REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. 20 OF 2018

KHALIF SHEIKH ADAN……..……PLAINTIFF

VERSUS

THE HONOURABLE ATTORNEY GENERAL……DEFENDANT

RULING

What is before me is the Notice of Motion dated 4th May, 2018 brought under Article 159 2 (d) of the Constitution, Order 51 CPR, Section 1A, 1B and 3A CPA Section 10 of the Judicative Act Rule 3 (1) and (2) of the High Court (Practice & Procedure Rules) and all other enabling provisions of the law. The Applicant is seeking the following orders:

1. **Spent.**

2. **Spent.**

3. **THAT pending the hearing and determination of this application interparties this Honourable Court be pleased to stay execution of the orders granted on 15th September, 2017.**

4. **THAT the Honourable Court be pleased to set aside and/or review the judgement delivered on 15th September, 2017.**

5. **THAT the costs of this application be in the cause.**

The applicant has set out 17 grounds on the face of that application. The said application is supported by an affidavit by Evans Kagoda sworn same date. The said affidavit is further supported by numerous documents marked EK1-EK4. On 1st August, 2018, the Respondent through the firm of Ahmed Nassir Abdikadir & Co. Advocates filed a Notice of Preliminary Objection and a replying affidavit by the Respondent/Plaintiff sworn on 27th July, 2018. The said replying affidavit is further supported by numerous documents marked KSA 1-KSA7.

APPLICANT'S CASE

The Applicant contends that the judgment delivered on 15th September 2018 was delivered without their knowledge or notice. The Applicant also averred that a new and conceal evidence that was not available to them during the trial has now been discovered. The Applicant argued that it has come to their knowledge that the Part Development Plan (PDP) styled as PDP Ref. 326/98/67 has been found to have no evidence supporting its approval. The Applicant stated that in a letter dated 5th February 2016, the Director of Physical Planning declared the approval of PDP styled as PDP Ref. 326/98/67 as not authentic. It is further contended that the Counsel who was having the conduct of the case did not have access to this information during the trial as the information only became available through a letter dated 8th March 2018.

The Applicant also urged that the suit property is a public land and is crucial in the service of the public as the County Tree Nursery, demonstration plot and the Kenya Forest Service Regional Offices. The Applicant further stated that Article 69 (2) (b) of the Constitution of Kenya obligates the State to work towards achieving and maintaining a tree cover of at least ten percent (10%) of the land area of Kenya and that the Forest Service has been charged with the mandate to achieve that forest cover threshold.

RESPONDENTS CASE

The Respondent filed a Notice of Preliminary Objection and a replying affidavit opposing the said application. In his Notice of Preliminary Objection dated 27th July 2018, the Respondent raised the following two grounds:

1. THAT this Honourable Court lacks the requisite jurisdiction to entertain the application and/or to grant the orders sought.

2. THAT this Honourable Court is functus officio and the remedy (if any) available to the Defendant lies in the Court of Appeal.

In the same vein, the Respondent in his replying affidavit raised numerous issues in opposition to this application. First, the Respondent contends that the Applicant's application is incompetent, fatally defective, frivolous and filed in bad faith with the sole purpose of delaying the realization of the fruits of his judgement. The Respondent further contends that the Applicant is guilty of inordinate delay in filing and prosecuting the instant application. As such, the Applicant is undeserving of the orders sought.

The Respondent further contends that this Honourable Court has no jurisdiction to set aside the judgment delivered on 15th September 2017 as the court is fanctus officio and that the court cannot also review the judgment as no legal basis has been laid as required by law to warrant that grant of such an order. The Respondent also argued that the Applicant is the Attorney General of Kenya who has unlimited access to all government offices and that all records pertaining to the suit property were available to tit and also the forest department and no justifiable reason has been given for failure to avail the same to the court well before the judgement was rendered on 15th September, 2017.

In conclusion, the Respondent stated that the orders being sought are extremely prejudicial to his rights and that it is not fair that he should continue to suffer in the hands of a government body that ought to uphold and protect his rights.

APPLICANT'S SUBMISSIONS

The Applicant submitted that Section 80 of the CPA (Cap.21) Laws of Kenya confers upon the court the necessary authority to review a decree or order it has made. The Applicant further submitted that Order 45 CPR sets out the rules for setting aside a judgment or order made by a court. The Learned Counsel cited the Case of **Republic –Vs- Public Procurement Administrative Review Board & 2 Others (2018) eKLR** where it was held as follows:-

"That the rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds:

(a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made;

(b) On account of some mistake or error apparent on the face of the record, or

(c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.

