



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**E.L.C NO. 3 OF 2017**

**WANJIRU MUIRURI NDUATI.....PLAINTIFF/RESPONDENT**

**VS**

**ERASTUS NDUNGU THUNGU.....DEFENDANT/APPLICANT**

**RULING**

1. This ruling emanates from the Notice of Motion dated the 9/11/18 in which the Defendant seeks the following orders;
  - a. That the Court be pleased to review its judgement which it delivered to the parties on the 11/10/2018 together with all its orders and the decree thereof.
  - b. That the costs of the application be borne by the Plaintiff.
2. The grounds in which the Notice of Motion are set out in the affidavit of the Defendant sworn on even dates. The summarised grounds are as follows;
  - a. The error on the face of the record is that the parties in the suit were decreed to be registered as joint owners of the suit land alone excluding the children of the 2<sup>nd</sup> house of co-wife namely Julia Njoki, which fact is admitted by the Plaintiff in her affidavit sworn on the 2/9/16. That a representative of that house should be included as co-owner of the suit land as trustee.
  - b. That the Court did not consider that the contributions of the Plaintiff are minor and are limited to development of the suit lands which is not sufficient or reasonable ground to warrant her to be entitled to half share of the said suit lands.
  - c. That the interest and financial needs of the Defendant as an old and sickly man ought to have been addressed before the judgement was arrived at as it is oppressive to him.
3. The Plaintiff sought the following orders in the suit;
  - a. That permanent injunction do issue restraining the Defendant by himself, his servants and employees from doing any of these acts, that is to say, from advertising for sale, selling whether by public auction or private treaty, leasing, letting, charging gifting or disposing in any manner all those parcels of land known as LOC 6 GIKARANGU/4480, 4481 and 4482 formerly LOC 6 GIKARANGU/207 or any part thereof without the Plaintiff's consent.
  - b. Declaration that the Defendant holds all that parcel of land known as LOC 6 GIKARANGU/207 (subdivided into parcels LOC 6 GIKARANGU/4480, 4481 and 4482) in trust for his dependants.
  - c. Declaration that all that parcel of land known as LOC 6 GIKARANGU/4480, 4481 and 4482 formerly known as LOC 6 GIKARANGU/207 is the Plaintiffs matrimonial and ancestral land.
  - d. That the honourable Court be pleased to revoke the registration of the mutation registered on 18/9/2015 and the subsequent subdivision of all that parcel of land formerly known as LOC 6 GIKARANGU/207.
  - e. A declaration that the Plaintiff is entitled to half share of the properties known as LOC 6 GIKARANGU/4480, 4481 and 4482 formerly known as LOC 6 GIKARANGU/207.

f. An order directing the Land Registrar Murang'a to enter the name of the Plaintiff into the Register of titles as a joint and equal title holder to the properties known as LOC 6 GIKARANGU/4480, 4481 and 4482 formerly known as LOC 6 GIKARANGU/207.

4. On determining the matter on its merits the Court made the following orders in the impugned judgment;

a. The registration of the mutation forms registered on the 18/9/2015 and their subsequent subdivisions for LOC 6/GIKARANGU/4480,4481 and 4482 be and are hereby cancelled and the suit land reverted to LOC 6/GIKARANGU/207.

b. It is declared that the Plaintiff holds a beneficial interest in the suit land. The Defendant holds the land in trust for himself and persons who are children, spouse or dependants.

c. It is hereby ordered that LOC 6/GIKARANGU/207 be registered in the name of the Plaintiff and the Defendant in trust for themselves and all their children.

d. In default of c above the Deputy Registrar of this Court is hereby authorized to execute all the documents to effect the said registration as contemplated under order c above.

e. A permanent injunction do issue restraining the Defendant by himself his servants, employees and/or agents or any person claiming under him from advertising, selling, charging, gifting or disposing LOC 6/GIKARANGU/207 without the Plaintiff's consent.

f. The parties being husband and wife, I make no orders as to costs.

5. With concurrence of the Court, the Defendant and the Plaintiff filed their written submissions on the 12/3/19 and 14/3/19 respectively. The Court has considered the Notice of Motion, the Defendant's affidavit in support of the Notice of Motion and the submissions filed by the parties. The Plaintiff did not file any affidavits in reply but filed grounds of opposition to the Notice of Motion.

6. The Defendant did not set out issues for determination but the Plaintiff set out two issues for determination namely;

a. Whether the application is competent

b. Whether the application has merit

7. Saving different phraseology, the Court adopts the two issues for determination. These are dealt with in turn.

#### **Whether the application is competent**

8. The Plaintiff's challenge on this ground is anchored in the provisions of Order 9 Rule 9 of the Civil Procedure Rules and case law that he has filed. The relevant provision of the law states;

“When there is a change of Advocate , or when a party decides to act in person having previously engaged an Advocate , after judgment has been passed, such change or intention to act in person shall not be effected by order of the Court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be”.

9. It is in the Court record that on 12/11/2018 the Defendant simultaneously with the Notice of Motion filed a consent by his then Advocate s Messrs Muhia & Mutai Co Advocate s and his present Advocate Kamata & Company Advocate s where the former Advocate s accepted the latter to take over conduct of this case on behalf of the Defendant. On 3/12/18, the Defendants present Advocate s Muhia & Mutai Co Advocate s filed their notice of change of Advocate s.

10. In this premises the rules of procedure as stated above are duly satisfied. The Plaintiffs first ground of opposition to the Notice of Motion therefore fails and is dismissed.

#### **Whether the application has merit**

11. The premises for challenging the Defendants application under this heading is based on the Order 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 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.

12. These provisions of law have to be applied with regard to the Defendant's application to determine its merit or none.

13. A review based on an error apparent on the face of record is one of the grounds of review. 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 application may be considered with relation to each ground in a summarised form in the affidavit in support and set out in the Notice of Motion. In respect to the first ground, the matters stated under this heading are not new or a cause of an apparent error on the face of the record. These are matters set out in the pleadings and determined in the judgment. Consequently, this ground of the Notice of Motion is dismissed as it is not an error. The applicant is projecting his opinion of what the judgement of the Court should have been. That cannot be a subject of review, perhaps an appeal.

15. Ground no 2 which is that contributions of the Plaintiff are minor and are limited to development of the suit lands which is not sufficient or reasonable ground to warrant her to be entitled to half share of the said suit land, meets the same fate of dismissal as there is no error on the face of the record that can be discerned from the Notice of Motion as pleaded.

16. In respect to the 3<sup>rd</sup> ground, the Defendant personally attended Court and gave evidence that he is elderly is not a new matter discovered after the hearing of this case. The Court is not able to ascertain the medical condition of the Defendant and financial need before at and after the judgement. It is therefore not a matter falling in analogy reasoning so as to be categorised in a and b set out above. This ground is in the circumstances, therefore, not merited and is dismissed.

17. In the upshot the Court finds that the Notice of Motion dated the 20/11/18 is not merited and is accordingly dismissed.

18. The costs shall be to the Respondent.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 22<sup>ND</sup> DAY OF JULY 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Plaintiff/Respondent – Present in person. Advocate is absent.

Kamata for the Defendant/Applicant

Irene and Njeri, Court Assistants