REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO 314 OF 2017

MBURU GITIMU - APPLICANT / PLAINTIFF

VS

DANIEL KAMAU MUIRURI - RESPONDENT/DEFENDANT

RULING

1. The Applicant filed a Notice of Motion on the 29/1/19 seeking the following orders;

a. The judgment of this Court dated 17/5/18 that dismissed the suit be reviewed, vacated and set aside and the matter be heard afresh.

b. That judgment be entered as prayed in the plaint

c. Costs of the application be provided.

2. The application is premised on the grounds as thus;

a. There is an error apparent on the face of the record in that the Court ought to have found that the Applicant was entitled to the orders sought.

b. That the Court should intervene and review its judgment to the extent that the prayers in the plaint are justified

c. That substantive justice demands that the judgment be reviewed as the Defendant did not even defend the suit.

3. The Applicant in his supporting affidavit filed on the 29/1/2019 stated that the judgement delivered by this Court on the 17/5/18 is riddled with errors in that there is no specific finding that the Plaintiff had proved the case on a balance of probabilities. That the dismissal of the suit gave the Respondent a blank cheque to enjoy the Plaintiff's properties. That the fact that the Court did not find that the Defendant did not Defendant the suit smacks of an error apparent on the face of the record. That the Defendant should be ordered to restitute the Plaintiff and pay general damages for trespass.

4. Despite being served the Respondent did not file any response to the application. The Advocate for the Applicant chose to prosecute the application by way of oral arguments on the 14/2/19 where he relied entirely on the application as filed and the supporting affidavit deponed by the Applicant.

5. The key question for determination is whether there is an error apparent on the face of the judgement delivered by the honourable Court on 17/5/18.

6. Order 45 rule 6(2) 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".

7. In the case of **Paul Muthee Munuhe vs Executive Secretary, Seventh Day Adventist Church C.K.C & 3 Others, where** was an application for review of a judgment was before the Court , it was held :-

"Concurrent with the filing of the application for review, the Plaintiff filed the notice of appeal dated 10.10.2016. The Court finds that such concurrent pursuit of review and appeal rendered the application for review an abuse of the process of the Court and therefore an impetus to dismissal of the application as the Applicant was bound to elect review or appeal process."

8. I note that a notice of appeal was taken was also taken out on 21/5/18. Whilst it is open for a party to invoke the jurisdiction of both the review and appeal same time, where an Applicant files a Notice of Appeal, this unless withdrawn, has the effect of excluding review and an application would be incompetent. The Applicant has not explained the fate of this Notice of Appeal. He has neither demonstrated whether the appeal has been filed. Order 45 rule 6(2) is clearly states but from which no appeal has been preferred. This Applicant seems to want to have a bite at both cherry .The route taken by the Applicant is frowned by the very rule that allows for review. The Court holds and finds that the application in the circumstances is incompetent.

9. Order 45 rule 6(2) states that any person aggrieved by an order or decree. I note that no decree was extracted from the judgement of the honourable Court. It is not clear what the error is on the face of the record. The reading of the Applicant's application implies that the whole judgement is an error on the face of the record. No specific error has been pointed out for the Court to determine whether indeed there is an error apparent on the face of the record. With utmost respect to the Applicant, I see none.

10. The application was filed on 29/1/19 while the judgment complained about was delivered on 17/5/18 . The Applicant filed application for review after 8 months from date of judgement. The delay is unreasonable. The Court may also find that it is inordinate in absence of any account for the delay.

11. Order 45 Rule provides to whom the review should be made to ;

"An application for review of a decree or order of a Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed".

12. The operative tone of the above order demands that the application for review must be based on a). the discovery of new and important matter of evidence which after the exercise of due diligence was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made or b). account of some mistake or error apparent on the face of the record or c). any other sufficient reason.

13. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent from its very nature. It must be left to be determined judicially on the facts of each case. Error contemplated by the Order 45 must be such which is apparent on the face of the record and not an error which has to be searched and fished out. It must be an error of inadvertence. The line of demarcation between an error simpliciter and an error apparent on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident, and does not require an elaborate argument to be established. In the case of **West Bengal Vs Kamal Sengupta AIR 2009 SC 476**, the Court stated as follows;

" the term mistake or error apparent by its very connotation signifies an error which is evidence perse from the record of the case and does not require detailed examination , scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of review. …To put it differently an order or decision of judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the Court on a point of law or fact. In any case while exercising the power of review, the concerned Court cannot sit in appeal over its own judgment/decisions."

14. The Applicant has averred that the Court did not make a decision in his favour as prayed in the plaint. That the error lies in the fact that no finding was made in favour of the Applicant. And more so in the face of an undefended claim by the Defendant/Respondent. This cannot be an error apparent on the face of the record. This goes to the heart of the merits of the case. There is no evidence tendered by the Applicant that would support a prayer for review on grounds of an error apparent on the record. This would appear to be a case for appeal and not a review.

15. In the case of **Abasi Belinda –Vs- Fredrick Kangwamu and another (1963) EA 557 Bennett J held:**

"a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal."

It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law.

That was a good ground for appeal but not a good ground for an application for review. If parties were allowed to seek

> **review of decisions on grounds that the decisions are erroneous in law, either <u>because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which Court decisions that ought to be examined on appeal would be exposed to attacks in the Courts in which they were made under the guise of review when such Courts are functus officio and have no appellate jurisdiction</u>.**

16. The Applicant seems to belabor under a false impression that just because his case was undefended it should have been granted as a matter of course. That notwithstanding he retains the cardinal duty to proof his case. The Court found as much in the judgement for which this Court is now functus officio.

17. In Menginya Salim Murgani - Vs- Kenya Revenue Authority [2014] eKLR the Supreme Court of Kenya held that:

> "It is a general principle of law that a Court after passing Judgment, becomes *functus officio* and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law."

18. This application is dismissed with costs.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 4TH DAY OF APRIL, 2019.

J.G. KEMEI

JUDGE

<u>Delivered in open Court in the presence of</u>;

T M Njoroge for the Plaintiff/Applicant

Defendant/Respondent: Absent

Njeri and Kuiyaki, Court Assistants