



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 112 OF 2017

FORMERLY MERU ELC 147 OF 2009

ROYFORD RIUNGU KUURA.....1ST PLAINTIFF/RESPONDENT

WASHINGTON KIRIMI KUURA.....2ND PLAINTIFF/RESPONDENT

CHARLES NYAGA KUURA.....3RD PLAINTIFF/RESPONDENT

VERSUS

M'KUURA M'RIRIA.....1ST DEFENDANT/APPLICANT

TURA KARINGURI.....2ND DEFENDANT/APPLICANT

ATTORNEY GENERAL.....3RD DEFENDANT/APPLICANT

RULING

1. This application states that it has been brought to court under Section 80, 1A, 1B & 3A of the Civil Procedure Act, Order 9 Rule 9 & Order 45 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The application seeks orders:-

1. That this honourable court be pleased to certify this application urgent and to hear it ex-parte in the 1st instance.
2. That the honourable court be pleased to allow the law firm of M/s Thuraira Atheru & Co. Advocates to come on record for the 1st defendant in place of M/S Kiautha Arithi & Co. Advocates.
3. That there be stay of execution of the decree/judgment and all consequential orders herein pending the inter partes hearing of this application.
4. That the honourable court be pleased to review by way of setting aside the judgment/decree delivered on/date 19.3.2018 and all consequential orders made thereto in this suit.
5. That the 1st defendant's replying affidavit to the Originating Summons filed on 22.12.2009 and witness statement dated 13.2.2018 and filed on 14.2.2018 be considered and the 1st defendant and his witnesses be heard before the court delivers its judgment.
6. That this honourable court be pleased to grant such further or better orders as will meet the ends of justice
7. That the costs of this application be provided for.

2. The application has the following grounds:-

- a) That there is mistake or error apparent on the face of the record.
- b) That the 1st defendant is aggrieved by the decree/judgment herein which if allowed to stand the applicant will be condemned unheard and suffer substantial loss.

- c) That the subject matter herein is land in which the 1st defendant and his family have lived for 82 years and if execution takes place the 1st defendant and his family will be evicted and suffer irreparable loss.
- d) That the 1st defendant was never informed of the hearing date of this case before it proceeded in his absence and judgment rendered.
- e) That the 1st defendant has never been heard and is desirous of being heard.
- f) That the 1st defendant should not be condemned for the mistakes of his counsel who misled the court and did not point to the court material evidence already on record and in favour of the applicant.
- g) That the 1st defendant only came to know of the judgment herein long after it was delivered through a friend who was in court and heard his name being mentioned when judgment was being pronounced.
- h) That execution is imminent.

3. The application is supported by the affidavit of 1st defendant/applicant sworn on 5th July, 2019 which states:-

I, M'Kuura M'Riria, an adult male of sound mind resident in Gatua location, Mitheru location Tharaka Nithi County and of Post Office Box Number 299 Chuka do hereby make oath and state as follows:

1. That I am the 1st defendant/applicant herein and therefore competent to make and swear this affidavit.
2. That I am making this affidavit in support of my application to have the judgment dated 19.3.2018 reviewed and set aside.
3. That one of the subject matters in this matter is LR No. Muthambi/Gatua/266 which belongs to me and is still registered in my name as per the annexed copy of the certificate of official search marked as MM1.
4. That the other subject matter, LR. No. Muthambi/Gatua/503 belonged to my uncle one Gedion Thuura Karingururi who died on 1.9.1986 and left the said land to me and it is still in his name as per the annexed copy of the certificate of official search marked as MM2.
5. That on 19.3.2018 this honourable court delivered a judgment the effect of which is to alienate the said land from me and also ordered that I be forcefully evicted from the said land with the assistance of the local Officer Commanding Police Station (OCS) and that I also pay damages amounting to Kshs.200,000/=(Annexed and marked MM3 is a copy of the certified judgment).
6. That I was not present in court when the matter so proceeded for hearing culminating with the said judgment of this honourable court as I had also not been informed of the hearing date by my advocates then on record.
7. That having never been apprised of the date for hearing of the suit herein I only came to know about the judgment through a friend 9 days after it was delivered.
8. That at the outset I wish to state that I do not blame this honourable court for the events leading to the said judgment case. My problem has been my erstwhile advocates who I have changed from time to time and even now in this application I wish the court to allow Thurania Atheru & Co. Advocates to be allowed to come on record in lieu of my counsel on record.
9. That going back to the subject matter LR. No. Muthambi/Gatua/1266, it is my land where I was born and brought up and lived there all my life since 1937 when I was born as I am now aged 82 years old. (Annexed and marked MM4 is a copy of my national identity card).
10. That my late father and mother are also buried on the said land where to date I live with my adult children. The plaintiffs could not have been living there and fail to prevent the said burials.
11. That the truth of the matter is that I was issued with a title deed to the land in 1997 and I do not know about all the other land parcels that the plaintiffs are talking about.
12. That the plaintiffs are my distant neighbours who live about 2 km away from my home and we have never shared anything with them.
13. That contrary to the allegations in this matter the plaintiffs have never lived on my land at all and also we are not related at all. In fact in their witness statement of Charles Nyaga Kuura, the plaintiffs admit that I have settled my family on the suit land and have a permanent house on the subject matter which is inconsistent with the import and tenor of their Originating Summons on adverse possession herein. (Annexed and marked MM5 is a copy of the plaintiff's witness statement, case summary and list of documents).
14. That in the said witness statement of Charles Nyaga Kuura and other plaintiff's documents it is manifest that we have had

cases/disputes with the plaintiffs before the land adjudication office, Nairobi High Court Miscellaneous Application N. 257 of 1983, Attorney General/Director of Land Adjudication all which are acts, as I am duly advised by my incoming advocates and which I verily believe to be true, are totally inconsistent with the substratum of the plaintiffs claim under the Limitation of Actions Act and adverse possession.

15. That before this suit proceeded for hearing on 19.2.2018 I had already filed my list of witnesses and witness statement dated 13.2.2018 on 14.2.2018 and it was on record on the said 19.2.2019.

16. That from the judgment herein it is manifest that on 19.2.2018 when the matter came up for hearing the advocate purporting to act for me misled the court that I had not complied with order 11 of the CPR, which was not true as I had done so. His application for adjournment was of course refused and the court proceeded to render the impugned judgment.

17. That I believe that had the material already on record by 19.2.2018 been pointed out to the honourable court, the judge would have reached a different finding than he did.

18. That it is due to the foregoing that I am advised by my incoming advocates, which I believe to be true, that there is mistake apparent on the face of the record warranting this honourable court to interfere with its judgment dated 19.3.2018 by way of review.

19. That I am also praying that pending the hearing and determination of this application that the court stays its judgment/decreed dated 19.3.2018.

20. That I was therefore only aware of this suit long after judgment and did not deliberately fail to defend or appear in court.

21. That I am very much interested in prosecuting this suit and more so since I have a good defence as can be discerned from the copy of my replying affidavit to the Originating Summons and witness statement. (Annexed and marked MM6 is a copy of the 1st defendant's witness statement).

22. That I believe execution is now imminent as there is judgment on record.

23. That unless stay of execution is granted on priority basis execution will proceed occasioning me substantial loss.

24. That I therefore urge the honourable court to allow my application since I have moved timeously and that no prejudice shall be occasioned to the plaintiffs.

25. That what is deponed to hereinabove is true to the best of my knowledge, information and belief.

4. The application was opposed through the affidavit of the 3rd Plaintiff/Respondent sworn on 12th July, 2019 which states:-

REPLYING AFFIDAVIT

I, CHARLES NYAGA KUURA of Post Office Box number 147 Thika in the Republic of Kenya do hereby make oath and state as follows:-

1. That, I am an adult of sound mind and have authority to make this affidavit on my own and on behalf of my co-plaintiffs/applicants.
2. That, I am conversant with the facts giving rise to the suit and the present application by the 1st Respondent/Applicant.
3. That, in truth the application by the 1st Respondent/Applicant is irredeemably defective, incompetent, ill-founded, untenable, unfounded, unsubstantiated, wishy-washy and devoid of any merit and the same should be dismissed with costs.
4. That, the application is a collection of falsehoods and bare averments intended to hoodwink the honourable court.
5. That, I am informed by my counsel on record which advice I verily believe to be true and correct that the conduct of the defendants was plainly dilatory and this was well documented in this honourable court's judgment specifically paragraphs 3, 4, 5, 6 & 7.
6. That, I am further informed by my advocates on record whose advice I verily believe to be true and correct that the 1st defendant/applicant has thoroughly failed to demonstrate the error apparent on the face of the record as contemplated by order 45 Rule 1.
7. That, I am also informed by my advocates on record which advice I verily believe to be true that what is being advanced as a review is actually a flat attempt for the honourable court to sit on appeal on its own decision.
8. That, immediately after the judgment was delivered, the applicant instructed his former advocates to file a notice of Appeal against the entire judgment.
9. That, the applicant has already expressed his intention to appeal and cannot now approach the court for review.

10. That, the applicant having instructed his former advocates to lodge the Notice of Appeal is estopped to deny knowledge of the judgment.

11. That, I am also informed which information I verily believe to be true and correct that the applicant is trying to stretch the truth by averring it (sic) had filed his witness statement on 13.2.2018 yet the same were not served on the plaintiffs/Respondents nor were they on record as the court could have seen the same. Even most telling was the fact that their advocate on record on the material day was seeking an adjournment for not complying.

12. That, further I am informed by my advocates on record which information I verily believe to be true and correct that in keeping with their laxity and indolence the applicant is filing this application more than one year after judgment and purportedly after it came to the knowledge of the applicant.

13. That, it is my view that the application herein is only intended to scuttle the execution process that is underway.

14. That, I am advised by my advocates on record which advice I verily believe to be true and correct that the applicant has not even slightly come close to satisfying the express principles under Order 42 Rule 6 of the Civil Procedure Rules, 2010. He has neither shown what substantial loss he will suffer, nor has he brought the application without undue delay and he has not offered any form of security for due performance.

