**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC NO. 31 OF 2020**

**MARY JACKSON MASAI.....PLAINTIFF**

**VERSUS**

**JACKSON MASAI.....1ST DEFENDANT**

**JACKSON MNANGAT.....2ND DEFENDANT**

**COUNTY LAND REGISTRAR**

**WEST POKOT.....3RD DEFENDANT**

**RULING**

**The Application**

**1.** By a notice of motion dated **3/8/2020** and filed on the **7/8/2020** brought under the provisions of **Sections 1A, 1B, 3A** of the **Civil Procedure Act** and **Order 40 Rule 7** of the **Civil Procedure Rules**, the 1st and 2nd defendants/applicants seek the following orders:

> **1. …spent**
>
> **2. That this honourable court be pleased to set aside or vary the orders issued on 28th July 2020 and all its consequential orders.**
>
> **3. That the costs be in the cause.**

**2.** The application is supported by the sworn affidavit of 2nd defendant and also premised on the grounds summarized at the foot of the application; they are namely that this court granted the plaintiff respondent possession of the suit land yet she does not reside on or make use of the suit land; that there is an apparent error on the face of the ruling, and the orders issued would adversely affect the use and possession by the 2nd defendant, and that the *status quo* should be maintained.

**The Response**

**3.** The plaintiff through his advocate filed what has been referred to as a "*further replying affidavit*" on **23/9/2020**. In this court's view that is the plaintiff's replying affidavit as a perusal of the record showed no existence in the record of any other affidavit in opposition to the instant application. She states that the application lacks substance and is an afterthought; that the application has not attained the threshold for reviewing the order made; that the replying affidavit had established that the plaintiff was in possession and that the court found no evidence that the 2nd defendant had taken possession of the land and developed the same; it is also stated that there is no error on the face of the record; that the application is likely to be used by the 2nd defendant to obtain occupation of the suit land. It is further posited that an appeal would have been the right forum to ventilate the defendants' dissatisfaction with the ruling.

**4.** In a supplementary affidavit filed on **2/10/2020** pursuant to leave of court granted in the matter the 2nd defendant reiterated that the plaintiff has never been in possession and asserted that the 2nd defendant has developments on the suit land.

**Submissions**

**5.** The parties were ordered to file their respective submissions but none appear on the record.

**Determination**

**6. Order 40 rule 7** under which the application has been brought provides as follows:

> **7. Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.**

**7.** This being an application for review, the above provisions are clearly unsuitable but this court, in the spirit of doing substantive justice between the parties will delve into the merits of the application while guided by the provisions of **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules**

**8. Section 80** reads 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.**

**9. Order 45 Rule 1** reads as follows:

> **(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 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.**

**10.** The conditions to be satisfied in order for an applicant to merit an order of review and against which the court will assess the instant application are therefore as follows:

> **(a)That the application has been brought without inordinate delay;**
>
> **(b) That there is a mistake or an error on the face of the record;**
>
> **(c) 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 order was made;**
>
> **(c) Any other sufficient reason.**

**11.** Has the application been brought without undue delay? The orders sought to be reviewed were issued on **28/7/2020** and the instant application was lodged on **7/8/2020**. In this court's view the delay involved is not inordinate.

**12.** Is there a mistake or an error on the face of the record? The applicant alleged in his summary of the grounds in aid of the application, to which this court will have recourse to as there are no submissions on the matter, that the basis of alleging such error or mistake is that the orders issued would adversely affect his use and quiet possession of the suit premises. He avers that the court granted the plaintiff possession of the suit land yet she had no such possession. Without going extensively into the affidavit evidence of the plaintiff it is clear that she never claimed to be residing on the land. This court in its ruling observed expressly that the plaintiff does not live on the land. The entire application was not predicated on whether or not the plaintiff resided on the land. However this court considered that possession is not

proved only when a litigant physically resides on the suit land, there are other factors including working the land and presence by agent that denote possession. This court must have considered the allegations by the plaintiff that she had her trees growing on the land which were destroyed by the defendant.

**13.** Since the determination of the issue of possession was dependent upon the evidence that was presented by the parties, it behoves this court to be cautious lest it appear to sit in appeal over its own decision.

**14**. In the case of **NATIONAL BANK OF KENYA LIMITED vs NDUNGU NJAU [1997]eKLR**, **Nairobi Civil Appeal No. 211 of 1996** the Court of Appeal of Kenya stated as follows:-

> **"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 provision of law cannot be a ground for review." (emphasis mine.)**

**15.** The application before court whose ruling is impugned sought an injunction against the defendants and this court granted the same, stating expressly that the plaintiff shall have possession of the land and shall in no way alter the nature of the land or commit waste thereon but shall restrict her activities to the growing of annual crops.

**16.** In this court's view, the parties had an ample opportunity of demonstrating to court that they were in possession. If the defendants' evidence on the record was not sufficient to disprove the claim of possession by the plaintiff, that is an issue that should have been subjected to an appeal and not review by this court as it had made the order on the basis of its assessment of the available evidence. Since possession was an integral prop in the plaintiff's case for the purpose of establishing that she legally merited an injunction, and the issue was conclusively canvassed in the application a conscious decision made by this court on the same it can not entertain affidavit evidence at this juncture for the purpose of re-determining it as the court would appear to be implicitly allowing additional evidence by the backdoor.

**17.** In the **National Bank case (supra)** the Court of Appeal further observed as follows:

> **"In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."**

**18.** This court therefore not only considered the conditions for the grant of an injunction to have been satisfied by the plaintiff, but also that the plaintiff, though not resident on the suit land had been working the land. Revisiting such findings would in this court's view amount to entertaining an appeal against the court's own decision which is frowned upon by practice. Neither would ordering a *status quo* order upon the instant application help matters, for by such an order, the defendants may perpetrate the very mischief the court sought to prevent by granting an express order of injunction and possession to the plaintiff.

**19.** I therefore find that there was no error on the face of the record as alleged by the 2nd defendant.

**20.** Is there any 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 order was made?

**21.** Since the applicants have not claimed that there was any such discovery, this issue does not arise in the instant application.

**22.** Is there any other sufficient reason to warrant review in this case? The reason must be analogous to the two grounds expressly stated in **Order 45 Rule 1.** However I do not find any claim of the existence of any other analogous grounds by the applicants and the issue does not also arise in the instant application.

**23.** In the final analysis I find that the application dated **3/8/2020** has no merit and the same is dismissed with costs to the plaintiff.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 1st day of December, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE**