REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 67 OF 2018

MUGUMOINI FARMERS COMPANY LIMITED.....RESPONDENT/PLAINTIFF

VS

INSHWIL BUILDERS ENGINEERS LIMITED ....APPLICANT/DEFENDANT

AND

EPHRAIM WAITHAKA RUITHA......RESPONDENT/1ST INTERESTED PARTY

CHARLES WANGONDU SAMSON...RESPONDENT/2ND INTERESTED PARTY

RULING

1. The Defendant /Applicant filed a Notice of Motion dated 16/1/2020 under certificate of urgency seeking the review of the Court's orders of 23/9/19. It further sought the orders that the Court upholds the Defendant's Preliminary Objection dated 13/9/18 and dismiss the Plaintiff's entire suit and the Plaintiff's application dated 16/8/18 with costs to the Defendant.

2. The Application is premised on grounds of some error apparent on the face of the record and the discovery on the part of the Applicant of some new and important evidence which could not have been produced by the Applicant.

3. The new evidence alluded to by the Applicant is in respect to a chamber summons dated 9/8/04 and amended Chamber Summons dated 5/11/2004 respectively in Nairobi HCC No. 3086 of 1994 now Thika ELC No. 245 of 2017. The Applicant contends that the Court in that previous suit determined the ownership of the suit property in favour of itself vide a consent order dated 17/12/09 which remains unchallenged todate. The Applicant faults the Respondent/Plaintiff for filing the instant suit while aware of the existence of the said consent order. The order was annexed to the Plaintiff's application dated 16/8/18 as Exhibit no. **JKN2** and also listed among the Plaintiff's list of documents as document **No. 5.**

4. The Applicant urged the Court to uphold the Preliminary Objection and dismiss the Respondents entire suit together with the application dated 16/8/2018 with costs to the Defendant in the interests of Justice, good order and to guard against this Court giving contradictory orders/judgment to those issued by High Court vide the orders issued on the 17/12/2009 by Hon. Lady Justice Sitati.

5. The application is further supported by the Affidavit of Patrick Gukura Muraya who deponed that in Nairobi HCCC No. 3086 of 1994 now Thika ELC No. 245 of 201, a decree in favour of the Plaintiff, Erustus Nduhiu against the Defendant, Mugumoini Farmers Co. Ltd (current Plaintiff herein)was issued on 17/5/1995 by Mr. Justice Hayanga J for a sum of Kshs. 3,060,522/-. In the process of execution of the Decree the Court on 9/4/1998 issued a prohibitory order against the Defendant's title No. KAKUZI/KIRIMI/BLOCK7/37 preventing any sale or dealings with the suit land then. The said Mugumoini Farmers Co. Ltd thereafter sought to lift the prohibitory order to allow the sale of its own land with concurrence of Erustus Nduhiu and utilize the proceeds of the sale in settlement of the judgment debt. The Defendant (current Plaintiff) thereafter amended its chamber Summons Application of the 9/8/2004 on 5/11/2004 and sought orders that the Land Registrar to register the parcel of land in the name of INSHWIL BUILDERS ENGINEERING LIMITED. Subsequently the parties recorded consent orders transferring the land to the current Defendant. That the land was sold to INSHWIL BUILDERS ENGINEERING LIMITED and the proceeds were used to settle the decretal amount owed to Erastus Nduhiu.

6. The Applicant urges that by the consent order Mugumoini had indeed in no uncertain terms surrendered its proprietary rights over the suit land to INSHWIL BUILDERS ENGINEERING LIMITED for value.

9. That the instant suit relates to ownership of the same parcel of land and its subsequent subdivisions which the Applicant is of the view that the same was substantively dealt with in the previous suit sealed by the orders of 17/12/2009. That the allegations of fraud as particularized under paragraphs 5 to 19 of the Plaint are not demonstrable against the Defendant/Applicant herein in its explained acquisition of the suit land.

10. That a previous attempt to lodge criminal investigations and possible prosecution for fraudulent acquisition of the suit parcel of land against the Defendant herein by the Plaintiff failed in 2015.

11. The Applicant also contends that in view of the consent judgment of 17/12/2009 the instant suit is Resjudicata and offends section 6 of the Civil Procedure Act.

12. Additionally, the Applicant posits that should this Court proceed to hear and determine the Plaintiff/ Applicant's notice of motion application dated 16/08/2018 and the main suit thereof the same would amount to an Appeal to orders of 17/12/2009issued by a Court of concurrent jurisdiction.

13. In opposition to the application the Plaintiff / Respondent filed its grounds of opposition together with a replying affidavit of Joseph Kamande Ngone both dated 24/2/2020 and filed on 2/3/2020. The Respondent contends that the application falls short of the requirements for grant of review orders for being brought after unreasonable delay, failing to demonstrate the discovery of new and important evidence that was not within the knowledge of the Applicant , no explanation was offered on how the alleged new information was not be obtained after exercise of due diligence whilst the Defendant /Applicant was represented by the same advocates in the previous suit where the orders of 17/12/2009 were allegedly issued and also failure to demonstrate the self-evident error on the face of the record.

14. The Respondent claims that the orders of 17/12/2009 were fraudulent as they were allegedly issued in the absence and without the consent and knowledge of the Plaintiff's Advocates which Advocate was alleged to have been present in Court, Mr. Simon Kamere has since filed an affidavit dated 21/11/2017 disowning the said consent.

15. That there is duplicity in the issues raised in the Preliminary Objection by the Defendant / Applicant dated 13/09/2018 which issues have since been heard and elaborately determined vide the ruling of 23/09/2019. Moreover, the said issues were well within the knowledge of the Defendant and its Advocates having been represented by the same firm from the onset of this suit and the previous suit.

16. The Respondent also sought to distinguish the cause of action in the present suit and the cause in Thika ELC NO. 245 of 2017 as being fraud and breach of contract respectively and the matters of fraud having not been litigated before any other forum makes this suit a proper suit before the Court.

17. In addition, the Respondent accuses the Applicant of indolence and ill motive in bringing the instant application after an inordinate delay of more than three months since the issuance of the orders it seeks to review and reads foul motive on the Applicant to delay and scuttle its otherwise merited case which ought not be entertained.

18. The Respondent views the application as aimed at scuttling the Plaintiff's suit based on fraud which ought to be subjected to scrutiny in a full hearing which review if granted would amount to a violation of the Plaintiff's fundamental right to be heard on merit. And concludes by inviting the Court to dismiss the said application with costs in its favour.

19. The Interested Parties on their part swore an affidavit in support of the Defendant/ Applicant's application by the 2nd Interested Party and on behalf of the 1stInterested party on 27/02/2020 and filed on 02/03/2020 deposing that he and the 2ndInterested Party are the bonafide purchasers and registered owners of land parcel numbers KAKUZI/KIRIMIRI BLOCK 7/250 and KAKUZI/KIRIMIRI BLOCK 7/382 respectively having purchased the same from the Defendant / Applicant herein which they are in possession of. They are in agreement with the grounds raised by the Applicant in regard to the suit being res-judicata and this Court being functus officio in view of the orders of 17/12/2009.

20. Parties canvassed the application by way of written submissions which I have read and considered and shall refer to them from time to time in my finding here below.

21. The issue for determination is whether the orders of review are merited.

22. The applicable law for grant of review is Section 80 of the Civil Procedure Act which provides *inter alia*: -

> **"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**
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> **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."**

23. Order 45 Rule 1 of the Civil Procedure Rules is couched in the following terms: "**(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**
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> **(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**
>
> (c.) on account of some mistake or error apparent on the face of the record,

or

(d) 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."

24. The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay. This position was reiterated in the case of **Origo &Another V Mungala [2005] 2 KLR 307,** the Court of Appeal of Kenya held, inter alia that:

"a) A person who makes an application for review under the Civil Procedure Rules Order XLIV Rule 1 has to show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time; or that there was some mistake or error apparent on face of the record or that there was any other sufficient reason. The Applicant must make the application for review without unreasonable delay.

b) An erroneous conclusion of law or evidence is not a ground for review but may be a good ground for Appeal.

c) A person who files a Notice of Appeal which is struck out cannot thereafter proceed by way of review as rule 1 (1)(a) of the Civil Procedure Rules Order XLIV applies to an order from which an Appeal is allowed but from which no Appeal has been preferred."

25. As to whether the Applicant has shown that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time, the **Applicant in its application and submissions urged that the review in regard to the discovery of the chamber summons and amended chamber summons dated the 9/8/2004 and 5/11/2004 as well as the supporting affidavit of the then chairman of the Plaintiff urging the Court to order the lifting of the prohibitory orders to allow for the disposal of the land. Although the Applicant has not satisfied the Court as to the reasons why the said documents were not presented then, it has neither demonstrated that the pleadings could not be obtained with exercise of due diligence. The impugned consent judgment dated the 17/12/2009 was annexed to the affidavit pursuant to the orders dated the 25/4/19 and filed on the 21/5/19. The chamber summons elucidated earlier were a precursor to the consent and therefore the same were in the knowledge at the time of making the objection.**

26. My perusal of the record shows that the advocate for the Applicants and the Respondent informed the Court that they both had filed a copy of the consent order in the Court file on the 2/7/19 in pursuance to the orders of the Court issued on the 10/5/19. This lends credence to the holding that the Applicants advocate was aware of the chamber summons the basis of which the parties in the previous case compromised the application leading to the consent orders of17/12/ 2009.

27. In any event the Applicant has not satisfied this Court that the said documents could not be obtained with the exercise of due diligence. Reasons wherefore the Court is not satisfied that the Applicant has demonstrated that there is discovery of new and important matter.

28. Has the Applicant shown that there is an error apparent on the face of the ruling delivered on the 23/9/19? To answer the question, the Court has looked at the definition of an error on the face of the record. In the case of **National Bank of Kenya Ltd Vs Ndungu Njau Civil Appeal No.211of 1996(1997) Eklr** the Court of Appeal made the following pronouncement on the meaning of an err or apparent on the face of the record:

"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient

Ground for review that another judge could have taken a different view of the matter nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review."

29. Similar, in **Nyamogo&Nyamogo V Kogo[2001]EA170** the Court of Appeal described an error on the face of the record which would warrant are view thus:

"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of in 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 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 possibly 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 and drawn out 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. 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for Appeal."

30. *With respect to the ground on mistake or error on the face of the record,* the Applicant has made arguments and counter arguments as to the existence of the consent order of the 17/12/2009. It contends that the said consent order between the Plaintiff and the current Defendant determined the ownership of the suit land between the Plaintiff and the Defendant and that there is nothing left in this suit for the Court to determine.

31. In the case of **Nyamogo&Nyamogo v Kogo[2001] EA170**which stated “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 along-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. 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for Appeal.”

32. In the case of **Njoroge & 104 Others (suing in representative capacity for Kariobangi South Civil Servants Estate Tenant Purchasers)V Savings& Loan Kenya Ltd &Another [1990]KLR 78** it was held, interalia,that:

a. A point which may be a good ground of Appeal may not be a ground for an application for review. Thus as erroneous view of evidence or law is no ground for a review although it may be a good ground of an Appeal.

b. An application for review should not be taken as a form of Appeal. To warrant a review of an error alleged to be on the face of a record, such error ought to be so clear as to be without dispute.

33. It is evident from the above arguments of the Applicant that the Applicant has not demonstrated an error on the face of the Ruling on record but instead has offered arguments as to why it believes that the suit is res judicata. For instance, the Applicant has at length discussed the issue of fraud and why it is not founded in this suit, these are matters that are left to the trial Court to establish. The power of review is only available when there is an error apparent on the face of the record. It is the finding of the Court that the ruling the subject matter of this application has not been shown by the Applicant to suffer any such error on the face of the record. The error apparent is such error that is manifest on the record which does not require the detailed examination scrutiny or arguments of facts or a legal opinion. It must be a glaring omission the evidence of a mistake or a simple error apparent.

34. The Court is not satisfied that the Applicant has demonstrated an error apparent on the face of the record to warrant the review of the Court Ruling. The Applicant has contended that the Court erred in holding that this suit is nor res judicata. With due respect, that is not an error on the face of the record but a different point of view which perhaps is best left for an Appeal and not review.

35. The Respondent has argued that the application should fail for delay in filing the same. The question as to whether the delay in any given case is unreasonable depends on the circumstances of each case and the explanation rendered for the delay. The impugned ruling in this case was delivered on 23/9/2019.This application was filed on the 16/1/2020.The Applicant has not rendered any explanation for the delay of about 3 months in the filing of the application for review. In the case of ***Ken freight (E.A) Limited V Star East Africa Co. Ltd [2002] 2 KLR 783****, the Applicant had filed its application for* review after a delay of 3 months and the High Court found that such delay was unreasonable since no adequate or satisfactory explanation for the delay had been rendered. There being no explanation for the delay in the instant case, the Court finds and holds that the Applicants application was not filed without unreasonable delay within the meaning of **Order 45 Rule1**oft he **Rules.**

36. As to whether the review can be granted for sufficient reasons, it is the holding of the Court that there are no other sufficient reasons analogous to the above three to warrant the review.

37. For the above reasons, it is the finding of the Court that the application for review does not meet the rules set out in Order 45 of the Civil Procedure Rules and the same is therefore dismissed with costs payable to the Respondent/Plaintiff.

38. **It is so ordered.**

DATED, SIGNED & DELIVERED THIS 1ST DAY OF OCTOBER 2020

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Ms Beaco for the Plaintiff

Mr. Ndurumo for the Defendant

Ndurumo HB for Wambugu for the 1st and 2nd Interested Parties

Njeri &Kuiyaki, Court Assistants