15. That, I am advised by my advocates on record which advice I verily believe to be true and correct that the 1st defendant's application is misconceived, made in bad faith, misplaced and fundamentally defective.

16. That, I am further advised by my advocates on record which advice I verily believe to be true and correct that the honourable court lacks jurisdiction to hear the present application as it is functus officio as the suit was heard inter partes and counsel for the 1st defendant had opportunity to cross examine the plaintiffs' witness.

17. That, I am further advised by my advocates on record which advice I verily believe to be true that the application is fatally defective as Order 42 Rule 6 of the Civil Procedure Rules, 2010 contemplates an appeal or intended appeal for stay to be sought and this application is for review.

18. That, I am further advised by my advocates on record which advice I verily believe to be true that further the counsel who has filed the said application has inappropriately and improperly come on record.

19. That, it is strange and interesting that the 1st defendant is now blaming his advocates when he says that he knew of the judgment supposedly 9 days later after delivery but chose to come to court one year later.

20. That, I and my co-plaintiffs/respondents strongly believe that the present application is brought to court for only one purpose and that it is to frustrate the execution process.

21. That, I and my co-plaintiffs/respondents humbly urge the honourable court to dismiss the 1st defendant's application with costs.

22. That, what is deponed hereinabove is true to the best of my knowledge, information and belief.

5. The application was canvassed through written submissions.

6. The 1st defendant's submissions are reproduced in full herebelow without any changes whatsoever including spelling or any other mistakes.

1ST DEFENDANT'S SUBMISSIONS IN SUPPORT OF THE NOTICE OF MOTION DATED 05.07.2019.

May it please Your Lordship, we hereby submit as follows.

On 17.07.2019, you directed that the afore-stated application be disposed of first, through written submissions, hence our so doing herein.

A. ON APPLICATION

The application dated 5.7.2019 prays for the following orders namely:-

- 1) Spent.
- 2) Spent.
- 3) THAT there be stay of execution of the decree/judgment and all consequential orders herein pending the *inter partes* hearing of this application.
- 4) THAT the Honourable Court be pleased to review by way of setting aside the judgment/decreed delivered on/dated **19.03.2018**

and all consequential Orders made thereto in this suit.

5) THAT the 1st Defendant's Replying Affidavit to the Originating Summons filed on 22.12.2009 and Witness Statement dated 13.2.2018 and filed on 14.2.2018 be considered and the 1st Defendant and his witnesses be heard before the court delivers its judgment.

B. ON FACTS OF THE APPLICATION.

Your Lordship, the Applicant relies on his two supporting affidavits sworn on 5.7.2019 and 22.7.2019 respectively. And since this is a Court of Record and the Applicant's grievance revolves on a mistake apparent on the face of the record the applicant also relies on the court record including and not limited to;

- i) Originating Summons (OS) and supporting affidavit herein dated 11.11.2009;
- ii) Plaintiffs' list of documents;
- iii) Plaintiffs' case Summary;
- iv) 1st Defendant's Replying Affidavit to Originating Summons dated 21.12.2009 and filed on 22.12.2009;
- v) 1st Defendant's (applicant) list of witnesses and Witness Statement dated 13.2.2018 and filed on 14.2.2018;
- vi) Witness Statement of CHARLES NYAGA KUURA dated 9.6.2014;
- vii) The Judgment dated 6.2.2019; and
- viii) Decree issued on 6.2.2019.

In the OS the Plaintiffs aver that they have been in uninterrupted occupation of the suit land since 1950. In the list of documents attached the plaintiffs have inter *alia annexed copy of case No. 159 dated 22.8 1966, proceedings* in HC Misc Application No. 257/83, correspondence between the Office of the Attorney General, Correspondence between the parties and Department of land Adjudication and settlement and correspondence with the Court. These go a long way in showing that the Plaintiffs' occupation of the suit land, if any was marred with controversy, cases and disputes.

In the plaintiffs case summary the Plaintiffs admit that there were cases upon cases between them, the Applicant, the office of The Land Adjudication, the High court et al spanning from the time of land adjudication to date.

The Applicant filed Replying Affidavit on 22.12.2009 in which he said he is the undisputed owner of the suit land which he acquired in 1964 upon the land gathering and adjudication. In the same year in 1964 the father of the plaintiff one KUURA MBAE (deceased) illegally gathered part of his land which is now **MUTHAMBI /GATUA/1941**. The 1st Defendant in 1966 filed Committee case No. 159/66 which resulted in the said land being returned to the 1st Defendant. He annexed a copy of the proceedings and ruling to that effect. He occupied the said land until 1980 when upon discovering that it was not recorded in his name but that of the plaintiff's father, he again filed a land adjudication case in 1983. The land adjudication officer awarded the land to him in a ruling dated 18.3.1983 (ruling annexed to his affidavit).

The plaintiff's father became aggrieved by the said award upon which he filed HC MISC. APPL. NO. 257/83 to quash the said decision which before the judgment herein was delivered was also pending.

The 1st Defendant therefore on oath denied that the plaintiffs have been in peaceful occupation of the Suitland for 12 years as parties have been litigating over the same all along.

The 1st Defendant in his witness statement dated 13.2.2018 stated that **LR. NO. MUTHAMBI/GATUA/1266** is where he was born and brought up and has known no other home in his 80 years of age. He said his father and mother are buried on the land and that is where he lives to date. That the other **LR. NO. MUTHAMBI/GATUA/503** belonged to his late uncle one GEDION THUURA KARINGURURI who died on 1.9.1986 and left the said land to him and it is still in the said deceased's name.

In the Witness Statement of the 3rd Plaintiff CHARLES NYAGA KUURA dated 9th June, 2014 he states,

“The 1st Defendant has now settled his family on the disputed land.....

The 1st Defendant has now built a permanent house in parcel number 503, a clear indication.....”

It has further been deposed by the 1st Defendant that his erstwhile advocates did not inform him of the hearing date of 19.2.2018 pursuant to which the matter proceeded and the judgment rendered. The 1st Defendant had on 14.2.2018 filed his list and Witness Statements. On 19.2.2019 he was not in court when the matter was called but an advocate holding brief for his advocate was. The said advocate applied for adjournment asking for more time to comply with Order 11 of CP Rules but which was rejected by the court for obvious reasons that he had

such an opportunity before but had not risen up to it. But the compliance documents were already on record having been received at the court registry on **14.2.2018**. for ease of reference the applicant has annexed it as annexure number **MM6**.

C. ON THE LAW

Section 80 of the **Civil Procedure Act** is in the following terms:-

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 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.

Order **45 Rule 1(1)** of the Civil Procedure Rules states:-

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,

.....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.”

From the foregoing this court is clothed with power to review its own judgment/decreed if there appears material discrepancy/contradiction between the actual judgment and the material on record that was relied on. The condition being that no appeal was preferred. In our case though a Notice of Appeal was filed no actual appeal was indeed filed within 60 days thereof and under the Court of Appeal Rules the said Notice is deemed withdrawn.

We reiterate the averment in the application that the 1st Defendant applicant was not informed of the hearing date and indeed never attended. The court record bears this out. Can it be said that since an advocate appeared for him and relied on the wrong reason to ask for an adjournment and which was refused then he is stopped from challenging the later outcome?

Article 159 (2)(d) of the Constitution of Kenya, 2010 states that **in exercising judicial authority, the courts and tribunals shall be guided by the principles among them that**

“d) justice shall be administered without undue regard to procedural technicalities.”

The subject matter herein being land is sensitive. The instant matter was commenced by way of Originating Summons. In an Originating Summons the court can rely even on only affidavit evidence to come to its conclusion, so long as it is uncontroverted and not contradictory. Unfortunately these discrepancies though on record were not put to the attention of the court and the court was misled to arrive at a judgment that can be reviewed. The material errors on the face of the record are-

i) The plaintiffs List of documents attest to myriad of cases involving the subject matters from the time of adjudication to the time of judgment herein. As long as that list of documents is on record it cannot be said that there was any peaceful occupation.

ii) In the witness statement of the 3rd Plaintiff he has stated that -

“The 1st Defendant has now settled his family on the disputed land.....

The 1st Defendant has now built a permanent house in parcel number 503, a clear indication.....”

Which is inconsistent with the alleged continuous and uninterrupted occupation? We say no more of that.

iii) The plaintiffs say they have been in occupation for 50 years and yet the title deed was obtained in 1997. A title was not in existence for that period hence such averment is incorrect.

iv) Contrary to advocates’ submission from the bar, the 1st Defendant had filed a Replying Affidavit dated 21.12.2009 and Witness Statement dated 13.2. 2018 all which adequately answer the Originating Summons.

v) A perusal of the Originating Summons and Judicial Review consolidated therewith shows the plaintiffs claim is not for adverse possession *per se* thus discounting its very basis.

In SAID V MAITHA & ANOTHER (2008)2KLR(EP)

The Kenya Court of appeal while dealing with similar inconsistencies on record held-

There is inherent power of the court to recall a judgment before it is perfected. See Raichad Lakhanshi vs Assan and & Sons (1957)EA 82Sir Newham Worly then President of that Court said after referring with approval the English case of Re Harrison's Share Under A Settlement (1995) 1 All ER 185:

“It is evident that the power to recall a judgment is one of the inherent powers of a court, in Kenya, as regards both the Supreme Court and the subordinate courts, inherent powers are saved by s 97 of the Civil Procedure Code. We think therefore that the Courts in Kenya have the same inherent power as Courts in England to recall a judgment before it is perfected by a formal decree or order. Such a power is beneficial because, as was pointed out in Harrison’s case, it avoids the absurdity and consequential expense of the court having to pass a decree which it knows to be an appeal or, in Kenya by the alternative procedure of an application for review.”

The applicant is alive to the time that may be wasted in reopening the matter again. But while faced with a similar circumstance the Court of Appeal above held-

“Whilst it is always desirable to wish to end any litigation it is equally desirable that party ought to be allowed to canvass fully any relevant germane point he may have. That is a matter of course in our adversarial system.”

It has been contended by the Respondents that instead of filing a review application the 1st Defendant ought to have filed an appeal. Dealing with a similar issue the Court of Appeal in *Said* (supra) had this to say-

“With respect, the right of review given by section 80 of the Civil Procedure Act and order 44 (1) (b) of the Civil Procedure Rules, required the learned Judge to consider a review application where an appeal lies but as in this case, no appeal has been filed, and it was wrong for this reason, for him to refuse to do so.”

D. CONCLUSION

The glaring plaintiffs documents aforesaid are acutely cancerous to the plaintiffs’ very case and the court cannot ignore them. The 1st Defendant/applicant is only asking that the errors on record be construed in his favour by adjusting the judgment accordingly. It is our prayer that the 1st Defendant/Applicant’s application dated 5.7.2019 be allowed as prayed.

And the applicant shall so pray,

Your Lordship.

DATED AT MERU THIS.....05TH ..DAY OF...AUGUST,2019

FOR: THURANIRA ATHERU & CO.

ADVOCATES FOR THE 1ST DEFENDANT/APPLICANT

7. The Plaintiffs’/Respondents’ submissions are reproduced in full herebelow without any changes whatsoever including spelling or any other mistakes.

PLAINTIFFS’/RESPONDENTS’ SUBMISSIONS ON THE APPLICATION DATED 05TH JULY 2019

A. INTRODUCTION

Your Lordship,

Before you for determination is an application by the 1st Defendant/Applicant dated 05/07/2019. Therein the 1st Defendant/Applicant seeks: stay of execution of the decree/judgment and all consequential orders pending *interpartes* hearing of this application; review by way of setting aside the judgment/Decree delivered on 19/03/2018 and all consequential orders made thereto in this suit; that the 1st Defendant’s Replying Affidavit to the Originating Summons filed on the 22/12/2009 and witness Statement dated 13/2/2018 and filed on 14/02/2018 be considered and the 1st Defendant and his witnesses be heard before the Court delivers its judgment; that the Honourable Court be pleased to grant such further or better orders as will meet the ends of justice; and Costs of the Application.

The Application is anchored on Section 80, 1A, 1B, & 3A of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Code 2010 and is supported by an affidavit sworn by the 1st Defendant/Applicant.

The gist of the 1st Defendant’s/Applicant’s case is that they were condemned unheard on account of an error apparent on the face of the record compounded by the mistakes of his erstwhile advocates. It is the 1st Defendant’s/Applicant’s case that his counsel did not point out to

the court material evidence already on record in terms of a Replying Affidavit and witness Statements that had been filed on 14/2/2018. That further his former advocates failed to inform him of the hearing date of the 19/2/2018 nor the judgment date of 19/3/2018. It is the 1st Defendant's case that he was informed of the judgment by a friend 9 days after delivery of the same.

In reply the Plaintiffs/Respondents have filed with the court Grounds of Opposition and a Replying affidavit sworn by Charles Nyaga Kuura. In answer the Respondents vehemently opposed the 1st Defendant's/Applicant's Application averring that the said application was irredeemably defective, incompetent, ill-founded, untenable, unsubstantiated, wishy-washy and devoid of merit and an abuse of the court process. The Respondents urged that the same be dismissed with costs.

B. ISSUES FOR DETERMINATION

From the foregoing the following arise as the issues for determination:

- i. Whether the 1st Defendant/Applicant has surmounted the threshold for grant of Stay of Execution as provided under Order 42 Rule 6 of the Civil Procedure Rules, 2010?
- ii. Whether the 1st Defendant/Applicant has met the express criteria for grant of the order of review as provided both under Section 80 of the Civil Act and Order 45 of the Civil Procedure Rules, 2010?

C. APPLICATION OF THE LAW

Your Lordship, we will begin with submissions on the first issue as regards stay of execution. At this juncture, the court will determine whether the Applicant has satisfied the explicit principles as stipulated under Rule 6(2) of Order 42 of the Civil Procedure Rules, 2010. It provides:

- a) *That the Application for stay has been made without unreasonable delay.*
- b) *That substantial loss may result to the applicant unless the order is made.*
- c) *That such security as the court may order for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.*

Interestingly, the 1st Defendant/Applicant in his submission elected not to address you on this prayer.

Your Lordship, in our humble submission the 1st Defendant/Applicant has not only failed to address you on the conditions but also from the facts on the record the 1st Defendant/Applicant could not by any stretch of imagination persuade the court that it deserved the orders it sought.

On the first condition on whether the application was brought without unreasonable delay. It is patently clear and in keeping with his character of indolence the 1st Defendant/Applicant filed the said application on 5th July 2019. That is a year and two months after judgement was delivered. Even if we allow his reason that he came to be aware of the judgment from a friend after 9 days after delivery of the judgment the delay is inexplicable, inordinate undue and utterly unreasonable and hence inexcusable. Accordingly, this being a court of equity, it is our prayer that it does not lend a hand to an habitual indolent Applicant who has treated the court process ignominiously all through; doing as he pleases and hoping the court adopts to his speed and casualness.

