REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 239 OF 2015

PAUL NJERU MWATHE.....APPLICANT

VERSUS

VIDYA THIRA MWATHE.....1ST RESPONDENT

CATHERINE MUTHONI.....2ND RESPONDENT

MARY WARUE JOHN.....3RD RESPONDENT

ALOIS NYAGA MBOGO.....4TH RESPONDENT

RULING

The plaintiff had moved this Court by his amended Originating Summons dated 30th July 2014 seeking orders that he be declared to have obtained title to land parcels No. KYENI/MUFU/7142 to 7148 by adverse possession and that the defendants hold it in trust for him. That claim was resisted by the defendants who filed a replying affidavit through the 1st, 2nd and 3rd defendants.

On 7th March 2016, when the matter came up for hearing, it was agreed both by **Mr. MUGO ADVOCATE** holding brief for Mr. **NJIRU ADVOCATE** for the plaintiff and **Ms MIGWI ADVOCATE** holding brief for **Ms WAIRIMU ADVOCATE** for the defendants that the Originating Summons be determined on the basis of the parties respective affidavits and that submissions be filed thereon.

That was done and on 3rd March 2017, this Court delivered its judgment declaring that the defendants hold land parcel No. KYENI/MUFU/7142 to 7148 (the suit land) in trust for the plaintiff who is entitled to 2.6 acres thereof. No appeal appears to have been filed so far against that judgment.

The plaintiff is however aggrieved by the decision to award him only 2.6 acres which he considers to be "***too small considering the nature of the case***". He therefore moved to this Court by his Notice of Motion dated 5th April 2017 seeking the following orders:

> ***1. Spent.***
>
> ***2. Spent.***
>
> ***3. Spent.***
>
> ***4. That the Court be pleased to review, vacate and/or set aside the judgment entered on 3rd March 2017 and all consequential proceedings.***
>
> ***5. That the plaintiff and his witnesses be given a chance to give oral evidence and the suit be determined on its full merit.***
>
> ***6. Costs be provided for.***

The application is predicated on the grounds set out therein and supported by the plaintiff's affidavit also dated 5th April 2017 in which he has stated, inter alia, that there is a mistake or error on the face of the record, that he and his witnesses did not give evidence contrary to his wishes and therefore the Court was not seized of all the facts of the case. Those facts have now been pleaded in paragraph 11 of his supporting affidavit and I need not cite them save to state that they relate to evidence which the plaintiff feels was ***"not placed before the Court***". He depones further that the interests of justice will not be served should he be condemned ***"on account of the inadvertence on the part of my advocates".***

The application is opposed and by the replying affidavit of the 1st defendant **VIDYA THIRA MWATHE**, it is deponed as follows:

> ***- That the plaintiff was always represented by an advocate and when this suit came up for hearing, both advocates consented to have it disposed off by way of written submissions.***
>
> ***- That it is therefore not true that the plaintiff was not aware that the suit would be disposed off by way of written submissions and there are no new facts to warrant a review of this Court's judgment.***
>
> ***- That this application is un-meritorious and a mere tactic to defeat justice and should be dismissed with costs.***

The application has been canvassed by way of written submissions which have been filed by **ROSE NJERU ADVOCATE** for the plaintiff and **WAIRIMU ADVOCATE** for the defendants.

I have considered the application, the rival affidavits and submissions by counsel.

The plaintiff seek that this Court reviews/vacates and/or set aside its judgment dated 3rd March 2017 together with all the consequential proceedings so that his witnesses can be given a chance to give oral evidence.

I must start by pointing out that this was not a default judgment. It was a final judgment arrived at by the Court after the Court had determined the suit in accordance with the manner chosen by the parties themselves. Such a judgment can only be set aside either through review under ***Order 45 of the Civil Procedure Rules*** or on appeal. As no appeal was preferred, the only route available to the plaintiff was to seek a review which he has done.

Order 45 (1) of the Civil Procedure Rules provides for the power of review in the following terms:

> ***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".*** Emphasis added

The judgment subject of this application was delivered on 3rd March 2017 and this application was filed on 10th April 2017. There has therefore not been any unreasonable delay.

The plaintiff was nonetheless also required to demonstrate the following before an order for review can be made in his favour:

> ***1. Discovery of new and important matter or evidence which could not be produced after the exercise of due diligence or was not within his knowledge; or***
>
> ***2. Some mistake or error apparent on the face of the record; or,***
>
> ***3. Any other sufficient reason.***

It is clear from the plaintiff's affidavit that he is seeking the review of this Court's judgment for the main reason that he would have preferred an oral hearing where he and his witnesses would have given oral evidence and be cross-examined. He then proceeds to point out facts (presumably his evidence) in paragraph 11 of his affidavit which was not brought to the attention of the Court and which, by paragraph 12 of the same affidavit, he considers to be "***a mistake/error apparent on the face of the record".***

When the suit came up for hearing on 7th March 2016, counsels for the parties recorded the following consent order as to the manner in which this dispute should be resolved:

> "***By consent, let the Originating Summons be canvassed by way of written submissions and the parties' statements and pleadings. Mention on 3.5.16 to confirm filing of submissions and fix date for judgment".***

Pursuant to that consent, this Court did not take any oral evidence from the parties but was instead guided by their respective pleadings and the submissions by their counsel. A consent order recorded by counsels is binding on the parties and there is no evidence of any fraud in this case. Further, **Mr. EDDIE NJIRU** who was then acting for the plaintiff had the authority to record that consent. It is not mandatory that cases can only be determined through oral evidence. The determination of disputes on the basis of the parties' statements and other documentary evidence is not inimical to a fair hearing so long as the parties elect that mode of dispute resolution. Indeed ***Article 159 (2) (c) of the Constitution*** is clear that:

> ***"Alternative forms of dispute resolutions including reconciliation, mediation, arbitration and traditional disputes resolution mechanisms shall be promoted subject to clause (3)"***

Clause (3) is a provisal that traditional dispute resolution mechanisms shall not be applied if they contravene the Bill of Rights or are repugnant to justice morality or inconsistent with the Constitution or any other written law. Therefore, the parties in this case were perfectly in order to elect to have their dispute resolved in the manner that they chose. That cannot be a ground upon which this Court can review its judgment.

The plaintiff refers to an error apparent on the face of the record and he mentions evidence which was not presented to Court. Where a party fails to avail evidence that was always available and within his knowledge, that cannot be an error apparent on the face of the record and neither is it new and important matter or evidence nor any sufficient reason to warrant a review of this Court's judgment. The issues disposed to in paragraph 11 of his affidavit are issues that the plaintiff could earlier have included in any affidavit in support of his Originating Summons because those were within his knowledge or could, with due diligence, be made available as part of his evidence.

The up-shot of the above is that this application is devoid of any merit. It is accordingly dismissed with costs to the defendants.

B.N. OLAO

JUDGE

20TH MARCH, 2018

Ruling dated, delivered and signed in open Court at Kerugoya this 20th day of March 2018

Ms Nyangati for Ms Njeru for Plaintiff present

Mr. Rugaita for Defendants absent

Parties absent.

B.N. OLAO

JUDGE

20TH MARCH, 2018