



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**ELC SUIT NO. 299 OF 2012**

**ELIUD NJUGUNA MWANGI.....1ST PLAINTIFF/APPLICANT**

**MICHAEL K. MWANGI.....2ND PLAINTIFF/APPLICANT**

**-VERSUS-**

**JOHN KIBIWOT KIBOWEN.....DEFENDANT/RESPONDENT**

**RULING**

This ruling is in respect of an application dated 20th July 2020 by the plaintiff/applicants seeking the following orders;

- a) Spent.
- b) That the firm of Orwa Seda & Co. Advocates be placed on record in a place of m/s ONYINKWA & CO. Advocates for the plaintiffs.
- c) That the application dated the 11th March, 2020 be withdrawn with no orders as to cost.
- d) That the judgement of the honorable Justice Odeny made on the 15th day of, October, 2014 be implemented to its full effect.
- e) That the order implementing the survey report dated 31st July, 2017 be varied and/or set aside.
- f) That the execution of the said report be stayed pending the hearing and determination of this application.
- g) That the court issues summons to the county surveyor E. KEITANY to be cross examined on his report dated 31st July 2017.
- h) That the court orders a re-survey of parcel Karuna/Sosiani block 2(progressive)289, to be conducted.
- i) That the court orders that the plaintiffs may have an independent surveyor carry out the re-survey together with the county land surveyor in the presence of both parties.
- j) That the cost of this application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed.

**APPLICANT'S CASE**

Counsel submitted that it is the applicant's case that there is an error apparent on the face of the report and sketch map provided by the County Surveyor E. KEITANNY dated 31st March 2020 and the order implementing the survey report dated 31st July 2017 hence should be varied and/or set aside.

Counsel further submitted that the applicants being dissatisfied with the surveyors' report dated 31st July 2017, commissioned M/s Prestoland Real Estate and Properties Ltd, to conduct a re-survey of the parcel No. Parcel KARUNA/SOSIANI BLOCK 2(PROGRESSIVE) 289 who proceeded to carry out a resurvey of the suit property on the 30th march 2020.

That the private Surveyor found serious/gross discrepancies in the County Surveyor's report and sketch and presented their report, which is annexed to the plaintiff/applicant's application, and upon careful examination of the measurements and drawings provided, M/s Prestoland Real Estate and Properties Ltd, their report dated 5th March 2020, gave the total acreage that the County Surveyor excised for the defendant

as 6.58 acres.

Mr. Seda submitted that this is contrary to the orders issued by this court, whereby the County surveyor was ordered to excise 5.5 acres on the parcel. That the interpretation of clause "e" in the said order, which is to the effect that" the judgment given on 15th October 2014, by this honorable court be implemented to the fullest and the defendant be allowed to excise only 5.5 acres out of the land parcel.

It was the applicants case that if the report is implemented as it stands, then they will be left destitute with no way to access the small portion they are left with and will suffer irreparable harm.

Counsel therefore submitted that there is a good and sufficient cause for the setting aside of the implementation of the surveyor's report dated 31st July 2017 and ordering a joint re-survey, whereby all parties will fully participate. Counsel urged the court to allow the application as prayed.

### **RESPONDENT'S CASE**

Counsel submitted that the plaintiffs have sought orders of this court that this court review and set aside the orders of implementation of the survey report dated 31st July 2017 and summons to issue to the County Surveyor E. Keittany for purposes of cross-examination on the said report.

Mr Tororei submitted that this issue is res judicata as the same was heard and determined vide ruling delivered on 7th May 2019 and annexed a copy of the ruling to the respondent's replying affidavit. That tis fact has not been disputed by the applicants.

Counsel relied on Black's Law Dictionary which defines res judicata as an issue that has definitively been settled by a judicial decision. Three elements have been established as to comprise the concept of res judicata:

- a) An early decision on the issue;
- b) A final judgment on the merits;
- c) Involvement of the parties.

Mr Tororei submitted that the above ingredients are present in the current case as there is an earlier decision on the issue as evidenced by the ruling delivered on 7th May 2019 which was with respect to the plaintiffs' application dated 18th July 2018. That in that application, the plaintiffs sought orders that the said Surveyor E. Keittany be summoned for purposes of cross-examination as pertains his report dated 31st July 2017 and the discrepancies therein. The plaintiffs also sought orders for reviewing and setting aside the orders of this court where the said report was adopted in court.

Counsel further submitted that the said ruling shows that the plaintiffs' former advocate M/S Onyinkwa & Company Advocates were present and participated in the cross-examination of the County Surveyor through Ms. Kesei Advocate. The plaintiffs' counsel also confirmed in her re-examination of the surveyor that all the parties were present during the demarcation. The court thereafter proceeded to make a ruling whereby the said report was adopted. That no appeal was lodged against this court's finding by the plaintiffs demonstrating their satisfaction with the court order.

It was therefore Mr. Tororei's submission that a decision on this issue was deliberated on merit and it involved the parties herein as can be seen in the application dated 18th July 2018 as similar orders have been sought in this application as they are also seeking to review and set aside the orders where the report was adopted. The plaintiffs are also seeking orders that the surveyor be recalled for purposes of cross-examination over the same report.