On to the second condition, which demands that the applicant demonstrate substantial loss; we humbly submit that the Applicant has failed miserably. The Applicant has just in a cavalier manner averred that he will suffer substantial loss but has not gone the extra mile as required by case law to demonstrate either a pecuniary or tangible loss. This was authoritatively opined in the case of **Machira t/a Machira & Co Advocates -Vs- East African Standard (No.2) (2002) KLR 63** where it was held; **"In this kind of Applications for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars...where no pecuniary or tangible loss is shown to the satisfaction of the Court will not grant stay."**

Further the Applicant in attempt to demonstrate substantial loss has claimed that it is the land where he was born and brought up and has lived there all his life. First of all, the Court was fully aware and alive of the 1st Defendant/Applicant being in possession which is why it necessitated it to issue order (e) in the decree for eviction of the Defendants. Secondly, that alone has been rejected and declined by the courts as reason enough as was propounded in the case of **Peter Rugu Gikanga & another v Weston Gitonga & 10 others [2014] eKLR, H.C at Nakuru Civil Case No. 148 of 2010** which was quoted with approval in the case of **Boniface Kariuki Wahome Vs Peter Nziki Nyamai & Anor [2019] eKLR** the learned judge Enyara Emukule reiterated as follows;

"10. It is clear from the Replying Affidavit of the Peter Rugu Gikanga, that some of the Defendants/Applicants have moved out of the suit land in obedience to the order of court. The majority do not live on the land, but are said to have structures thereon. Only the 3rd and 10th Defendants/Applicants persist on living on the land, allegedly because they have no alternative land. This, with respect, is no ground for granting a stay of execution. In Charles Wahome Gethi Vs. Angela Wairimu Gethi (Court of Appeal Civil Application No. NAI 302 of 2007 UR 205/2007), the Court of Appeal held –

"... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them."

As regards security the Applicant has not even made a mention of it.

Given the above, the only issue for adjudication before the Honourable Court is whether the Applicant has satisfied the conditions aforementioned? To our mind, and as enumerated above the Applicant has not even remotely come close, and as a result his prayer for stay of execution should fail and be declined.

More importantly, stay under Order 42 is ordinarily sought and/or issued pending the outcome of an appeal but as pointed out by the Applicant they strategically allowed the time to appeal to efflux without lodging a Record of Appeal. Hence they have no appeal that will be rendered nugatory if stay is not granted. This was explicitly captured in a **Butt -Vs- Rent Restriction Tribunal [1982] KLR 417** which was quoted with approval in the case of **Pascal Obonyo Agwena & 3 others Vs Simon Juma Odiyo [2018] eKLR** where the Court of Appeal gave guidance on how the Court should exercise discretion:

“1. The power of the court to grant or refuse an application for stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion....”

Consequently, the Applicant’s prayer for stay is unmeritorious and the same should be dismissed.

On to the second part of the 1st Defendant/Applicant’s case on review. The same is pegged on Section 80 of the Civil Act and Order 45 (1) of the Civil Procedure Rules, 2010.

Section 80 of the Civil Procedure Act provides:-

“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 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”.

While Order 45 Rule 1 of the Civil Procedure Rules thereof reads:

“(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”.

It is our humble submission that a strict reading of both Section 80 and Order 45 makes review unavailable to the 1st Defendant/Applicant the second he elected to file a Notice of Appeal on the 26th March 2018.

Our position is fortified by numerous authorities where it has been held that once a Notice of Appeal has been filed then review is not available under section 80 and Order 45. In **Protein and Fruit Processors Ltd -Vs- Credit Bank Ltd & 2 others Civil Case 128 of 2003 [2007] eKLR** it was held,

“In my view, it is not open for a party to invoke both jurisdictions of appeal and review at the same time. The Defendants/Applicants opted to pursue the appeal when they lodged their Notice of Appeal on the 1st October 2003. The filing of the notice unless withdrawn excludes the procedure under section 80 and Order 45 of the Civil Procedure Act and Rules. The application to my mind is incompetent.”

Equally, in **Shaffique Alibhai -Vs- William Onchanda Onguru T/A Ochanda Onguru and Co Advocates & Anor [2019]eKLR** it was held,

“I would like to think that there is a difference between preferring an appeal and institution of an appeal. An appeal is preferred once a Notice of Appeal is duly lodged under the provisions of Rule 75 of the Court of Appeal Rules. An institution of an Appeal is a step taken after the Appeal has been lodged. Taking cue from Order 42 Rule 6 of the Civil Procedure Rules, an appeal for purposes of section 80 and Order 45 on Review is deemed to be duly filed when a Notice of Appeal has been given. This Court identifies with the position of Azangalala J (As he then was) in Protein and Fruit Processors Ltd -Vs- Credit Bank Limited [2007]eKLR.

Further in **Serephen Nyasani Menge Vs-Rispah Onsase [2018]eKLR** it was held,

“In view a proper reading of section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party can not apply for review and appeal from the same decree or order...

...Her instant application constitutes an abuse of the process of the and the same must fail...

...Litigation cannot be conducted on the basis of trial and error.”

Contrary to what the 1st Defendant/Applicant will have the Honourable Court believe, the Notice of Appeal is actually not withdrawn but deemed withdrawn by operation of the law due to the indolence the 1st Defendant/Applicant keeps manifesting. Notably, under Rule 81 of the Court of Appeal Rules, 2010 the Applicant ought to have done a notice but the Applicant chose not to. Furthermore no order of the Court of Appeal has been obtained to that effect as contemplated by Rule 83.

The 1st Defendant/Applicant and his counsel have misapprehended, misinterpreted and misconstrued the law in thinking that preferring an appeal is the filing of a Record of Appeal and not the Notice of Appeal. As has been explained by Hon. Justice F. Tuiyott in **Shaffique Alibhai Case (Supra)** preferring an appeal is by filing a Notice of Appeal and not a record of appeal, as the case herein. To that end, just as your brother dismissed a similar application, we implore your Lordship to follow suit and dismiss the 1st Defendant's/Applicant's application as it is a consummate abuse of this Court's process.

Without prejudice to the above, if the court finds that review is available it is our submission the 1st Defendant/Applicant has not surmounted the stringent and rigid principles as found in Order 45 Rule (1). In **Francis Njoroge -Vs- Stephen Maina Kimore [2018]eKLR** the grounds for consideration were summarized as follows:

- a) There must be discovery of a new and important matter which after the exercise of due diligence was not within the knowledge of the Applicant at the time the decree was passed or the order was made; or
- b) There was a mistake or error apparent on the face of the record; or
- c) There were other sufficient reasons; and
- d) The application must have been made without undue delay.

From the record, it is patent that the application was made inordinately as no explanation has been given for the undue delay. The Application was made 1 year and 2 months after the delivery of the judgment the Applicant intends to review.

Mindful, that the 1st Defendant/Applicant seeks to rely on the limb that the judgment was achieved due to a mistake or error apparent on the face of the record, we don't need to submit on principles (a) and (c).

On whether, there is an error apparent on the face of the record, we submit to the contrary. We will associate ourselves with the sentiments of the Court of Appeal in **Muyodi -Vs- Industrial and Commercial Development Corporation & Anor [2006] 1 EA 243**, the Court of Appeal described an error apparent on the face of the record as follows:

“In Nyamogo & Nyamogo Vs Kogo [2001] E.A 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 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 record. Where an error on a substantial point of law stares one in the face, and there could reasonably be on two opinions, a clear case of error apparent on the face of 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 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 pertinent issue for determination is whether the 1st Defendant/Applicant has established an error apparent on the face of the record as claimed. Does the error stare one in the face?

Curiously, instead of submitting on what the error apparent on the face of the record is the 1st Defendant/Applicant has extensively submitted on the Plaintiff/Applicant's evidence. Which begs the question is the 1st Defendant/Applicant asking the Honourable Court to sit on appeal on its own judgment? All the facts raised therein were adjudicated upon by this Court and if the 1st Defendant/Applicant has a grievance then the Court of Appeal is the correct forum and not review.

Of note, the power of the Court in review is limited and narrow and cannot be equated in its scope and ambit with that of an appeal and/or rehearing, which regrettably is what the 1st Defendant/Applicant is asking the court to do. We beseech the court to decline the invitation as it will be *ultra vires* and illegal as the Court is already *functus officio*.

On the ground that the 1st Defendant/Applicant evidence was not considered by the Court the same is not only mischievous but deceptive. The Court cannot consider what's not on record as the witness statement being referred to was neither in the Court file nor was it ever served on the Plaintiffs'/Respondents' to date and even more curious not in the possession or within the knowledge of Counsel who appeared for the 1st Defendant. As a matter of fact, it has mysteriously surfaced with this application an year after judgment, which makes one shudder with

suspicion.

Further Counsel who was present for the 1st Defendant/Applicant, categorically, unequivocally and plainly informed the court that his instructions were to seek an adjournment as the 1st Defendant had not complied and he needed more time to comply. Whose statement has not been disowned by the 1st Defendant/Applicant's former advocates and who himself did not have a copy of the said statement for reference and yet he had the 1st Defendant/Applicant's file in court which he used to cross examine the Plaintiffs' witness. Is it plausible for an advocate to forget filing of a document purportedly filed 5 days before the hearing date, 14/2/2018? It does not add up.

It seems bizarrely coincidental that an Advocate comes to court seeks more time to comply, forgets that they had purportedly filed a witness statement, has no copy of the same for the Plaintiffs and/or the Court and to top it off the witness who swore the statement does not attend court and comes after a year to aver that he was not informed of the date of the hearing or judgment.

Are the averments by the 1st Defendant/Applicant plausible? As for the Respondents, it sounds risible, fictional and an attempt to deceive, hoodwink, fool, dupe and cheat the Court. All the Respondents hope for is, that the Honourable Court sees through the 1st Defendant's/Applicant's machinations and stop him on his tracks with his Abunuwasi stories, by dismissing the Application as it does not demonstrate an error apparent on the face of the record. As the record is clear on what the 1st Defendant/Applicant's Counsel had intended to engineer that morning, an adjournment. Which could have been so had it not been for the firmness of the Court.

Even most telling that this application is an afterthought and an abuse of the Court process, the 1st Defendant filed a Notice of Appeal; applied for proceedings; which took an entire year to prepare; issued with a Certificate of delay on 20th February 2019; then come to the realization 5 months later that they ought to have applied for review. If this ain't abuse of the process, what is?

D. CONCLUSION

All in all, the court will find that the Application is a complete abuse of the court process. The Court will also find that it is being asked to reconsider the suit; which is not a review but an appeal. The facts will further demonstrate plainly that no error apparent on the face of the record has been exhibited to warrant review and accordingly the court should dismiss the application with costs. Furthermore, as matter of fact and law the 1st Defendant's/Applicant's Application for review is unavailable as he had already elected to pursue an appeal through the filing of a Notice of Appeal on 26th March 2018 which has not been withdrawn as no order from the Court of Appeal is on record as contemplated by Rule 83 of the Court of Appeal Rules 2010 nor did the 1st Defendant/Applicant notify the Respondents of his intention to withdraw as envisaged by Rule 81 of the Court of Appeal Rules. Currently though it is deemed withdrawn by operation of the law, due to the indolence of the 1st Defendant/Applicant. It goes to speak to the characteristic contempt the 1st Defendant/Applicant has for the Court and its processes. For all the above reasons, we urge the Court to dismiss the Application with costs as it is unmeritorious, untenable and incurably defective.

We so humbly submit.

DATED AT NAIROBI this...29th ...day of.....August,2019

OYUGI & COMPANY

ADVOCATES FOR THE PLAINTIFFS/RESPONDENTS

8. I have considered the pleadings, submissions and the authorities proffered by the parties in support of their diametrically incongruent assertions. The authorities proffered by the parties are proper precedents in their facts and circumstances. I, however, opine that no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. I see no need to regurgitate the authorities proffered by the parties in view of the fact that their written submissions have been reproduced in full in the earlier part of this ruling. The principles of law they espouse have been elaborated therein.

9. Judgment in this matter was delivered on 19th March, 2018. This application was filed on **5th July, 2019**, nearly one year and three months after Judgment was delivered. The 1st defendant/applicant has not explained to the satisfaction of the court why there was inordinate delay before this application was filed.

10. A perusal of the apposite proceedings shows that the applicant was represented in court and that his advocate cross-examined the plaintiff. I opine that the hackneyed practice of blaming advocates who represented parties in the proceedings they impugn can never be a good excuse for the lack of diligence by litigants to ensure that their cases are properly prosecuted. In all cases, suits belong to the litigants. It is always their cardinal duty to follow up the progress of their cases with their advocates.

11. I do note that many of the issues raised by the applicant relate to the evidence adduced or not adduced during the hearing of the suit. These are issues which should be properly canvassed during the hearing of an appeal.

12. It is noted that the defendants'/appellants' advocate filed a Notice of Appeal on 26th March, 2018. The applicant has not told the court what happened to the intended appeal. Order 42, Rule 6 of the Civil Procedure Rules reads as follows:

“(4). For the purpose of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of the court notice of appeal has been given.”

Rule 75(2) of the Court of Appeal Rules states as follows:

“(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

Judgment in this case was delivered on 19th March, 2018. The Notice of Appeal was filed on 26th March, 2018, seven days after Judgment was delivered. This was within the 14 days prescribed by the Court of Appeal Rules. From that day hence, an appeal existed.

13. Outrightly, I find that an appeal exists or existed in this matter from 26th of March, 2018 when the apposite Notice of Appeal was filed. No evidence has been tendered to show that that appeal was withdrawn. The court has not been told what happened to that appeal. If the appeal was withdrawn, and there is no evidence that it was withdrawn, that may mean that the appellants were in agreement with the court whose decision was being appealed against.

14. I find that no existence of matter or evidence which after exercise of due diligence was not within the knowledge or which could not be produced when the judgment in this matter was delivered has been demonstrated. In any case, the defendants in the main suit had already filed an appeal. Section 80(a) of the Civil Procedure Act cannot come to the aid of the applicant.

15. It is ordered as follows:

a) The grant of prayer 2 which allowed the law firm of M/s Thurania Atheru & Co. Advocates to come on record for the 1st defendant in place of M/s Kiautha Arithi & Co. Advocate is hereby confirmed.

b) Prayer 3 for stay of execution of the decree/judgment and all consequential orders is hereby denied and forthwith dismissed.

c) Costs are awarded to the plaintiffs.

Delivered in open Court at Chuka this **24th day of October, 2019** in the presence of:

CA: Ndegwa

Kirimi Muturi h/b Atheru for the Applicant/1st Defendant

Royford Riungu – 1st Plaintiff/Respondent

P. M. NJOROGE,

JUDGE.