REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 464 OF 2017

SYLVESTER KYALO MUTUA

BERNARD SYENGO KILONZO MULI *T/A*

NZAMU INVESTMENTS.....PLAINTIFF

VERSUS

FELIX MULWA MUNYALO.....1ST DEFENDANT

KENNY MUTHOKA.....2ND DEFENDANT

RULING

1. This Ruling relates to an Application dated 3rd October, 2019 seeking for an order of Review of the Judgment delivered on 8th February, 2019 against the 2nd Defendant/Applicant. The Application is brought under Order 45 Rule 1 (1) of the Civil Procedure Rules and Section 13(7) of the Environment and Land Court Act.

2. The Application is supported by the Affidavit of Kenny Muthoka who has deponed that the Plaintiffs ought to have first exhausted the jurisdiction donated to the Land Registrar under Section 18(2) of the Land Registration Act before suing him.

3. The 2nd Defendant deponed that the persons who instituted the suit against him did not have the capacity to sue and that the Plaint violated the provisions of Order 4 Rule 1 (1) (f) of the Civil Procedure Rules. It was the deposition of the 2nd Defendant that the Judgment delivered on 8th February, 2019 ought to be reviewed and the suit be struck out to allow parties to exhaust the mechanism provided for under Section 18(2) of the Land Registration Act.

4. The Application was opposed vide a Replying Affidavit sworn by the Plaintiff. The Plaintiff deponed that the issues being raised in the current Application were never raised in the pleadings; that the Applicant was bound by his pleadings and that the Applicant has not met the threshold for grant of review orders. It was averred that the court was *functus officio* and that the Application was an attempt to reopen the hearing through the back door.

5. The Application was canvassed vide written submissions. The Applicant's counsel submitted that the Applicant has met the threshold for the grant of review orders; that the suit as framed shows the existence of a boundary dispute between the parties herein and that the Plaintiff should have invoked the provisions of section 18 (2) of the Land Registration Act before moving this court.

6. Counsel submitted that this court was divested of jurisdiction to entertain the suit; that the first port of call was the Land Registrar and that the suit ought to have been struck out *in limine*.

7. The 2nd Defendant's/Applicant's counsel submitted that the pleadings are not specific on who the Plaintiff is; that a business name does not t have the legal capacity to institute a suit and that there is no nexus between the Plaint and the deponent of the Verifying Affidavit.

8. Counsel for the Plaintiff/Respondent submitted that there is no explanation for the delay in instituting the Application; that the Application is an abuse of the court process because the issues raised by the Plaintiff in the suit fell within the ambit of the jurisdiction of the court and that the threshold for reviewing a Judgment have not been made. Counsel relied on numerous authorities which I have considered.

9. As can be deduced from the Notice of Motion and submissions, the summary of the Applicant's case is that the Judgement of this court was made in error and that since the suit offended Order 4 Rule 1(1) (f) of the Civil Procedure Rules and Section 18(2) of the Land Registration Act, the Judgment of the court should be set aside and the entire suit be struck out.

10. On the other hand, the Respondent opposed the Application by arguing that the court was functus officio and that the Applicant did not raise the issues he is now raising in his pleadings.

11. The issues for consideration are as follows:

a) Whether there are grounds for court to grant an order of review.

b) Whether the applicant is entitled to the orders sought in the application.

12. The law under which an order of review can issue is provided for under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Order 45 (1) of the Civil Procedure Rules 2010 provides that:

"1. (1) Any person considering himself aggrieved-

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."

13. In order for an Application for Review to succeed, the Applicant must convince the court of the existence of new and important matters 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. The Applicant is obliged to clearly and specifically state the new evidence or matter and strictly prove the same. In the case of ***James M. Kingaru & 17 others vs. J. M. Kangari & Muhu Holdings Ltd & 2 Others (2005) eKLR,*** Visram J *(as he then was)* held as follows: -

"Applications on this ground (review) must be treated with caution. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial."

14. An Application for Review cannot be an avenue to supplement or introduce new evidence. Having looked at the Applicant's application, I find that the Applicant failed to demonstrate any new matter or evidence that could not have been made available at the time of conducting proceedings. Indeed, the issue of whether this court had the jurisdiction to entertain the suit, or whether the Plaintiffs had the *locus standi*, are matters of law which all parties, represented or not, are presumed to know. This is the position that the Court of Appeal took in the case of ***Pacras T. Swai vs. Kenya Breweries Limited (2014) eKLR*** in which the court held as follows:

'The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 relates to issues of facts which may emerge from evidence. <u>The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to.'</u>

15. Having not raised the jurisdictional and the *locus standi* issues during the hearing, those issues can only be raised on Appeal, and not by way of Review.

16. The second limb of Order 45 Rule 1 refers to an error apparent on the face of the record. In making an examination as to whether there is an error apparent on the face of the record, the court must be quick to draw a parallel between a decision that is merely erroneous in nature and an error that is self-evident on the face of it.

17. The court in the case of ***Nyamogo & Nyamogo Advocates vs. Kago [2001] 2 EA 173*** defined an error apparent on the face of the 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 in 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 a 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

18. A review application must confine itself to the scope and ambit of Order 45 rule 1, lest it mutates into an appeal. A perusal of the Application does not suggest that there is an apparent error on the face of the record. What the Applicant is saying in the application is that the court misapprehended the law by proceeding to hear the suit and delivering a Judgment. That, as I have said, is an issue for the Court of Appeal to determine, and not review.

19. The court may review its Decree or Order if theirs is a *"sufficient reason.''* In the instant case, the sufficient reason put forward by the Applicant is that the failure by the court to interrogate the capacity of the Plaintiff to sue and the exhaustion of the remedy provided under

Section 18 (2) of the Land Registration Act led to a decision being made against him.

20. There is no evidence at all to show that the Applicant took any steps to notify the court of the issues he is now raising, and this being an adversarial system, the court cannot deal with issues which are not before it.

21. In light of the foregoing, I dismiss the Application dated 3rd October, 2019 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE