REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 356 OF 2017

(Formerly Machakos HCCC No. 93 of 2014)

SAMMY AKIFUMA.....1ST PLAINTIFF

JOYCE AKIFUMA.....2ND PLAINTIFF

VERSUS

KAPOSHI NJOROGE NAKUMANIA.....1ST DEFENDANT

JONATHAN KAPOSHI.....2ND DEFENDANT

NTEENE OLE KAPOSHI.....3RD DEFENDANT

KENNETH OBIMBO ODHIAMBO.....4TH DEFENDANT

RULING

What is before me for determination is the Plaintiffs' application dated the 8th August, 2018 seeking the following orders:

1. That this Honourable Court be pleased to review and vary its judgment delivered on 16th April, 2018 relating to the award to the Plaintiff of the sum of Kshs. 120, 000 inclusive of interest at court rates from 1990 todate and costs of the suit.

2. That having made a finding that the Plaintiff is indeed entitled to (the value of) sixty (60) acres of land, then this Honourable Court be pleased to award the Plaintiff the current monetary equivalent of the sixty (60) acres of land.

3. Such further orders as it commends to this Honourable Court to issue in the circumstances of the case.

4. That the costs of this application be provided for.

The application is premised on the summarized ground that the award of Kshs. 120,000 was computed based on the 60 acres purchased from the 1st and 2nd Defendants at Kshs. 2,000 per acre. The Kshs. 2000 was based on the value of the suit property per acre in 1990. The value of the suit property per acre has considerably increased over the years and ought to have been computed at its current value. Further, that the 1st and 2nd Defendants have since benefitted from both the land and the monies received from the Plaintiffs from the sale in the year 1990 hence the refund ought to reflect the current market value of the land. It is therefore an error apparent on the face of the judgment in view of the award for refund of the purchase price of Kshs. 120,000 as it was computed based on the value of the suit land in 1990.

The application is supported by the affidavit of SAMMY AKIFUMA the 1st Plaintiff herein, where he reiterates his claim above.

The application is opposed by the 2nd Defendant JONATHAN KAPOSHI who filed a replying affidavit where he deposes that the instant application is bad in law and lacks merit. He explains that the Plaintiffs being dissatisfied with the Judgement filed Notice of Appeal dated the 21st May, 2018 and the Defendants filed Notice of Address of Service dated the 28th May, 2018. He contends that the orders sought for review in the application is not available as the Plaintiffs have elected to Aappeal the decision of the Honourable Court, which Appeal has not been withdrawn. He insists there is no error apparent on the face of the Judgment as alleged by the Plaintiff since the law requires the refund of the purchase price paid at the time of the transaction and not compensation of the value of the land at the market rate. He reiterates that it was not the Defendant's fault that the Plaintiffs disappeared from 1990 and showed up in 2010. He avers that the valuation report by Isaac Wirunda is not credible as there is no title known as Kajiado/ Kaputiei Central/ 839 that would be subject to the said report. He insists the suit land has since been subdivided and some portion sold to various people who have developed the same. Further, that such blanket

valuation of Kshs. 1,500,000 per acre without taking into account various factors is incompetent and unreliable. He reiterates that the Plaintiffs' never took possession of the suit land and were never evicted nor asked to surrender vacant possession hence the valuation is imaginary and non – existent. He states that the Plaintiffs never sought for refund of the purchase price.

Both the Plaintiffs and the Defendants filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 8th August, 2018 including the supporting and replying affidavits and submissions herein, the only issue for determination is whether the Judgment delivered on 16th April, 2018 should be reviewed and or varied to award the Plaintiff the current monetary equivalent of the sixty (60) acres of land.

It was the Applicants' contention that there is an error apparent on the face of the record in the Judgement and the award of Kshs. 120,000 was computed based on the 60 acres purchased from the 1st and 2nd Defendants at Kshs. 2,000 per acre. The Kshs. 2000 was based on the value of the suit property per acre in 1990. The value of the suit property per acre has considerably increased over the years and ought to have been computed at its current value, hence the need to review it. They relied on the case of **Emily Chonge Wanyama V Patrick Mangeni Yusto (2014) eKLR** to support this argument.

The Respondent submitted that there was no evidence adduced to show the court committed a mistake or error on the face of judgment or proceedings. They contend the Plaintiffs intend to introduce new evidence of the valuation report from one Isaac Warunda who had not been lined up as a witness. He relied on the case of **KWANZA ESTATE VS DUBAI BANK LIMITED MOMBASA HIGH COURT CIVIL SUIT NO. 44 OF 2013** to support his argument.

Section 80 of the Civil Procedure Act provides as follows:**-"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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."**

Further, Order 45, rule 1 (1) of the Civil Procedure Rules provides as follows: **' 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.'**

I note the Applicants have annexed a Valuation Report dated the 20th July, 2018 from one Isaac Wirunda in respect of land parcel number Kajiado/ Kaputiei Central/ 839. I note the said Valuation Report was prepared three months after the Judgment herein had been delivered. It has also emerged that the Plaintiffs lodged an Appeal against the Judgement, which Appeal has not been withdrawn. In the Plaintiffs' submissions, they relied on the case of **Emily Chonge Wanyama V Patrick Mangeni Yusto (2014)** where Judgement had been entered for the Plaintiff to be refunded the purchase price at the current market value since she had taken possession of the suit land and developed it. However, in the current scenario, the Plaintiffs paid the purchase price and never took possession nor developed the suit land.

In the case of **MUYODI v INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION AND ANOTHER EALR (2006) EA 243**, the Court of Appeal while describing an error apparent on the face of record, held as follows:' ***" In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of 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 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."***

Further in the case of **ROSE KAIZA Vs ANGELO MPANJU KAIZA (2009) eKLR** the Court stated that: **' In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.'**

In relying on this judicial decisions and the facts as presented, I opine that the alleged errors cited by the Applicants which I have stated above, have been drawn from a long process of reasoning on the judgment of the Court and opinion of the Applicant. I find that the introduction of abovementioned valuation report which was undertaken three months after the judgment does not meet the threshold for review. Further, I note the Applicants have already lodged an appeal, which they are yet to withdraw.

It is against the foregoing and after analyzing the evidence before me that I find the Notice of Motion dated the 8th August, 2018 unmerited and disallow it.

Costs are awarded to the Respondents.

Dated and delivered at Kajiado this 21st Day of February, 2019

CHRISTINE OCHIENG

JUDGE