**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 372 OF 2017**

**(Formerly Nairobi ELC No. 963 of 2006)**

**MARITUAI KARINGITHE (Suing as the legal representative**

**of the estate of Karkise Ole Mosiro).....1ST PLAINTIFF**

**BOMAN MOSIRO.....2ND PLAINTIFF**

**ELIJAH MOSIRO.....3RD PLAINTIFF**

**VERSUS**

**SIMON NDUNGU SUPEYO.....1ST DEFENDANT**

**JOSEPH CRESPERS SUPEYO.....2ND DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiffs' Notice of Motion Application dated the 18th February, 2020 brought pursuant to Section 80 of the Civil Procedure Act, Sections 3, 13 (1), (2), (7), 19 of the Environment and Land Court Act, Order 9, 22 (22), 45, 51 (1) (3) (4) & (11) of the Civil Procedure Rules, Articles 48, 50 (1) , 159 & 259 of the Constitution. The Applicants pray for the following orders:

1. Spent.

2. That the firm of M/S Mutitu, Thiongo & Co. Advocates be allowed to come on record for the Plaintiffs/ Applicants in place of M/S T. K. Rutto & Co. Advocates who formerly withdrew from acting for the Plaintiffs without giving notice to the Plaintiffs before the Plaintiffs case was closed.

3. That a stay of execution be granted restraining the 1st and 2nd Defendants/ Respondents whether by themselves, their servants, workers, agents and/or employers from executing the Decree dated 18th December, 2019 which Decree is to the effect that the Plaintiffs, their respective families, relatives or agents or any one claiming interest under them be evicted within 90 days from land parcel number Ngong/ Ngong/ 845.

4. That this Honourable Court be pleased to review its Judgment and Decree dated 9th December, 2019 and 18th December, 2019 respectively and set aside the said Judgment and Decree and order a retrial of this matter.

5. That the Plaintiffs/ Applicants be granted the costs of this application.

6. That this Honourable Court do issue any such other and/ or further orders as justice of the case herein may demand.

The application is premised on the grounds on the face of it and the supporting affidavit of FRANCIS BOMAN MOSIRO the 2nd Plaintiff herein where he deposes that they had instructed M/S T. K. Rutto & Co. Advocates to represent them in this matter. He explains that when the matter commenced for hearing, the 1st Plaintiff testified after which the Advocate applied for time to enable the 3rd Plaintiff to give further evidence. He claims to have been surprised to learn that the firm of M/S T. K. Rutto & Co. Advocates had long withdrawn from acting for them when they received a Notice to attend Court for judgement. He confirms the Judgment was delivered in their presence where their suit was dismissed and court entered judgment as per the Counterclaim. He states that they were dissatisfied with the conduct of Mr. Rutto Advocate and when they sought an explanation from him, he advised them to seek the services of another Advocate. Further, they engaged the services of M/S Mutitu, Thiongo & Co. Advocates who filed a Notice of Appeal and applied for certified copies of proceedings.

He avers that their new Advocate upon perusal of the Court file advised them to apply for review rather than proceeding with the Appeal. He explains that there is no indication on record whether the Court inquired from Mr. Rutto if he had informed the Plaintiffs that he was ceasing to act for them. Further, whether the Plaintiffs recorded their objection to the same and they were never served with an Order from Mr. Rutto that he had ceased acting for them. He reiterates that they failed to instruct a new advocate due to the negligence of Mr. Rutto. He contends that the Court failed to take into account that they had failed to close their case after allowing Mr. Rutto's application to cease acting. Further, that they were not aware of any hearing notices issued by the court calling on them to attend hearing on subsequent dates. He avers that there is an error apparent on the face of the record as on 17th December, 2018, when the Defence case came up for hearing the Court allowed the Defendants' to introduce Supplementary List and Bundle of Documents dated 14th December, 2018 without having served the said documents upon the Plaintiffs. He avers that the said evidence was prejudicial to their case. He states that the eviction orders issued by the Court in its judgement will affect unsuspecting third parties who were never given an opportunity to canvass their interest in the land from which they were evicted from. Further, there is an error on the face of the record because the reasons that caused the Court to dispossess the Plaintiffs from their land was that they were accused of forgery for having superimposed Ngong/ Ngong/ 845 with Ngong/ Ngong/ 846 and charged vide Kibera Criminal Case No. 366 of 2014 which is yet to be finalized. He further explains that the owners of the subdivided portions are unsuspecting third parties who derived their titles from the Plaintiffs title which has now been awarded to the Defendants through this judgement and it would amount to the unlawful eviction of innocent purchasers of property for value without notice of any legal defects as their property arose from the subdivision of NGONG/NGONG/845 and NGONG/NGONG/846. Further, this eviction would be effected or carried out without giving them a chance to defend their claim over the ownership of such parcels yet they possess genuine title deeds for such parcels issued to them by the Government of Kenya. He claims the owners of these subdivided portions include among others, the owners of parcel numbers NGONG/NGONG/ 41726 and NGONG/NGONG/41727, L.R. NGONG/NGONG 41726 which has further been subdivided into NGONG/NGONG/42003; 42004; 42005; 42006; 42007; 42008; 42009; 42010; NGONG/NGONG/42011; /42012; 42013; 42014; 42015; 49013; 52449; 52500; 52501; 52502; 52503; 52504; 52505; 52506; 52507; 49050; 49011; 50996; 49685; 42004 and 49686. Further, that some of the aforementioned parcels such as NGONG/NGONG/42005 and NGONG/NGONG/42015 have been further subdivided. He insists the said unsuspecting owners are entitled to a legal right to be enjoined as parties to this suit so that they can get a chance to defend their rights from being evicted from such parcels of land. He reiterates that they should not be condemned for the mistake or fault of their Advocate that made them not defend the Counterclaim.

