REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 42 OF 2013

JUSTUS SHILULI IMBWAGA

ESTER MUKALITSI.....PLAINTIFFS/RESPONDENT

VERSUS

SOLOMON AHINDUKHA

SILVANUS HUNTER ACHESA.....DEFENDANTS/APPLICANTS

RULING

The application is dated 8TH April 2016 and brought under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules seeking the following orders;

1. That there is an error apparent on the face of the record in the judgment delivered on 20/11/2018 in that the defendant/applicant's counter-claim was not considered.

2. That the counter-claim of the defendant/applicant be considered in that the plaintiff/respondent be ordered to be evicted from the defendant/applicant's parcel of land known as Isukha/Mukhonje/1191 and the plaintiff/respondent's structures erected therein be removed.

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

4. That any other further orders be made as the honourable court may deem just and expedient.

This application is based on the following grounds that the defendant/applicant had prayed for an order of eviction of the plaintiff/respondent out of the parcel of land known as Isukha/Mukhonje/1191 and led evidence on it though the honourable court by error did not address it in its judgment delivered on 20/11/2018. That the error is apparent on the face of the record and prejudicial to the defendant/applicant. That the application has merit and it is made in good faith.

The respondent submitted that, the plaintiff/respondent sued him alongside with the late Silvanus Hunter Achesa claiming that they had encroached into the plaintiff/respondent's parcel of land known as Isukha/Mukhonje/1009. That he denied ever having encroached into the plaintiff/respondent's parcel of land aforementioned. That it is infact the plaintiff/respondent who has encroached into his parcel of land known as Isukha/Mukhonje/1191. That in his statement of defence filed on 3rd April, 2018 at paragraphs 5 and 6 and at paragraph 7 thereof he made a clear counter-claim that the court be pleased to order that the plaintiff/respondent be evicted from his parcel of land known as Isukha/Mukhonje/1191 and that the plaintiff/respondent's structures erected on his said land by the plaintiff/respondent be removed (Attached and marked S.A.1 is a copy of his said statement of defence and counter-claim). That his statement of evidence filed on 3rd April, 2018 I also clearly stated that the plaintiff/respondent had encroached onto his parcel of land known as Isukha/Mukhonje/1191 and erected structures thereon and he prayed that the plaintiff/respondent be evicted and the structures complained of removed (Attached and marked S.A.2 is a copy of his statement under reference). That on 25th September, 2018 he gave his evidence in court on oath and specifically pleaded with the honourable court to allow his counter-claim and have the plaintiff/respondent evicted from his land. That it was clear from the proceedings and specifically based on the report of the surveyor that the plaintiff/respondent had actually encroached into his land No. Isukha/Mukhonje/1191 and prayed that the plaintiff/respondent be evicted there from (Attached is a copy of his submissions filed on 9th October, 2013 marked S.A.3 by his counsel in this respect). That unfortunately when the honourable court delivered its judgment on 20th November, 2018 his prayer on the counter-claim which had pleaded, testified and proved on and submitted was not considered. That the judgment delivered on 20th November, 2018 be reviewed /corrected to include his prayer that the plaintiff/respondent be evicted from his parcel of land known as Isukha/Mukhonje/1191.

The plaintiff opposed the defendant's application dated 8th April, 2019 on the grounds that the application is an afterthought, lacks merit and is an abuse on court process. That there was no error apparent on the face of record as the defendant's counter claim was never proved. That the defendant never subjected his counterclaim to trial as required by the law. That the defendant's application is introducing new issues that were never raised at trial herein which can only be addressed in a separate suit or appeal. That the application if granted will not only be prejudicial but unfair to the plaintiff/respondent herein. That the application ought to be dismissed with costs.

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"*

I have perused the pleadings and the proceedings in this matter and indeed find that the defendant did plead in his counterclaim for eviction orders. In the courts judgement delivered on the 20th November 2018, the court held that;

> *"The plaintiff has produced no evidence to prove this encroachment and the defendant has produced a surveyors report dated 13th June 2014 after this suit was filed stating that the plaintiffs' house was on the defendants' land parcel ISUKHA/MUKHONJE/1191. The report stated that the boundaries between land parcel ISUKHA/MUKHONJE/1009 land parcel ISUKHA/MUKHONJE/1191 were intact. I find that the plaintiff has failed to prove his case on a balance of probabilities and l dismiss it with costs".*

It is clear that the court did not mention or make a determination on the counterclaim. This is an era on the face of the record. The 1st defendant gave evidence in court on 25th November 2018 and stated that the disputed parcels were surveyed in the presence of both parties

on the 5th June 2014 and the Surveyor found in his report dated 13th June 2014 after this suit was filed stating that the plaintiffs' house was on the defendants' land parcel ISUKHA/MUKHONJE/1191. The report stated that the boundaries between land parcel ISUKHA/MUKHONJE/1009 land parcel ISUKHA/MUKHONJE/1191 were intact. Be that as it may, the Surveyor recommended that the Land Registrar visits in person to take the history of the case. I find this report is not conclusive as the Land Registrar did not make this visit to give her report. It is not clear from the evidence adduced how land parcels ISUKHA/MUKHONJE/1009 and ISUKHA/MUKHONJE/1010 are sub-divisions of ISUKHA/MUKHONJE/472 and also land parcel ISUKHA/MUKHONJE/1191 ISUKHA/MUKHONJE/1192 are the subdivisions of again ISUKHA/MUKHONJE/472. Could there be an overlap of this parcels? I find the counterclaim was not proved on a balance of probabilities. I therefore will not grant this application and the parties need to revert to the Land Registrar to determine the boundary dispute. There will be no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE