



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC APPEAL NO. 4 OF 2018

(Formerly Machakos ELC Appeal No. 163 of 2010)

WANJIRU WAIRAGU WANJOHL.....APPELLANT/RESPONDENT

VERSUS

MIRIAM NAISUAGU KANUNU (Suing on behalf of the estate of KANUNU OLE

KAURRAI – deceased).....RESPONDENT/APPLICANT

RULING

What is before Court for determination is the Respondent's Application dated the 3rd April, 2019 brought pursuant to section 1A, 1B & 3A of the Civil Procedure Act; Order 51 Rule 1, Order 45 Rule 1, 2 and 3 of the Civil Procedure Rules. The Applicant seeks for the following orders:

1. That this Honourable Court be pleased to set aside or review the order made by His Lordship Justice Kariuki on the 13th February, 2015 as there was an error apparent on the face of the record.
2. Costs of this application be in the cause.

The application is premised on the grounds on the face of it and the affidavit of MIRIAM NAISUAGU KANUNU where she deposes that she is the legal representative of the deceased Respondent's estate. She confirms that the Respondent died on 28th April, 2014 while the Appeal was determined on 13th February, 2015. She claims the outcome of the Appeal subjected the beneficiaries of the deceased Respondent to unexpected turmoil. She contends that the deceased estate is being deprived of a portion of 2 acres from Ngong/ Ngong/ 1143 as the deceased only sold four (4) acres and not six (6) acres. She states that the Court erred by determining the Appeal in the absence of one of the parties.

The Respondent and the Appellant filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 3rd April, 2019 including the supporting affidavit and respective submissions, the only issue for determination is whether the Court should review and or set aside the order made by Justice Kariuki on 13th February, 2015.

The Applicant in her submissions reiterated her claim above and insists there is an error apparent on the face of the record as the Appeal was heard and determined after the Respondent's demise. The Respondent in her submissions insist the Applicant was represented by messrs Mulwa, Isika & Mutia Advocates who came on record for him on 9th May, 2012. Further, the matter came up for hearing on 8th October, 2013 where directions were given for the parties to file their submissions with the Applicant's Advocate filing submissions on 9th December, 2013. He claims all these were done when the Respondent was alive. Judgement was however delivered on 13th February, 2015.

Section 80 of the Civil Procedure Act provides: -"**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.**"

Further, Order 45, rule 1 (1) of the Civil Procedure Rules 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.’

In the case of MUYODI v INDUSTRIAL AN COMMERCIAL DEVELOPMENT CORPORATION AND ANOTHER EALR (2006) EA 243, the Court of Appeal while describing an error apparent on the face of record, held as follows:’ “ *In Nyamogo & Nyamogo -vs- 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 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. This laid down principle of law is indeed applicable in the matter before us.*”

The Applicant seeks a review of the judgement dated the 13th February, 2015 which is almost four years later. I note the Applicant initially filed an application for review dated the 19th August, 2016 which was struck out on 26th January, 2018 and she later filed the instant application. She claimed the deceased was not represented and the Appeal proceeded in their absence. On perusal of the Court Record I note the deceased was indeed represented by an advocate on various dates in Court and I find the Applicant not being candid on this point. Further, the deceased Advocate was present when the Counsels sought for a Judgement date and never informed Court of his demise. The Applicant has sought for review of the judgement much later and not explained the reason for the delay. Order 45 rule 1 (1) of the Civil Procedure Rules is clear that **a party may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.** Based on the facts as presented and since the delay is not explained and in relying on the abovementioned decision as well as the legal provisions cited above, I find that the review has been sought after a long delay which is not explained.

In the circumstances, I find the application dated 3rd April, 2019 umerited and will proceed to dismiss it with costs.

Dated signed and delivered via email this 26th Day of May, 2020.

CHRISTINE OCHIENG

JUDGE