The Defendants opposed the application and filed a replying affidavit sworn by JOSEPH CRESPERS SUPEYO TUMPES where he deposes that the Plaintiffs had all along resisted the commencement of the hearing of this suit and even on 28th July, 2018 they sought for adjournment which the Court declined. He contends that the Plaintiffs were present in Court on 24th July, 2018 when the 1st Plaintiff testified and were present when the Court gave subsequent dates for hearing. Further, that Ms/T K Rutto & Co. Advocates ceased acting for the Plaintiffs through an application dated the 23rd October, 2018 but since then the Defendants have always served the Plaintiffs with hearing notices and court processes through the same mode in which they served them with the notice of delivery of judgement. He contends that even though Mr. Rutto Advocate ceased acting for the Plaintiffs, he remains on record for the 2nd Plaintiff in Kibera Criminal Case No. 366 of 2014 and the said suit has come up for hearing on the following dates: 25th October, 2018, 31st October, 2018, 13th February, 2019, 7th March, 2019, 19th June, 2019, 29th January, 2020 and 17th February, 2020. Further, he has been attending court in Kibera including his Advocates who have been watching brief in Kibera Case No. 366 of 2018. He has personally seen the Plaintiffs engaging with Mr. Rutto in Kibera and contends that they cannot feign ignorance of the fact that he ceased acting for them in the instant suit. He insists the reasons Mr. Rutto ceased to act for them is indicated in his application dated the 23rd October, 2018 and failure of the Plaintiffs to appoint another Advocate at that stage should not be an excuse to deny the Defendants' the fruits of their judgement. He avers that the Notice of Appeal dated the 23rd December, 2019 and filed on 23rd December, 2019 has never been served upon them hence it is null as well as void. Further, the indication that the Plaintiff's new Advocate was perusing the court file on 4th February, 2020 shows the casual manner in which the Plaintiffs are taking the matter. He reiterates that the hearing date for 25th October, 2018 had been fixed in the presence of all the parties. Further, the Plaintiffs were served with Hearing Notices for 17th December, 2018. He avers that the Plaintiffs were duty bound to be present in court during the hearing of their case or to follow up on the same. He insists Mr. Rutto never filed any list of witnesses or witness statements despite being granted an opportunity to do so. Further, on the day the 1st Plaintiff testified, the 2nd and 3rd Plaintiffs were in court however when called upon to testify, their advocate indicated they wanted to call other witnesses and the matter was adjourned on their account. He insists there is no error apparent on the face of record as the Plaintiffs were duly served and the Court exercised its power to close their case when they failed to attend court. He denies that there was any newly introduced evidence but the evidence provided by the witnesses in court were as per facts within the knowledge of the Plaintiffs as the same was submitted by the surveyor pursuant to previous court orders as well as supplied in the Kibera case. Further, that the Plaintiffs cannot blame any party for failing to participate in the hearings. He reiterates that the Plaintiffs action of subdividing the land was done illegally during the pendency of the status quo order issued by the court. Further, this case has been pending in court for many years and where there is a case in court regarding ownership of land, no party should transact with the said land. He insists the Plaintiffs appeared to be intent on subdividing and attempting to subdivide the disputed pieces of land which they knew belonged to the Defendants. Further, any claim by the third parties should be made and be satisfied by the Plaintiffs for knowingly subdividing and allegedly disposing off the disputed land. He avers that the Plaintiffs are to blame for the involvement of the said third parties and the remedy for any such third parties lies as against the Plaintiffs and not the Defendants. He contends that the Kibera Criminal case and the ELC case are dealing with two different reliefs, the ELC case is for establishment of the Defendants legal right to their land while the Kibera Criminal case is to punish the Plaintiffs for their criminal activities which include forgery. Further the jurisdiction and burdens of proof of the two courts are different. He further insists any issue the Plaintiffs have against Mr. Rutto and T.K. Rutto & Co. Advocates should be taken up with the said advocate and his law firm and should not be used as an excuse to fault this Honourable Court's Judgement which is sound. He states that the application been brought with undue delay as it is clear from the Plaintiffs' own admission that their new advocate had been instructed on 23rd December 2019 but they only filed this application on 19th February 2020. He reiterates that as far back as June 2012 the parties had pursuant to a court order proceeded to the disputed site together with a government land surveyor who marked the area where the Defendants' property was located, and the Plaintiffs' therefore clearly knew where the suit land was.

