REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 229 OF 2017

HAMISI JUMA MBAYA.....PLAINTIFF/APPLICANT

VERSUS

ASMAN AMAKECHO MBAYA.....DEFENDANT/RESPONDENT

RULING

The application is dated 1st April 2019 and is brought under Section 1A, 3A, 80 of the Civil Procedure Act, Cap 21 Laws of Kenya Order 45 rule 1 of the Civil Procedure rules seeking the following orders;

1. That this honourable court be pleased to review the judgment delivered on 24th July, 2018.

2. That the court do substitute the said judgment with an order that the plaintiff is entitled by adverse possession all that land occupied by him on L.R. No. South Wanga/Lureko/706 as admitted by the respondent.

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

The applicant submitted that he filed an amended originating summons dated 14th August, 2013 the applicant herein had sought to be registered the proprietor of half of L.R. No. South Wanga/Lureko/706 by way of adverse possession. That judgment was delivered by this court on 24th July, 2018 (Attached and marked 'HJMI' is a copy of the judgment) That in the said judgment court stated that 'the applicant is only entitled to that portion which is under his occupation and use which portion in fact the respondent has admitted that he is ready to surrender to him.' That the error apparent on the face of the record is that plot 3700 does not exist (Attached and marked 'HJM2' & 'HJM3' is a copy of the green card and certificate of official search). That plot 3700 was a sub-division of S. Wanga/Lureko/706. As per entry no. 2 on the green card. That subsequently all the sub divisions were cancelled vide court order No. 1 of 2012 by the Principal Magistrate's Court, Mumias as per entry no. 3 on the copy of green card. That said decision of the Principal Magistrate's Court at Mumias still stands as the same has not been challenged in any court of law. That this application has been brought without undue delay. That it is in the interest of justice that this application is allowed. That no prejudice will be occasioned to the defendant if the orders sought herein are granted. That I swear this affidavit in support of the application filed herewith. That he urges this honourable court to review the judgment delivered on 24th July, 2018.

The respondent submitted that by a judgment delivered on the 24th day of July, 2018 the claim of the applicant was dismissed and consequently, this honourable court has now become functus officio. That the applicant having admitted in a chamber summons application dated the 1st day of August, 2018 that there is a pending appeal against the judgment before the Court of Appeal at Kisumu, he is precluded from reviewing the said judgment. Annexed hereto as exhibit 'AAM 2' is a copy of the said chamber summons. That although the sub-divisions emanating from L.R. No. south Wanga/Ekero/706 was at one time cancelled by the Mumias Law Court this decision was reversed by the High Court at Kakamega vide Civil Appeal No. 33 of 2012. Attached hereto as exhibit marked 'AAM 2' is a copy of the judgment delivered by the High Court. That this honourable court having made a finding that the applicant is not entitled to any portion of land in plot 706 under the principle of Adverse Possession the applicant cannot be granted the orders under prayer 2 of his application.

This court has considered the application and the submissions therein. Section 80 provides:

> ***80. 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 hereby 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.***

Under **Order 45 rule 1** of the Civil Procedure Rules, which states that:

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 appl*y for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.*

2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when being the respondent, he can present to the appellate Court the case on which he applies for review. (emphasis added)

On the mistake or error apparent on the face of the record, the Court of Appeal in **Muyodi V. Industrial and Commercial Development Corporation & Another (2006) 1 EA 243** explained it 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 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."

In the case of **David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR the court of Applea held that:**

Courts are normally bound by the pleadings of the parties so as to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.

The opinion was also in the Court of Appeal for Eastern Africa in *Gandy v Caspar Air Charters Ltd [1956] 23 EACA, 139:*

"The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given"

From the grounds of this application, the applicant submits that vide amended originating summons dated 14th August, 2013 the applicant herein had sought to be registered the proprietor of half of L.R. No. south Wanga/Lureko/706 by way of adverse possession. That judgment was delivered by this court on 24th July, 2018. That in the said judgment court stated that 'the applicant is only entitled to that portion which is under his occupation and use which portion in fact the respondent has admitted that he is ready to surrender to him'. That the error apparent on the face of the record is that plot 3700 does not exist. That plot 3700 was a sub-division of S. Wanga/Lureko/706. As per entry no. 2 on the green card. That subsequently all the sub divisions were cancelled vide court order No. 1 of 202 by the Principal Magistrate's Court, Mumias as per entry No. 3 on the copy of green card. That said decision of the Principal Magistrate's court at Mumias still stands as the same has not been challenged in any court of law. That the respondent admitted that the applicant occupies a portion of S. Wanga/Lureko/706. That this application has been brought without undue delay. That it is in the interest of justice that this application is allowed. That no prejudice will be occasioned to the defendant if the orders sought herein are granted. On the 24th October 2018 this court granted a stay of execution pending appeal. The matter is now on appeal and this court cannot now review its own judgement. I find this application is an abuse of the court's process and a waste of the court's time. This court is not persuaded, that there is an era on the face of the record. I find that the applicant has not fulfilled any of the grounds to enable me review the said judgement. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE