REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC MISC. CASE NO. 32 OF 2009

HENRY VISIETSA MKUTU.....APPLICANT

VERSUS

THE LAND REGISTRAR VIHIGA COUNTY

THE ATTORNEY GENERAL.....RESPONDENTS

RULING

The application is dated 10th September 2020 and is brought under order 45 rules 1, 2, 3 & 4, order 51 rules 1, 2, 3 & 7 of the Civil procedure Rules, 2010 and sections 1A, 1B, 2, 3, 3A & 19 of the Civil Procedure Act and sections 13 (4) & (7), 19 & 26 of the Environment and Land Court Act, 2011 and Articles 10 (2), 47, 48, 50 (1) & 159 (2) (d) of the Constitution, 2010 the following orders:-

1. The honourable court be pleased review, vary and/or otherwise set aside the entire ruling and/or decision of this honourable court rendered and/or otherwise delivered on the 5th day of November, 2019, pertaining to and/or concerning the notice of motion application dated the 29th day of May, 2019.

2. Consequent to prayer 1 hereof being granted, the honourable court be pleased to grant an order pertaining to and/or concerning the provisions of Sections 60 of the Land Registration Act, 2012, which is merely declaratory in nature and does not confer any rights and/or title to the applicant, whatsoever and/or howsoever, in the manner hitherto alluded to by the court.

3. In the alternative and without prejudice to the foregoing, the honourable court be pleased to review the aspects of the impunged ruling and order, whereby the honourable court (sic) proceeded to dismiss the notice of motion application in lieu of striking out.

4. The honourable court be pleased to issue such further and/or other directions, towards ensuring that the cause of justice is not restricted and /or otherwise hindered by (sic) undue regard to procedural technicalities and/or otherwise lapses.

5. Costs of this application be provided for.

It is based on the annexed affidavit of Henry Visietsa Mukutu and grounds that the subject matter herein pertains to and/or concerns LR. No. South Maragoli/Buyonga/179. The suit property herein was hitherto registered in the name of the applicant and one Agade Mukutu, now deceased. The registration in favour of the applicant and the deceased, was based on joint ownership as opposed to ownership in common. For the avoidance of doubt, had the registration been in common, the sharing ratios, if any, would have been reflected and/or otherwise displayed on the face of the register. Nevertheless, upon the request of the applicant herein for correction of the register, this honourable court variously held that the suit touched on and/or concerned enforcement of a right. On the other hand, the honourable court also held that the suit touched on and/or concerned the cancellation, nullification and/or revocation of sub-divisions of the suit property. Nevertheless, the subject matter, touched on and/or merely concerned declaration of existing interests. In any event, the issue at hand was formal and/or otherwise explicit. That the issue beforehand, could be commenced by way of a miscellaneous application as opposed to a substantive suit. Be that as it may, a suit is aptly defined to include civil proceedings commenced in any manner prescribed. That the honourable court over looked the import and/or tenor of the provisions of Sections 2 and 19 of the Civil Procedure Act, Chapter 21, Laws of Kenya. Owing to the foregoing, there exist several errors and/or mistakes, apparent on the face of record. That the errors and/or mistakes alluded to are discernible and/or remediable, without altering any legal right and/or interest pertaining to the suit property. On the other hand, this honourable court is bestowed and/or conferred with wide latitude to ensure that justice is meted out, without undue hindrance and/or restriction. That the Dictates of Justice demand that justice be rendered without undue regard to procedural technicalities and/or lapses. That the mandate of this honourable court is well prescribed and/or noted by dint of Sections 13 (7) and 26 of the Environment and Land Court Act, 2011. That there exist sufficient cause and/or basis to warrant the intervention of this honourable court. That the intervention of this honourable court will realign the orders and/or ruling of this honourable court to the established statutory provisions governing the subject dispute. That the ruling and/or decision of the honourable court has also divested the applicant of a legitimate right. That the dismissal orders, meted out by this honourable court also constitute a bar to the filing of further proceedings by the applicant. In the circumstances, it is in the interest of justice that the subject matter be re-visited, to avert and/or abate grave injustice being inflicted upon the applicant. Unless the subject application is

heard and granted, the applicant herein shall suffer foreclosure in respect of ownership and/or rights over the suit property. Consequently, the subject application is merited and in any event meant to obviate injustice and/or undue delay in the realization of accrued rights and/or interests.

This court has considered the application and the submissions therein. It is based on the grounds that the issue beforehand, could be commenced by way of a miscellaneous application as opposed to a substantive suit. That a suit is aptly defined to include civil proceedings commenced in any manner prescribed. That the honourable court over looked the import and/or tenor of the provisions of Sections 2 and 19 of the Civil Procedure Act, Chapter 21, Laws of Kenya. That there exist several errors and/or mistakes, apparent on the face of record. The court is now asked to review and set aside the ruling. **In the case of Kwame Kariuki & Another Vs. Mohamed Hassan Ali & 4 Others (2014) eKLR,** the Court observed that:-

> *"It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal."*

In the case of *Mwihoko Housing Company Limited vs Equity Building Society (2007) 2 KLR 171* is relevant. It was held, that;

> *"A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;*

> *"An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made…"*

Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

> *"(1) Any person considering himself aggrieved-*
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> *(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 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.*
>
> *(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."*

The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states as follows:

> *"Any person who considers himself aggrieved-*
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> *(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."*

Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However this discretion should be exercised judiciously and not capriciously. In Court of Appeal, *Civil Appeal No. 211 of 1996, National Bank of Kenya Vs Ndungu Njau,* the Court of Appeal held that;

> *"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 evidence and should not require an elaborate argument to be established. It will not be 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 proceed on an incorrect expansion of the law".*

From the above provisions of the law, authorities cited and facts of this case I find that the applicant has failed to show any mistake or error apparent on the face of record and/or any sufficient reason to enable this court set aside its decision. There is no new matter and/or evidence that has come out in this matter. The records are clear that it cannot be establish in this application whether the ownership was joint or in common and the matter would need to go to through a full hearing for the same to be established. The matter of res judicata will also not apply in this case. I find this application is not merited and I dismiss it with no orders as to costs as the same was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 25TH NOVEMBER 2020.

N.A. MATHEKA

JUDGE