Counsel therefore submitted that this application is an abuse of the court process and should be dismissed with costs. Counsel cited the case of **Paul Mwaniki v National Hospital Insurance Fund Board of Management [20201 eKLR**, where the court was guided by **Nyamongo & Nyamongo vs Kogo (2001) EA 170, the Indian Supreme Court in the case of Aribam Tuleswar Sharma v. Aribam Pishak MSharmal, (SCC p. 390, para 3) 1 (1979) 4 SCC 389: AIR 1979 SC 1047 and attorney. General & (Yrs vs Boniface Byanyima (HCMA No 1789 of 2000)** in holding that:

*"...mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment. "*

*37. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and Process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.*

*38. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it. In the instant case therefore, I find and hold that there is no error apparent on the face of the record.*

39. Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn Process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.

40. The power of review is available only when there is an error apparent on the face of the record. I emphasize that review Proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.”

Counsel also relied on the case of **Republic vs Public Procurement Administrative Review Board & 2 Others (2018) eKLR** where the court held that the power of review can be exercised only for correction of a patent error of law or fact which states in the face without any elaborate argument or reappraisal of the entire evidence being needed for establishing it. That the applicants have not demonstrated that there is an error apparent on the face of the record as the applicants ‘position that they were not satisfied with the surveyor’s report dated 31st July 2017 is not a ground for review. Mr. Tororei submitted that the applicants ‘have preferred this application for review as an appeal which is an abuse of the court process.

On the issue of stay of execution with respect to implementation of the report 31st July 2017, the applicant must demonstrate sufficient cause to warrant stay of execution as sought which the court has discretionary powers to grant. Counsel submitted that the applicants have failed to demonstrate sufficient cause to warrant stay of execution of the report as sought and reiterated that this application is res judicata as a similar application dated 18/7/2018 was heard and determined vide ruling delivered on the 7/5/2019.

Counsel therefore urged the court to dismiss the application as the applicants have not complied with the provisions of Section 80 of the Civil Procedure Act as read with Order 45 of the Civil Procedure Rules. Further that the application is res judicata.

### **ANALYSIS AND DETERMINATION**

The issues for determination are whether the applicants have established grounds for review and whether this application is res judicata.

It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 45 Rule 1 of the Civil Procedure Rules, 2010 and Section 80 of the Civil Procedure Act. It is trite that the court has power of review but that power must be exercised within the confines of the provisions of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

Section 80 of the Civil Procedure Act provides as follows:-

#### **80. 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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.**

Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-

#### **45 Rule 1 (1) 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”**

From the above provisions it is clear that Section 80 gives the power of review and Order 45 sets the rules for review as was held in the case of **Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR (supra)**

*“the rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it 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 or; (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 un reasonable delay.”*

Further in the case of **Evan Bwire V Andrew Aginda Civil Appeal No. 147 of 2006 cited in the case of Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR** the Court of Appeal held as follows:

*“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the*

*application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”*

The grounds being raised in the application for review do not amount to new evidence which the applicants could not get even after exercising due diligence. The parties were all present when the survey and the resurvey was done. The applicant had earlier made an application for the cross examination of the County Surveyor who gave evidence and gave his expert opinion on what should be done on the ground. In matters involving survey, the court relies on the expert evidence to come up with a decision. A judgment was rendered in this case on 15th October 2014 and what remained was the implementation of the Judgement which required the expertise of the surveyor which was done.

The fact that the applicants engaged a private surveyor after the fact is not new evidence. The applicants had an opportunity to engage such private surveyor at the time when the County Surveyor was doing his work to compare notes but they did not do so. This is surely an afterthought to derail the implementation of the court order. The application for review is a disguise to appeal indirectly which is an abuse of the court process.

In the case of **Origo & Another V Mungala (2005) 2KLR cited in Jameny Mudaki Asava V Brown Otengo Asava & Another (2015 eKLR** the court held as follows:

*“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction. They have now come to a dead end.”*

On the issue as to whether the application is res judicata, it is on record that the applicants had filed a similar application whereby they sought for the following orders:

- a) Spent
- b) There be a temporary stay of execution of orders given on 12th July 2018 pending the hearing and determination of this application.
- c) The court be pleased to set aside or vary or review the orders made on 12th July 2018 adopting a county survey report dated 31st July 2017.
- d) This honorable court be pleased to adopt the survey report dated 22nd February 2016 and, or in the alternative, an order be given that an independent survey be prepared and adopted by the parties herein.
- e) The judgment given by this court be implemented to the fullest and the defendant be allowed to excise only 5.5 acres of land parcel number KARUNA/SOSIANI BLOCK 2 (PROGRESSIVE/289)
- f) That the surveyor be summoned to explain the discrepancies in the two reports.

Prayers 4, 5, 7, 8, and 9 were substantially in issue in the application dated 18th July 2018 and the court gave its determination on the same. I find that this application is res judicata as a ruling had already been rendered determining the issue. The court had even acceded to the prayer that the County Surveyor be summoned to court to explain the contents of the survey report and the sketch map. If the applicants were aggrieved by the ruling, then the right thing that they should have done is to file an appeal.

The doctrine of re judicata is found in Section 7 of the CPA which provides that:

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

In the recent case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)**, the Court of Appeal held that:

*“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;*

- a) The suit or issue was directly and substantially in issue in the former suit.*
- b) That former suit was between the same parties or parties under whom they or any of them claim.*
- c) Those parties were litigating under the same title.*
- d) The issue was heard and finally determined in the former suit.*

*e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”*

I have considered the application and the submissions by counsel and find that this application is an abuse of court process as it is res judicata and that the application for review does not comply with the provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. The application is dismissed with costs to the respondent.

***DATED and DELIVERED at ELDORET this 29<sup>TH</sup> DAY OF October, 2020***

***DR. M. A. ODENY***

***JUDGE***