REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 265 OF 2014

FRANCIS KITHAKA CUBI.....1ST APPLICANT

JOSEPH MUGO CUBI.....2ND APPLICANT

JOHN WARUI CUBI.....3RD APPLICANT

GABRIEL MUTHIGANI CUBI.....4TH APPLICANT

VERSUS

ISAACK ISIKA CUBI Alias ICHIKA CUBI.....DEFENDANT

RULING

The applicant vide a Notice of Motion dated 5th August 2019 sought the following orders:

(1) Spent.

(2) Spent.

(3) This Court do issue a temporary injunction restraining dealings over land parcel No. MWERUA/KITHUMBU/65 sub-divided to MWERUA/KITHUMBU/2929 to 2934 and stay the execution judgment delivered on 9/12/2016 pending hearing and determination of this application inter-parties.

(4) That Court do issue a temporary injunction restraining dealings over land parcel No. MWERUA/KITHUMBU/65 sub-divided to MWERUA/KITHUMBU/2929 to 2934 and stay the execution judgment delivered on 9/12/2016 pending hearing and determination of this application.

(5) That this Court do review the judgment delivered on 9/12/2016 where it ordered that land parcel MWERUA/KITHUMBU/65 be shared into 5 parts equally and award the defendant 2 acres in the land.

(6) Costs be provided for.

The said application is supported by grounds shown on the face of that application and a supporting affidavit of the applicant sworn the same date.

The application is opposed with a replying affidavit sworn by the respondent on 2nd September 2019.

APPLICANT'S CASE

The applicant contends that he was the original registered owner of land parcel No. MWERUA/KITHUMBU/65 after he was given by the clan. He stated that the plaintiffs sued him and the Court held that he was only a trustee for his brothers and by that decision, the Court erred in stating that the land be shared out equally between him and his brothers who are actually step-brothers.

He stated that the Court erred when it held that percentage is not disputed in its judgment. He stated that he was born in 1948 and his father died in 1956 leaving him as his only child and that the plaintiffs were born later. He stated that he helped his mother to raise his siblings until they became adults and also educated them and even allowed them to live in the suit land and was ready to share the same but not in equal shares as ordered by the Court. He contends that when the suit was pending, the plaintiffs/respondents had even accepted the shares of

land he had given them but changed their minds later. He stated that their lawyer wrote several letters to his advocate indicating that they had accepted the shares he gave them. He stated that he raised the plaintiffs and that he should be given a bigger share than them.

In conclusion, the applicant stated that even under Kikuyu Customary Law, it was a practice that the person who held the land in trust would get a bigger share than his brothers.

RESPONDENTS CASE

The respondent in his replying affidavit stated that the applicant has not given sufficient reasons for the grant of the orders sought. He stated that no sufficient reasons have been given for the Court to review its judgment delivered on 9th December 2016. He stated that the issues being raised as grounds for review are good grounds of appeal and not review. He urged that the applicant never appealed against the Court's findings nor did he give evidence or reasons why he would be entitled to a bigger share at the hearing. He stated that there is no discovery of new and important matter to warrant a review of the Court's judgment. He contends that the alleged reasons were within the applicant's knowledge during the hearing of this case. He stated that there was no mistake apparent on the face of the record to warrant review of the judgment or decree of the Court and that it is now almost three (3) years down the line and no reasons have been given for the delay in filing the application for review.

In conclusion, the respondent stated that there is no explanation for the inordinate delay in filing the application for review hence the same should be dismissed with costs.

LEGAL ANALYSIS

I have considered the affidavit evidence for and against the said application dated 5th August 2019 and submissions by the counsels. I have also considered the applicable law. It is trite law that before an order for review under ***Order 45 CPR*** can be granted, an applicant must satisfy the Court on the following grounds:

> ***(1) 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 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 and/or:***
>
> ***(3) For any other sufficient reason.***

The applicant has attempted to give some evidence in form of letters exchanged between his advocate and that of the plaintiffs in the year 2015 or thereabouts. However, he has not stated that these new and important evidence was not within his knowledge or could not be produced at the time when the decree was passed. The decree of this Court was passed after the case was heard and witnesses called. The defendant had all the opportunity to call his witnesses and present their evidence. He cannot be allowed a second bite at the cherry in the name of review when he had the opportunity to present all his evidence during the hearing. I also find that there is no error or mistake apparent on the face of the record or any sufficient reasons to disturb the decision of the Court delivered on 9th December 2016.

The case law relating to review of judgments is abundant from the High Court and the Superior Courts. The learned author on ***Mulla on the Indian Civil Procedure Code, 15th Edition at page 2726*** laid out the principle as follows:

> ***"Applications on this ground must be treated with great caution and as required by 4 (2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of a new evidence, it must be established that the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for review, but the discovery of a new and important matter which was not within the knowledge of the party when the decree was made".***

In the case of ***Nyamogo & Nyamogo Vs Kogo (2001) E.A 174***, the Court of Appeal stated on an error apparent on the face of 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 on its very nature, and it must be left to 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 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".***

I agree with the decision by the Court of Appeal which is binding. From the arguments presented by the applicant, it is clear that what is alleged as an error are actually points that can be taken out as grounds of appeal. I find no error apparent on the face of the record which requires the review of this Court. I find the application dated 5th August 2019 lacking in merit and the same is hereby dismissed with costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 8th day of November, 2019.

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E.C. CHERONO

ELC JUDGE

8TH NOVEMBER, 2019

In the presence of:

1. Mr. Ombachi for Plaintiff/Respondent

2. Mr. Asiimwe holding brief for Ms Thungu for Defendant/Applicant

3. Kabuta – Court clerk – present