REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 12 OF 2015

MARY MUTHONI NGARI.....PLAINTIFF

VERSUS

JOSEPH NGARI KAMAU.....1ST DEFENDANT

JANE WAIRIMU NGARI.....2ND DEFENDANT

JORAM KAMAU NGARI.....3RD DEFENDANT

JAMES MWANGI MGARI.....4TH DEFENDANT

SAMUEL GITHUA NGARI.....5TH DEFENDANT

PATRICK KURIA NGARI.....6TH DEFENDANT

ELIUD KAGUMO NGRI.....7TH DEFENDANT

RULING

BACKGROUND

What is before me is the Notice of Motion dated 12th November, 2019 where the Applicant is seeking the following orders:-

> **(1)** ***That this Honourable court be please to REVIEW and/or amend its judgment/decree dated 18.10.2019 by way of deleting its entire holding number 3 and issues another holding/order as follows:-***
>
> > ***"Upon cancellation of the two titles, the DISTRICT LAND REGISTRAR KIRINYAGA do issue to the plaintiff (MARY MUTHONI NGARI) and the 2nd defendant (JANE WAIRIMU NGARI) with new titles in their names each title measuring five (5) acres in accordance with the wishes of their husband JOSEPH NGARI KAMAU (DECEASED) as reflected in the family meeting held of 12th February, 1996".***
>
> **(2)** ***THAT the costs of this application be provided for and be by the defendants.***

The application is supported by the affidavit of P.W. Kariuki Advocate sworn the same date and grounds apparent on the face of the said application. The application is opposed with a replying affidavit sworn by Felistas Fatuma Wanjiku Advocate on 3rd December, 2019. The said replying affidavit is further supported by numerous annextures thereto.

APPLICANT'S CASE

The Applicant through her advocate P.W. Kariuki stated that it is on record and undisputed fact that JOSEPH NGARI KARIMI died when this matter was ongoing. He deponed that ordering the land to revert back to and be registered in the name of the deceased without a specific order that the District Land Registrar Kirinyaga issues the plaintiff and the 2nd defendant with new titles as sought would necessitate and provoke starting of a succession cause which would be expensive and time consuming. He stated that it is undisputed that the plaintiff's five (5) acres were to be on the side of the Rural Road whereas the 2nd defendant's five (5) acres were to be on the side of River Nyaikungu. He

deponed that the application will not be prejudicial to the defendants at all even if they would want to appeal as their appeal would be the subject of the reviewed and/or amended decree.

RESPONDENTS CASE

The Respondents through their Advocate stated that the application is incompetent and bad in law as there is nothing new or important matter that has been discovered and which was not within the knowledge of the applicant or could not have been produced by the applicant at the time the case was heard and judgment delivered. It is further deponed that the deceased JOSEPH NGARI KAMAU died on 6th November, 2016 while this case was ongoing and counsel for the plaintiff who was aware of the death of the 1st defendant Joseph Ngari Kamau (deceased) applied to the Court to have the case as against him withdrawn was allowed. She stated that there is no allegation that there is a mistake or error apparent on the face of the record in holding No. 3 of the judgment delivered on 18th October, 2019 that would necessitate a review since the death of Joseph Ngari Kamau is not a new fact that was not within the knowledge of the applicant. She deponed that the need to subject the suit land to a succession cause would not necessitate a review as one cannot run away from the provisions of the law as the estate of Joseph Ngari Kamau (deceased) who passed on during the pendency of this suit is subject to the law of succession. The respondent further stated that *Section 99 of the Civil Procedure Act* provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising from accidental slip or omission and that there is no such error mistake accidental slip or omission in holding No. 3 of the judgment that the applicant seeks to amend.

The respondent also states that *Section 100 of the Civil Procedure Act* provides for amendment of any defect or error in any proceeding in a suit for the purpose of determining the real question or issue raised therein in the proceedings which is not the case in the current application. She stated that the applicant's application amounts to a change of the decision of this Court which would be tantamount to sitting on appeal of its own decision. The respondents also stated that contrary to the applicant's allegation that the application will not be prejudicial to the defendants, she stated that the respondents will indeed be prejudiced as there is now a pending application before the Court of appeal which application is seeking *inter-alia* stay of execution of this Courts judgment and that should this Court interfere with its judgment, it would necessitate them to withdraw the said application and start all over again.

PLAINTIFF'S/APPLICANT'S SUBMISSIONS

The plaintiff/applicant through the firm of Wambugu Kariuki & Associates submitted that the law on review is provided under *Section 80 of the Civil Procedure Rule*s. He submitted that the Court in considering any matter before it always has the judicial discretion that is exercised judicially and/or on the basis of material evidence presented before it. He further submitted that the most important condition to be demonstrated according to *Order 45 CPR* is that the applicant has not appealed against the order/decree being sought to be reviewed. The applicant did not cite any authority.