The Applicant also stated that review was distinguished from an appeal as was decided in the case of **National Bank of Kenya limited –Vs- Ndungu Njau (1996) KLR 469** where it was held as follows:

"In my discernment, an order cannot be reviewed because it is shown that the Judge decided the matter on a foundation of incorrect procedure and/or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case much less could it be reviewed on the ground that the other Judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a Judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion unless the error be apparent on the face of the record and therefore require no elaborate argument to explore."

The Applicant further cited the case of **Stephen Gathua Kimani –Vs- Nancy Wanjira Waruingi / Providence Auctioneers (2016) eKLR** where it was held:

"Section 80 gives the power of review and Order 45 sets out the rules. The rules in my view restrict the grounds for review. In my view, the above rule lays down the jurisdiction and scope of review limiting it to the following grounds:

(a) Discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made; or

(b) On account of some mistake or error apparent on the face of the record or

(c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

RESPONDENT'S SUBMISSIONS

The Respondent through the firm of Ahmed Nassir Abdikadir & Co. Advocates filed their submissions on 5/2/2019 where they raised the following issues:

1. The application for review has no merit whatsoever and is merely intended to delay and obstruct the Plaintiff from realizing the fruits of the judgment and orders issued by the court.

2. The application dated 4th May, 2018 is defective in form and substance. The orders/decree sought to be impugned have not been exhibited nor has the Applicant even bothered at the very least to annex the proceedings leading to the orders of 15th September 2017.

3. The instant application is incompetent, fatally defective, frivolous and filed in bad faith and intended to delay and/or derail the realization of the fruits of the judgment. The application amounts to an abuse of the court process and ought to be dismissed in limine.

4. The application though filed on 4th May 2018, under Certificate of Urgency was filed close to two (2) weeks later and served upon them on 24th July 2018, i.e. over two (2) months later and barely six (6) days to the scheduled hearing on 1st August 2018.

5. This matter was filed on 5/7/2007 and the Applicant has never produced the documents he claims they got after one judgment and that it is now 12 years since. Litigation has to come to an end.

6. Throughout all these years, the Plaintiff/Respondent was denied the use and enjoyment of his land in sheer breach of his Constitutional Rights guaranteed by the provisions of Articles 40 of the Constitution.

7. The Applicant has never filed a Notice of Appeal and this application is a back door application intended to derail the finality of this matter and this court ought to dismiss the same with costs.

8. Even if the court was to excise the Defendant for the grave failure as highlighted above, which we submit should not happen, this Honourable Court will still be required to ask itself whether the issues raised by the Defendant do form a proper basis for an application under Order 45 Rule 1.

9. The reason given for review do not qualify as "an apparent error" as envisaged in Order 45 Rule 1.

10. The orders sought are calling for the re-hearing of the entire suit when the matter was heard and determined. That cannot happen through an application for review.

11. The Plaintiff cited the case of **Evans Buire –Vs- Andrew Ngida HCCA No. 103/2000 (Kisumu)** (reported in Odunga's Digest on Civil Case Law and Procedure Vol. IV at page 3553) where it was held;-

"An application for review will only be allowed on very strong grounds if it's effect will not amount to rehearing the original application afresh."

12. Again the Respondent cited the case of **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) where 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."

13. The instant application is premised on falsehoods and utter deception as the Applicant deliberately fails to make disclosure of crucial and pertinent facts to the court and therefore underserving of the orders sought.

14. The Applicant has concealed material facts and now claims that he was not aware of the judgement date and documents were not filed.

15. The letter dated 8th March 2018 was done after the meeting.

16. The annexture marked 2B was done on 5th February 2016 and the defence was closed on 29th October, 2010. This was an afterthought and cannot be introduced after the close of the defence case.

He cited the case of **Nyamogo & Nyamogo Advocates –Vs- Kogo (2001) 1EA 173** where it was held:-

"An error on the face of the record can only be determined on the facts of each case. For an error of law on the face of the record to form a ground for review, it must be of a kind that states one in the face and on which there could be reasonably be no two options. If a courts original view was a possible one, it cannot be a ground for a review even though it may be one for appeal…"

17. It is trite law that a court should not be urged to act in vain.

18. The court ought to consider the delay in filing the application for review.

19. It is submitted that the prayer for stay is speculative and has no clean legal basis and thus the same should not issue and that the same

should be dismissed with costs.

