REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 240 OF 2018

DOROTHY WAMUYU MUCHIRI................................PLAINTIF/APPLICANT

VERSUS

BARTHLOMEW J.WAWERU TITI...................DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated **21st September 2018,** brought by the Plaintiff/ Applicant seeking for the following orders;

> ***1. THAT this Honourable Court be pleased to grant an order staying execution of all the orders pursuant to the ruling delivered by this Honourable Court (by Justice E.O Obaga) on the 19th day of September 2018, pending the hearing of review of the said ruling and the said orders which was delivered and orders made in respect of the Defendant/ Respondent's application dated the 3rd day of July 2017.***
>
> ***2. THAT this Honourable Court be pleased to review its ruling delivered on the 19th day of September 2018 together with all the orders thereof.***

The Application is premised on the ground that the Applicant herein who was the Respondent in the Application dated **27th July 2018,** was granted leave to file a Replying Affidavit to the said Application within fourteen (14) days, which she did and filed the same on the **8th August 2018**,and handed the Court's copy to the Court's Assistant before the lapse of the fourteen (14) days and further the submissions were also filed and the Court Assistant promised to have the same placed in the Court's file. She further averred that there has been a problem with accessing the court file and if the documents never found their way into the court file before the lapse of the fourteen (14) days or writing of the Ruling she should be excused in the interest of justice.

In her supporting Affidavit the Applicant reiterated the contents of the grounds in support of the Application and further averred that she has been advised by her Advocates that having perused the court file, her Replying Affidavit filed on the **8th of August 2018,** was in the court's record before the lapse of the fourteen (14) days allowed. She urged the Court to review its decision as the defendant has been benefiting to her detriment.

The Application is opposed and the Respondent filed a Replying Affidavit and averred that he filed an Application and despite serving the Applicant, she had not filed a response to the said Application an year later and that he is yet to be served with the said response. Further that the said response ought to have been served on his Advocates or attached to this Application and he denied that the Applicant was condemned unheard. It was his contention that the Judge in allowing his Application dismissed her earlier Application. He further averred that he is the registered owner and the Applicant having unlawfully invaded his property has come to court to be declared the owner and until that prayer is granted the property vests in him. It was his contention that the Applicant should be moving to have the matter heard and not delaying it by filing interlocutory Applications.

The Application was canvassed by way of written submissions to which the court has now carefully read and considered.

It is important to note that the Ruling that is set to be reviewed was delivered by **Justice Obaga,** sitting in Nairobi. However the said suit is within the Jurisdiction of this Honourable court and as provided by order **45 (2)** of the **Civil Procedure Rules** that provides**;**

> ***"If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.''***

As this matter was heard by a court of concurrent jurisdiction to this court, the most important factor that must be determined from the onset is whether the Application sought is capable of being reviewed or the same should have gone on appeal so that the court is not seen to be sitting on appeal against a court of equal jurisdiction. It is therefore the court's opinion that the issues for determination are;

1. Whether the Application is capable of being reviewed.

2. Whether the Applicant is entitled to the orders sought

1.Wheher the Application is capable of being reviewed

Order 45(1) of the Civil Procedure Rules sets out the requirements for an application for review 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 review of judgment to the court which passed the decree or made the order without unreasonable delay"***.

From the foregoing it is clear that when a party seeks to have a matter reviewed, the court ought to be satisfied that there is discovery of new and important matter of evidence, or the order made is on account of some mistake or an error on the face of the record. The court in the case

of **Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) …Vs…Kariuki Marega & another [2018] eKLR** cited the case of **Muyodi…Vs…Industrial and Commercial Development Corporation & Another (2006) 1 EA 243** in which the court held that;

> ***"There is 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 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."***

The Plaintiff/ Applicant has made it very clear that the reason as to why they are seeking to review the court's decision is because the court did not consider her affidavit despite the same being in the court's record. It is this Court's opinion that the same falls within the purview of a matter that can be reviewed as the issue in not one that seeks to have a process of reasoning before one can come to a conclusion. Further in the case of Parliamentary Service Commission …Vs…Martin Nyaga Wambora & others [2018] eKLR the Supreme Court laid down the following as the guiding principles in the Application for review;

> ***(i) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.***
>
> ***(ii) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;***
>
> ***(iii) An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.***
>
> ***(iv) In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.***
>
> ***(v) During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.***
>
> ***(vi) The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:***
>
> ***(a) as a result a wrong decision was arrived at; or***
>
> ***(b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.***

This Court in applying the above principles finds that the said order is capable of being reviewed as the Application by the Plaintiff is based on an error due to the fact that the court did not know of the existence of the said Replying Affidavit.

2.Whether the Applicant is entitled to the orders sought

This court has gone through the Application, the parties pleadings and the Ruling of the court. It is very clear that the court in allowing the Application by the defendant acknowledged that the same was unopposed and therefore it was allowed. It would therefore be safe to

conclude that the main reason why the Application was allowed was because it was not opposed. The court further noted that the Plaintiff/ Applicant was given an opportunity to file a Replying Affidavit but she failed to do so. The Defendant/Respondent has contended that the court acknowledged having considered the written submissions of the parties and therefore the Plaintiff cannot be seen to disregard that. However, there were two Applications that were decided by the learned Judge on the said Ruling and it is that other Application by the Plaintiff that was dismissed that the Judge was referring to.

The Applicant has provided reasons as to why she thinks the Replying Affidavit did not find its way to the court's record. This court has equally perused the courts record and has seen the Replying Affidavit filed in court on **8th August 2018** and the directions to file the said Affidavit having been given on the **27th of July 2018,** the lapse of the fourteen (14) days had not yet materialized and as much this Court agrees with the Plaintiff. The Court in delivering its ruling may not have been aware of the existence of the Replying Affidavit and as such may have come to a conclusion without the necessary information as the Plaintiff acknowledges that the said Affidavit was given to the Court Assistant. For the court to be able to exercise its discretion in allowing a review the Court is guided by **Order 45,** which requires that there ought to be discovery of new information or an error apparent on the face.

Having carefully gone through the pleadings it is this court's opinion that the Ruling is capable of being reviewed as the there was an error apparent on the face of the record. The Court in **Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) …Vs… Kariuki Marega & another [2018] eKLR** in deciding what constitutes an error on the face of the record held that;

> ***"While there cannot be a precise definition of what constitutes mistake or error on the face of the record, the Court in Muyodi V. Industrial and Commercial Development Corporation & Another** (2006) 1 EA 243 explained it 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.''*

Further the Court also cited the Tanzanian decision in the case of **Chandrakhant Joshibhai Patel …Vs… R (2004) TLR, 218**, where it was held that an error stated to be apparent on the face of the record;

> ***'...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions".***

From the foregoing decisions, this Court find that the Court came into a conclusion without full knowledge of the facts and in holding that the Application by the Defendants was not opposed while there is a Replying Affidavit on record is an obvious and patent mistake that does not require any long drawn process. It is therefore important that each party is heard and the matter be determined on merit.

Consequently this Court finds that the matter is one which can be reviewed and having come to a conclusion that there was an error apparent on the face a case has been made out to warrant a review.

Having now carefully considered the Notice of Motion dated 21st September 2018, the Court finds it merited and consequently the said Notice of Motion Application is allowed entirely in terms of prayers no.2 and 3 and set aside the said ruling delivered on 19th September 2018 with costs being in the cause.

It is so ordered.

Dated, Signed and ***Delivered*** at **Thika** this **14th** day of **June** 2019

L. GACHERU

JUDGE

14/6/2019

In the Presence of

……………………………………………for the Plaintiff/Applicant

…………………………………………for the Defendant/Respondent

……………………………………………Court Assistant