The Plaintiffs and Defendants' Counsels made their oral submissions in respect to the instant application which I have considered.

**Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 18th February, 2020 including the respective affidavits, annexures and oral

submissions, the following are the issues for determination:

· Whether the firm of M/S Mutitu, Thiongo & Co. Advocates should be allowed to come on record for the Plaintiffs/ Applicants in place of M/S T. K. Rutto & Co. Advocates who formerly withdrew from acting for them.

· Whether there should be a stay of execution of the Decree herein.

· Whether the Court should review and/ or set aside its Judgement and Decree and order a retrial.

As to whether the firm of M/S Mutitu, Thiongo & Co. Advocates should be allowed to come on record for the Plaintiffs/ Applicants in place of M/S T. K. Rutto & Co. Advocates who formerly withdrew from acting for them.

Order 9 Rule 9 of the Civil Procedure Rules provides that: ' **When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.'**

In this instance, the firm of M/S T K Rutto had ceased acting for the Plaintiffs before the entry of the judgement herein. Further, the Defendants did not oppose the firm of M/S Mutitu, Thiongo & Co. Advocates to come on record for the Plaintiffs. Even though the Plaintiffs instructed the said firm to come on record for them after judgement, based on the facts as presented and in relying on the legal provisions cited above, I will proceed to allow this prayer.

As to whether there should be a stay of execution of the Decree dated 18th December, 2019. The Plaintiffs have sought for a stay of execution of the Decree herein which will in effect culminate in the Plaintiffs, their respective families, relatives or agents or any one claiming interest under them to be evicted from land parcel number Ngong/ Ngong/ 845 within 90 days from the said date. Order 42 Rule 6(2) provides that:'' **No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**'

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stated thus:'

**"1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**

**2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.**

**3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**

**4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**'

In this instance, the Plaintiffs have sought for stay of execution of the Decree but not indicated whether they are proceeding with the Appeal or not. They claim there are third parties who will be affected by the said Decree but not provided their identities and the parcels of land they have purchased. I note the said third parties have also not applied to be enjoined in this suit. Based on the circumstances at hand and in associating myself with the decision cited above, I decline to grant the said stay of execution as sought.

As to whether the Court should review and/ or set aside its Judgement and Decree and order a retrial. The Plaintiffs in their submissions reiterated their claim above and relied on various decisions including: **Shimoni Resort V Registrar of Titles & 5 Others (2016) eKLR; Pancras T. Swai V Kenya Breweries Limited (2014) eKLR and KPLC Vs Benzu Holdings Limited; Civil Appeal No. 132 of 2014.** They submitted that the Status Quo order issued by the Court in the presence of Mr. Rutto Advocate but in their absence could not bind them. Further, that there was an error on record as the court relied on the Kibera Case which is yet to be determined. They insist they did not get a fair trial.

The Defendants in their submissions insist no third parties were named nor supporting documents annexed to confirm this averment. They referred to various annexures to confirm the Plaintiffs were indeed served with various hearing notices. They insist if there are third parties who are innocent purchasers for value, being condemned unheard, then it is the creation of the Plaintiffs as there were express orders dated the 15th November, 2006 on maintenance of status quo. Further, another order was issued on 24th January, 2012 by consent where parties agreed there would be no further dealings on the suit land. They referred the court to the District Land Registrar's report dated 29th June 2012 which was prepared as a result of the directions by the court for a survey on the disputed land to be done in the presence of the parties.

Further, that during the said survey, the Plaintiffs and Defendants were present including Mr. Rutto Advocate and a surveyor brought by them. In the said Report, the Land Registrar said there was no tangible evidence on Ngong/ Ngong/ 845 of any building or structures as at June 2012. The Defendants relied on the case of **NATIONAL BANK OF KENYA LIMITED vs NDUNGU NJAU [1997] eKLR** to buttress their arguments. The Defendants reiterated that the Plaintiffs sought a re appraisal of the whole evidence so that the court can sit on appeal of its own matter.