ANALYSIS AND DECISION

The Applicant is seeking review of the judgment and decree of this court issued on 15th September 2017.

Section 80 of the Civil Procedure Act (Cap.21) Laws of Kenya 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."***

Order 45 CPR sets out the rules for the review of a judgememnt. The same provides as follows:

"45 (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 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 review of judgment to the court which passed the decree or made the order without unreasonable delay."***

The Respondent filed a notice of Preliminary Objection and a replying affidavit in opposition to this application. From the Notice of Preliminary Objection, the Respondent contends that this court lacks jurisdiction to entertain this application and/or to grant the orders sought. The Respondent also stated that this court is fanctus officio. In the case of **Raila Odinga –Vs- the IEBC & 3 others**, the Supreme Court made the following remarks regarding the doctrine of functus officio:

> **"We therefore have to consider the concept of "functus officio", as understood in law. Daniel Malan Pretorius, in "The Origins of the Functus Officio Doctrine, with specific reference to its application in Administrative Law" (2005) 122 SALJ 832, has thus explicated this concept; "The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicating or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter……..The (principle) is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conducive. Such a decision cannot be revoked or varied by the decision maker." This principle has been aptly summarized further in Jersey Evening Post Limited V. AI Tharil [2002] JLR 542 at 550;**
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> **"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a Judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully conducted, and the court functus, when its judgement or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."**

That decision by the Supreme Court is obtained in the circumstance of this case. The doctrine of functus is not closed where a party discovers new evidence or matter which was not within her knowledge when the impugned decision was made. On the issue of jurisdiction, Section 80 CPA as read with Order 45 CPR gives court jurisdiction to review a judgment or an order on the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or account or could not be produced by him at the time the decree was passed or the order made or an account of some mistake or error apparent on the face of the record or for any other reason, decision to obtain a review of the decree or order. As such, the preliminary objection lack merit and the same is not upheld.

Going into the grounds for reviewing a judgment or decree of a court, Supreme Court of India in the case of **Afit Kumar Rath- Vs- State of Orisa & Others** (a Supreme Court cases) 596 at page 608.

> **"The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. 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 which states in the face without any elaborate argument being needed for stabling it. It may be painted 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."**

A similar view was taken by the Court of Appeal of Tanzania in the case of the **Registered Trustees of the Archdiocese of Dares Salaam –**

Vs- The Chairman Bunju Village Government & Others.

> **"It is difficult to attempt to define the meaning of the words sufficient cause; it is generally accepted however, that the words should receive a liberal construction in order to advance substantive justice, when no negligence, or in action or want of bona fides, is imputed to the appellant (Emphasis added)."**

In his affidavit in support of this application, Mr. Evans Kagoda who is the Head of Survey and Mapping Department within the Kenya Forest Service has deposed that in a letter from the Director of Physical Planning dated 8th March 2018, new evidence or matter has arisen to the effect that the purported Part Development Plan (PDP) Ref. 326/98/67 which was used as the basis for the issuance of the certificate of title in favour of the Plaintiff/Respondent in this case was not approved by the relevant authorities and therefore not authentic. Where the sanctity of title is being challenged on the basis of new evidence which could not be produced during the hearing of the case, a court of law and equity will not ignore such new evidence on grounds that it has come too late in the day. The head of Survey and Mapping Department within the Kenya Forest Services has laid a firm foundation and given explanations that the new information only came to their knowledge after the judgment and decree of this court had been issued.

I am satisfied that the information contained in the letter from the Director of Lands, Housing and Urban Development addressed to the Director, Kenya Forest Services dated 5th February 2016, is a new and important matter or evidence which was not within the knowledge of the Applicant or could not be produced with the exercise of due diligence when the judgment and decree of this Honourable Court was passed. In the upshot, I am of the view that the Applicant has satisfied the conditions for the grant of the orders sought under Section 80 CPA as read with Order 45 Rule 1 CPR. In the upshot, I allow the application dated 4th May 2018 in the following terms:

> **1. The judgment and decree of this Honourable Court together with all consequential orders be and are hereby set aside and/or reviewed.**
>
> **2. The Defendant to pay the Plaintiff thrown away costs of this application which I hereby assess at Kshs.20,000/= within 14 days from today.**
>
> **3. The parties to agree on a date for pre-trial conference.**

Read and delivered in the Open Court this 6th day of February, 2019.

E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Cohen for Plaintiff/Respondent

2. M/s Maina holding brief Terrel for Defendant/Applicant.

3. Plaintiff

4. Court Clerk: Amina