REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC APPEAL NO. 45A OF 2019

LAKE BASIN DEVELOPMENT AUTHORITY....APPLICANT

VERSUS

JOSEPH OCHIENG.....RESPONDENT

RULING

The Applicant filed a Notice of Motion dated 22nd June 2020 seeking orders that this court recalls, reviews and sets aside its ruling and orders issued on 22nd May 2020. The application is made on grounds that sufficient cause in terms of public interest had already been shown to warrant the orders sought and that there was a discovery of new and important evidence which could not be ascertained earlier by the Applicant despite due diligence, that the lower court had issued a 45-day stay of execution order on 31st October 2019 which lapsed on 14th December 2019 creating room for the Applicant to decide whether to settle the matter or prefer an appeal.

That there exists a mistake/error apparent on the face of the record in not capturing the fact that the certified copy of the ruling on the application dated 15th August 2019 was ready on 15th November 2019, the record of appeal filed on 26th November 2019 and application for stay of execution filed on 9th December 2019.

That it is apparent on the face of the record that delay in filing the application for stay can only be counted from the date of filing the appeal and the same amounts to 13 days which is excusable and not 37 days as alluded to in the ruling.

That it is also apparent on the face of the record that the Applicant explained the nature of the substantial loss it was bound to suffer unless orders of stay were granted.

That the ruling issued on 22nd May 2020 has the potential to open a floodgate of other cases involving 168 other parcels belonging to the Applicant within the Tonde Settlement Scheme, and it is in the public interest that the court exercises its powers of review to promote the public interest and enhance public confidence.

Dr. Raymond Omollo, the Managing Director of the Applicant, filed a supporting affidavit. He deponed that this court had on 22nd May 2020 delivered a ruling in respect of the Applicant's application for stay of execution dated 20th November 2019 and filed on 9th December 2019 wherein the application was dismissed with costs on the premises of there being an unreasonable and unexplained delay of 37 in filing the said application, and that the Applicant had failed to demonstrate how it would suffer substantial loss.

He averred that the ruling in respect of the Applicant's application for review dated 15th August 2019 was delivered on 31st October 2019 and certified copies issued on 15th November 2019. That the record of appeal in respect of that application was filed and served on 26th November 2019, about 13 days thereafter.

He averred that there was a potential of a floodgate of cases arising out of other claimants who acquired the Applicant's parcels in similar circumstances and that it was in the public interest that the judgment in reviewed and the status quo reverted to where the parties await the final and authoritative position from the National Land Commission on the ownership of the land. That the Respondent had already extracted a decree for a decretal sum of about Kshs. 1,306,000/= for which the Applicant had initially secured a stay of execution at the lower court and orders of status quo in this court.

APPLICANT'S SUBMISSIONS

Counsel for the Applicant reiterated the grounds that formed the basis of the application and cited the case of ***Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited*** **[2014] eKLR** which set out the principles governing the exercise of the court's powers of

review on the grounds enumerated under Order 45 Rule 1 of the Civil Procedure Rules

RESPONDENT'S REPLY

The Respondent filed a replying affidavit dated 9th June 2020. The Respondent deponed that there was no error on the face of the record, or discovery of new and important evidence. That the delay was indeed 37 days and not 13 days as alleged by the Applicant. That after the judgment of the lower court delivered in 21st May 2019, it was incumbent on the Applicant to file an appeal within 30 days. That the Applicant instead opted to wait and file two applications dated 15th August 2019 and 22nd August 2019, both filed on 22nd August 2019. That upon the dismissal of the two applications by the lower court, the Applicant then filed an appeal against the ruling which was dismissed by this court, hence the present application.

The Respondent reiterated that the Applicant was still persecuting an appeal disguised as an application for review. That the matter herein concerned one parcel of land belonging to the Respondent therefore the Applicant's allegation of a potential floodgate of cases from other claimants was an overreach. That the Applicant was still awaiting evidence from the National Land Commission while the Respondent held a legitimate title deed to the suit parcel, therefore the application was an afterthought. That the Applicant was actuated by malice and bad faith and did not wish the Respondent to enjoy the fruits of his judgment.

RESPONDENT'S SUBMISSIONS

The Respondent's Counsel submitted that the Applicant had not met the conditions required to warrant an order of review. Counsel cited C. K. Takwani in *Civil Procedure 3rd Edition* at pages 307-311 for the proposition that a power of review should not be confused with appellate power; that a party must show that there was no remiss in adducing all possible evidence at trial; an error cannot be said to apparent on the face of the record where one has to travel beyond the record to see if the judgment is correct or not; that a review is not an appeal in disguise whereas an erroneous decision is reheard and corrected; and sufficient reason did not include where the case had been mismanaged by the Applicant's counsel.

Counsel reiterated that the Applicants were in effect appealing the dismissed application within the present one. That the application was an abuse of the court process and meant to prevent the Respondent from enjoying the fruits of his judgment.

Counsel submitted that the order which is the subject of this application had not been extracted and annexed to the application. Counsel cited ***Suleiman Muringa v Nilestar Holding & another*** as cited with approval in ***Chelimo Plot Owners Welfare Group & 288 others v Langat Joel & 4 others*** **[2018] eKLR** for the proposition that under Order 45 Rule 1 of the Civil Procedure rules where the Applicant fails to annex the order sought to be reviewed, the application is fatally defective

ISSUES FOR DETERMINATION

1. Whether the application for review is merited

The review of decrees or orders is grounded in the provisions of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

Order 45 Rule 1 of the Civil Procedure Rules provides:

> "(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."

In ***Timber Manufacturers and Dealers –Vs- Nairobi Golf Hotels (K) Ltd*** **HCCC No.5250/92** (reported in *Odunga's Digest on Civil Case Law and Procedure* Vol. IV at page 3553) Emukule J. held:

> "For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established."

In **Nyamogo & Nyamogo Advocates v Kogo [2001] 1 EA 173** the court held that:-

> "An error on the face of the record cannot be defined precisely or exhaustively… 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 could 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."

Mativo J. in ***Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers*** **[2016] eKLR** also held:

> "Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*[8] had this to say:-
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> > "... 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 that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule."

Analysis

The court in its ruling dismissed the application on the grounds of having been filed 37 days after the ruling without an explanation for the delay, and that the Applicant had failed to demonstrate the substantial loss it would suffer, thereby failing to meet the threshold provided under Order 42 Rule 6 (2) of the Civil Procedure Act.

The Applicant instead contends that the certified copy of the ruling was ready on 15th November 2019 and that was when the computation of time should have begun, resulting in 13 days and not 37 days. As evidence they annexed a copy of the certified ruling indicating that it was certified by the Magistrate on 15th November 2019. Be that as it may, even if the court had been taken this into account and found that in the circumstances there was a sufficient explanation for the delay, the Applicant's failure to demonstrate substantial loss would still have led to the dismissal of the application.

On substantial loss Gikonyo J in ***JAMES WANGALWA & ANOTHER V AGNES NALIAKA CHESETO*** **[2012] eKLR** held:

> "...the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss... The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of ***Silverstein N. Chesoni [2002] 1KLR 867,*** and also in the case of ***Mukuma V Abuoga*** [which] emphasized the centrality of substantial loss thus:
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> > "**…**the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

The Applicant herein contends that it had explained the nature of the substantial loss it was bound to suffer. However, no evidence was tendered by the Applicant to demonstrate that it stood to suffer substantial loss. Merely stating the existence of an extracted decree would not be enough to demonstrate substantial loss. As was aptly elaborated by Gikonyo J in ***Antoine Ndiaye v African Virtual University*** **[2015] eKLR**:

> "Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must proof. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed."

On the issue of substantial loss, the Applicant does not raise the grounds of new or important evidence, an error or mistake apparent on the face of the record, or sufficient reason as required under Order 45 Rule 1. The Applicant is instead faulting the court's appreciation of its pleadings and evidence, an exercise that would be more suited to an appeal against the court's decision rather than an application for review. The application ought to be, and is hereby dismissed with costs.

DATED AT KISUMU THIS 10TH DAY OF DECEMBER 2020

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE