree by way of eviction of the Respondents from the suit land. From **paragraph 5** of the Affidavit of **Flora Cherono**, by this time execution had commenced by way of removal of the respondents from the premises and an erection of a barricade consisting of an iron sheet fence around the suit land. As to why the Applicant moved quickly to do this while she knew that the Application for stay pending Appeal was pending before the Court is anyone's guess. But the undoing of the end result of her action plays greatly as the motivation behind the instant application.

8. After the delivery of this court's ruling on **14/7/2021**, the Respondents' counsel wrote to the Auctioneers who had erected the iron sheet barricade, demanding that they remove the it. To counsel, that was the import of the ruling**. I do not think so.** Nevertheless, it appears that some time during the pendency of this Application, the fence was thus removed. This is evidenced by **paragraph 10** of the Respondents' Affidavit sworn by **Peter Maina Mungai** on **10th September, 2021** which goes as follows: "*…after the ruling of 14/07/2021, the applicants are in occupation of their parcels and carrying on with their normal businesses as shown by the photos annexed…*" The deposition was not controverted in any way by supplementary affidavit. It thus means that as things stand, there may not be any barricade any longer at the suit land and that the Respondents are in occupation of the premises. This inference is further grounded on the Applicant's own submissions filed on **08/10/2021** wherein at **paragraph 10** they submit, "*They have gone ahead to dismantle the barricades that surrounded the suit property and regained entry therein…*" Thus, the Applicant came to court seeking for a **review, variation or clarification** of this Court's ruling given obtaining circumstances or due to the above actions.

9. Before I make the determination herein, I wish to observe, and sadly so, that the actions of the parties from when the Application for stay of execution was filed on **16/03/2021**, depict a pattern: each side is intent on outdoing the other at the slightest moment. It is neither good behavior nor practice. I say no more!

DETERMINATION

10. I have carefully considered the application, the affidavits both in support and opposition, the annexures thereto, the parties' submissions and the law. I find two issues for determination. These are:

> ***(a) Should the honourable court review, vary or clarify its orders dated 14/7/2021?***
>
> ***(b) What orders should issue?***

11. I start with a discussion on the first issue as hereunder:-

(a) Should the Honourable Court review, vary or clarify its orders dated 14/7/2021?

12. Review of a court's judgment, decree, ruling or orders is provided for by the law. This court is given wide discretion to review, vary its orders. However, this discretion must be exercised judiciously. As to clarification also, the court is vested with power to do so if need arises. On the issue of review, this court is guided by the provisions of Section **80** of the **Civil Procedure Act** and that of **Order 45** of the **Civil Procedure Rules** 2010.

13. Order 45 Rule 1(1) of the **Civil Procedure Rules** provides as follows:

1) any person considering himself aggrieved-

a) by a decree or order from which an appeal is allowed but which no appeal is preferred; or

b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of a 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.

14. Section 80 of the **Civil Procedure Act** provides as follows:

"any person who considers 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 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.

15. Order 45 of the **Civil Procedure Rules 2010** is explicit that a court can only review its orders if the following grounds exist:

a) There must be discovery of a new and important matter or evidence which after the exercise of due diligence was not within the applicants knowledge and which could not therefore produce at the time the order was made; or

b) There was a mistake or error apparent on the face of the record; or

c) There were other sufficient reasons

16. Further, an application of this nature must be made without unreasonable delay. It therefore means that a party must move the Court within the shortest time possible upon realizing the need to do so. Thus, has the applicant satisfied these conditions?

17. As to whether the application was brought without unreasonable delay, this court notes that the application was filed on the **28/7/2021** whereas the ruling was delivered on **14/7/2021.** That translates to **14 days** of the delivery of the ruling. The period is short. Thus, the application was brought without undue delay.

18. As to whether there was discovery of new evidence which was not within the knowledge of the applicant, this court observes that there is no discovery of any important matter to warrant a review or variation of its orders. The applicant has not demonstrated so. Nowhere has she indicated that she has discovered new material that was not, with due diligence being exercised, placed before the Court for consideration was it was not.

19. Was there an error apparent on the face of the record? The Applicant seems to think so. But she only says that since the orders of the Court were issued after, according to her, eviction having taken place, they open room for interpretation which suits the parties. That for that reason there is a lacuna in the ruling. Respectfully, I do not think what the Applicant alludes to is an error apparent on the record. If a party, while knowing of the existence of a court order, chooses to act inconsistent with it, they do so at their own peril. The Court has power to punish for contempt, and that punishment can be severe depending on aggravating behavior of the contemnor. In the case of **Muyodi -v- Industrial and Commercial Development Corporation & Another (2006) 1 EA 243**, the court of Appeal described an error apparent on the face of the record as follows:

"....in Nyamogo & Nyamogo -v- Kogo (2001) EA 174 this Court said that 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 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 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....."

20. In the instant application, the applicant has not demonstrated that there was any error apparent on the record to warrant this court to review its orders. But that finding is not all that is to the requirements to be satisfied by an applicant in an Application of this nature.

21. Has the applicant then given sufficient reasons to warrant this court to vary the impugned ruling? I have perused the ruling dated **14/7/2021** and find that as at the date of its delivery, the applicant had already erected the iron sheet fence around the suit land. But eviction was not the only prayer the orders of stay of execution were directed at. The Judgment of **31/07/2019** contained many payers capable of execution. Two things need to be made clear. When the Court issued the orders on **14/07/2021** it directed them to the entire judgment. Also, the order was directed to the status of the decree arising from the judgment as at the time the orders were issued. Arguing differently would be doing no more than splitting hairs and skewing matters to suit parties' interests.

22. The purpose of stay orders was to preserve the subject matter pending the hearing and determination of the appeal. The stay was granted

on 14/07/2021. There was a subject matter as at that time, and its status was clearly known then. Stay of execution means stay of execution. If in any given judgment or decree execution has commenced by the time an order of stay of execution is issued, it means that the execution is ***frozen*** by the order at the point the order issues. It does not mean that that which has been done be undone. If the Court wishes that what has been done be reversed, it specifically says so.

23. To make things clear, I repeat that some parties herein must be splitting hairs on a simple and plain issue. The Applicant wants me to make a finding that this Court did not Order that there be ***"eviction and demolition".*** There is something that seems to be playing in the mind of the parties in relation to the order sought to be reviewed, varied and or clarified. Each party knows well that the orders of this court, in relation to stay of execution, were clear. But both the Applicant and the Respondents know well what they have done in relation to the said orders, what they had done before and after the order. I believe that they know well which steps to take in case there is or there no violation of the orders. In other words, what the applicant wants this court to do is to interpret its orders and review, vary and clarify them.

24. In interpreting the orders, this Court bears in mind that there are many tools used in interpretation of documents, and selection and application of the any depends on the document being interpreted. I need not go into these. But the commonest employed is considering the plain text of the document. Elsewhere such as in the United States of America's constitutional interpretation, this is what is known as *textualism*. One looks at only the text as it is and draws meaning.

25. For the purpose of the instant Application, this this Court begins from the point of giving meaning to what it sees or reads in documents. Where the text is plain and clear as the present orders sought to be reviewed, varied or clarified are, the Court reads the it and interprets it grammatically. It needs not look into another meaning when the text bears an ordinary and simple meaning. In the instant case**, prayer (e)** of the Judgment read ***"****An order that the defendants shall be evicted from.…****"*** I see no word ***"demolition"*** in that phrase or prayer or indeed in any other. Wherefrom the Applicant imports the word ***"demolition"*** which he emphasizes to the point of putting it in bold in **paragraphs 1** and **7** of the grounds on the phase of her Application I know not. Perhaps it is premised on the contents of the deposition by the Applicant in **paragraphs 5** and **7** of her Affidavit sworn on **28/7/2021**, where she states that she had barricaded the suit premises on **2/4/2021** and that on **26/7/2021** she received a letter from the Auctioneer that he removes the barricades. This, I see as where the Applicant comes from. She erected a barricade before the ruling was delivered, she did not want it demolished. I have stated above that in the prayer for eviction I have not seen inclusion of the word ***"demolition".*** But if the Applicant's ferocious argument in that respect was to be taken to be true and literally, equally, this court wonders loudly: did the prayer for eviction include a phrase or reference to ***"eviction"*** *and erection of* ***"barricade"****?* No! The orders of the Court ought to be interpreted as they were and still are in relation to the status quo as it was when they were issued. There is no ambiguity or anything to confuse anyone about them.

26. This court did not issue orders of interfering with the status that existed as at the date when the ruling was delivered. As I have stated before, this Court has become alive to the fact that the parties herein are keen to outdo each other in regard to the orders of this Court. In so doing, that neither makes the orders of the Court vague nor creates an error in them. It does not form the basis of the Court reviewing, varying or clarifying its orders. The orders were issued on **14/07/2021**, they were directed at staying the execution of the judgment of this Court that was delivered on **31/07/2019**, and the parties know clearly well that that is the date they took effect to stay the judgment of the Court.

(b) <u>What orders should issue</u>?

27. Basing on the foregoing, I find no merit in the application dated **28/7/2021**. It is therefore dismissed with costs to the Respondents.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 1ST DAY OF DECEMBER, 2021.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.