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.'**

First and foremost, I note this matter was filed by the Plaintiffs in the year 2006 and only proceeded for hearing from 2018. When the matter was first set down for hearing on 24th July 2018, the 1st Plaintiff testified and confirmed that there were no persons on the disputed land. I note on the said date the Plaintiff's advocate informed court that he intended to call another witness and sought for leave to file further witness statements. Despite the said Leave being granted he failed to do so. He further sought for an extension of seven (7) days to file the witness statements but still did not do so. On the 24th July, 2018, in the presence of the Plaintiffs, the Court adjourned the matter for further hearing on 18th October, 2018 and 25th October, 2018, hence on these dates, I find that the Plaintiffs did not require to be served with any hearing notices as they were well aware of the said dates. The Plaintiffs' claim they were not aware that their advocate had ceased acting for them. I note after the Advocate had ceased acting for them, the Plaintiffs were indeed served as evident in the Affidavits of Service marked as annexures 'JS1', 'JS2' and 'JS3' in the replying affidavit. The Plaintiffs further did not controvert the averments by the Defendants that the said Mr. Rutto was still on record for the 2nd Plaintiff in the Kibera Case and had appeared severally in court. I find that they are not being candid that the Court did not grant them a fair trial and their lawyer made a mistake since the Kibera matter was related to this suit and they should have sought for updates from him. Be that as it may, the Plaintiffs confirmed being served with a Notice of Judgement and at that time they never sought to reopen the proceedings before judgement was delivered. The Plaintiffs have claimed there are innocent third parties but not furnished court with their identities, dates they purchased the land as well as the respective parcel numbers. Except for listing various subdivisions, they did not annex any documents to support the said subdivisions. The 1st Plaintiff as PW1 testified in Court that a portion of their land was unutilized and did not know if any land had been sold to third parties. I opine that the said unnamed third parties still have a recourse against the person who sold them land and can institute their own suit to canvass their claim. From annexure 'JS4', it is evident the Court gave an order of status quo on 2nd March, 2009. Further as per the Order dated the 2nd February, 2012 which is part of annexure 'JS4' the Court clearly indicated that there should be no further dealings in the land. At annexure 'JS5' which is a Court dated the 23rd June, 2010, the Court directed the Land Registrar to present a report concerning Ngong/ Ngong/ 845 and this culminated in the Land Registrar's Report dated the 29th June, 2012 as well as District Surveyor's Report dated the 25th June, 2012 which were presented in court, which the Plaintiffs' claim was additional evidence. The Plaintiffs claimed they had not closed their case and at this point I wish to refer to Order 12 Rule 3 of the Civil Procedure Rules which provides that :' (1) **If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court. (2) If the defendant admits any part of the claim, the court shall give judgment against the defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court. (3) If the defendant has counterclaimed, he may prove his counterclaim so far as the burden of proof lies on him.** ' As per these legal provisions and since there was a counterclaim, there is no indication that the Court was to proceed to close the Plaintiffs case. Since the Plaintiffs failed to attend court, the Court directed the Defendants to proceed as per their counterclaim in accordance with the provisions cited above. In the circumstance, I hold that the Plaintiffs were indeed accorded a fair trial and the blame being meted on their former advocate is a mere excuse.

In the case of ***Nyamogo & Nyamogo -vs- Kogo*** ***(2001) EA 174*** *the Court held 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."***

*Further, in the case of National* Bank Of Kenya Limited v Ndungu Njau [1997] eKLR, the Court of Appeal held that:' **In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.'**

I note the Plaintiffs' relied on the decision of ***Shimoni Resort (supra)*** which I wish to distinguish from this case as it concerned a dispute where the actions of the Minister for Lands directed the Registrar of Titles to cancel specific entries made against certain land parcel numbers vesting specified interests and rights in various parties. In associating myself with the two decisions cited above and applying them to the current scenario, I opine that the alleged errors cited by the Applicants which I have stated above, have been drawn from a long process of reasoning on the judgment of the Court and opinion of the Applicants. It is my considered view that the Plaintiffs seem to want the Court to

reappraise its evidence. In the circumstance, I find that the said highlighted areas and the arguments supporting the same, form a good basis for appeal and it is my finding that they do not meet the threshold for review.

I further note that the Plaintiffs have already lodged a Notice of Appeal and sought to also pursue a review of the judgement and this is contrary to the provisions of Order 45 Rule 1 (1) (a) of the Civil Procedure Rules as they need to choose one route.

It is against the foregoing that I find the Notice of Motion Application dated the 18th February, 2020 unmerited and will proceed to disallow it.

Costs are awarded to the Defendants

**Dated Signed and Delivered via email this 21st Day of May, 2020**

**CHRISTINE OCHIENG**

**JUDGE**