RESPONDENTS SUBMISSIONS

The respondents through the firm of Fatuma Wanjiku & Co. Advocates submitted that *Section 80 CPA* does not support the applicant's application. They submitted that *Section 80 CPA* is substantiated by order *45 Rule 1(1) (a) and (b) CPR*. They also submitted that order *45 CPR* does not allow a party to ask the Court for a change of its judgment as doing so would amount to the Court sitting on appeal of its own decision. The respondents further submitted that in an application under *Order 45 CPR*, a party must bring himself with the conditions set out there under by showing that she has discovered new or important evidence which was not within her knowledge or could not be produced by her at the time when the decree was passed or order made. The Applicant also has to show there is a mistake or error apparent on the face of the record or any other sufficient reason that would enable her seek a review of the judgment.

Finally, the respondents submitted that the applicant's application is bad in law as neither Review nor Amendment of this Court's judgment/decree dated 18.10.2019 by way of deleting the entire holding No. 3 of the judgment is supported by the law. The respondents counsel did not also cite any authority in support of their case.

ANALYSIS AND DISPOSITION

I have considered the Notice of Motion dated 12th November 2019, the supporting affidavit and the annextures thereto. I have also considered the replying affidavit and the submissions by counsels for both the applicant and the respondents. The applicant in this application is seeking to review/and/or amend the judgment/decree of this Honourable Court issued on 18th October, 2019 by deleting holding Number 3 and replacing it with a new order. Holding No. 3 the Court issued on 18th October, 2019 reads as follows:-

> ***"Upon cancellation of the two titles, the title reverts back to the name of JOSEPH NGARI KAMAU to be shared equally between the plaintiff and the 2nd defendant in accordance with the wishes of their husband JOSEPH NGARI KAMAU (deceased) as reflected in the family meeting held on 12th February, 1996".***

The applicant is seeking review and/or amendment of the judgment/decree holding No. 3 to read as follows:-

> ***"Upon cancellation of the two titles, the DISTRICT LANDS REGISTRAR KIRINYAGA do issue to the plaintiff (MARY MUTHONI NGARI) and the 2nd defendant (JANE WAIRIMU NGARI) with new titles in their names each title measuring five (5) acres in accordance with the wishes of their husband JOSEPH NGARI KAMAU (DECEASED) as reflected in the family meeting held of 12th February, 1996".***

My reading of the provisions of ***Section 80 CPA*** is that it gives the mandate of review while ***Order 45 CPR*** sets out the rules. The rules restrict the grounds for review. It lays down the scope of review. It limits the jurisdiction of review to the following grounds:-

(a) ***Discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made.***

(b) ***On account of some mistake or error apparent on the face of the record or***

(c) ***For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.***

It is clear from the provisions of the law above that judicial review may be granted wherever the Court is satisfied that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be one that is self evident and which does not require on elaborate argument to be drawn or established. In the case of ***Nyamogo & Nyamogo Vs Kogo (2001) E.A. 170,*** the Court discussed what constitutes an error on the face of record and held as follows:

> ***"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un-definitiveness inherent in its very nature and it must 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 options, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two options can hardly be said to be an error apparent on the face of the record. Again, in a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal".***

Again in the case of ***Aljit Kumar Rath Vs State of Orisa & others, 9 Supreme Court Case 596 at Page 608***, the Supreme Court of India had this to say:

> ***"The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out.***

I agree absolutely with the decision by the Courts in the two decisions. The applicant in his grounds shown on the face of the application at paragraph (b) averred as follows:

> ***"Ordering the land to revert back to and be in the name of the deceased (Joseph Ngari Kamau) without a specific order that the District Land Registrar Kirinyaga issues the plaintiff and the 2nd defendant with new titles as sought herein would necessitate and provoke starting of a succession cause which would be expensive and time consuming".***

The import of the application by the applicant by the reading of that paragraph in my view is not based on the established rules set out under the law but based on arguments and/or correction of an erroneous view taken by the Court. It is not an application based on an error apparent on the face or the record. I am not persuaded that the reasons given by the applicant amount to those grounds provided under ***Order 45 Rule 1 (1) CPR***. My finding is fortified by the holding in the case of ***Evan Bwire Vs Andrew Nginda*** (supra) where it was held that an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or hearing the case afresh.

Guided by the jurisprudence discussed above and the analysis of the facts in the affidavit evidence, it is my finding that the grounds given by the applicant for the review of the judgment/decree of this Honourable Court issued on 18th October 2019 do not qualify to be grounds for review to bring the applicant's application within the ambit of the grounds specified under ***Order 45 Rule 1 CPR.*** I also find that this is not a proper case that the Court can grant the orders sought or even exercise its discretion in favour of the applicant.

Accordingly, the application dated 12th November 2019 is hereby dismissed with no order as to costs. Orders accordingly.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 19th day of June, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Okwaro holding brief for Fatuma Wanjiku

2. Muriithi holding brief for Wambugu Kariuki

3. Mbogo – Court clerk.