REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 635 OF 2017

JACOB MWANTO WANGORA ..... PLAINTIFF

VERSUS

MARY WARUGA WOKABI ..... 1ST DEFENDANT

GEORGE LWANGA KORONTO ..... 2ND DEFENDANT

(as beneficiaries and personal representatives of the estate of Sorometi Kapore (deceased)

BERNARD WOKABI WARUGA ..... 3RD DEFENDANT

JOSEPH NJUGUNA WARUGA .....4TH DEFENDANT

RULING

What is before Court for determination is the Defendants' Notice of Motion Application dated the 30th May, 2018 brought pursuant to articles 48, 50 & 159 of the Constitution, Section 80 of the Civil Procedure Act, Order 45 rule 1 & 2 of the Civil Procedure Rules and all the other enabling provisions of the law. The Applicants seek the following orders:

1. Spent

2. THAT this application be heard and determined by Hon. Lady Justice C. Ochieng being the Judge who delivered the judgement and the subsequent orders therein now sought to be reviewed.

3. THAT Honourable Court be pleased to stay execution of its orders granted on 18th April, 2018.

4. THAT this Honourable Court be pleased to review and or vary/ set aside/ vacate its judgment and the subsequent orders therein delivered on 18th April, 2018.

5. THAT this Honourable Court be pleased to grant such other or further orders as it shall deem fit and just for preservation of justice regarding the nature and circumstances of this case.

6. THAT the costs of this application be provided for.

The application is premised on the grounds that the Court erred in granting the Plaintiff adverse possession of property known as NGONG/ NGONG/ 3080 hereinafter referred to as the ' suit land'. The Court's judgment is a mistake and an error apparent on the face of the record as the Plaintiff's actions were never adverse to those of the deceased in relation to the suit land. New evidence has also since the judgement was read, been discovered which is material and core to the issues herein, and it was neither within the knowledge nor possession of the Defendants and was not produced in court. The Judgment has greatly prejudiced the Defendants who will suffer irreparable loss if the orders sought herein are denied.

The application is supported by the affidavit of the 1st Defendant MARY WARUGA WOKABI who confirms being the mother of the 2nd, 3rd and 4th Defendants. She deposes that the Court was unable to interrogate the evidence brought before it and mistakenly relied on the misrepresentation of the Plaintiff. She states that the mistakes and errors on the face of the record included failure by the Court to conduct a site visit and relying on written submissions instead of witness evidence. She insists that the Plaintiff knew them as beneficiaries of the deceased having been there when she separated with the deceased and when her children visited. She denies that the Plaintiff was a neighbor of the deceased. She contends that the Court erred in law by declaring that the rights of the Deceased were extinguished in 1990 upon

expiration of twelve (12) years, since the Plaintiff took possession, yet the right to adverse possession is not automatic. She enumerated the areas the Court failed to consider while reaching its judgment as follows: Plaintiff failed to provide proof to demonstrate he tried to trace the deceased or his next of kin; Plaintiff failed to apply for adverse possession after expiry of 12 years; the Plaintiff conveniently filed the instant suit in Machakos in 2011 after a resolution at the Chief's office in the year 2010 that he allows them to enjoy their proprietary rights over the suit property; Plaintiff failed to live on the suit land; Plaintiff failed to develop the suit land; and did not fence it.

She reiterated that they have discovered new evidence since the delivery of the judgment, which was not within their knowledge or possession which revealed that the Plaintiff was the actual previous owner of the suit land and that the Kshs. 3,000 he claims to have given the deceased was for payment for one acre of land is actually an additional transaction fees for sale of suit land. Further, that the Plaintiff and the deceased swapped properties and surrendered the same to each other. She reiterates that the Plaintiff has come to court with unclean hands and filed several suits in different jurisdictions to wit: Machakos Civil Case No. 111 of 2011 (OS); Nairobi ELC No. 51 of 2014 and Kajiado ELC Misc. Application No. 137 of 2017 to frustrate them, misrepresenting to court he was the owner of the suit land; denying knowing them; lying to court including police that they were trespassers; lying to court he has built a house on the suit land including cultivating it; and lying to court he has been in open, notorious and continuous use of the suit land. She avers that the Plaintiff is not entitled to the orders of adverse possession, as he has not proved them.

The Application is opposed by the Plaintiff JACOB MWANTO WANGORA who filed a replying affidavit where he deposes that an order of stay is unavailable to the Defendant, having withdrawn their Notice to Appeal and their time to lodge the Appeal will shortly have lapsed. He insists it is mandatory to annex the decree/ order sought to be reviewed which the Applicants have failed to do. He avers that the issue raised on the correctness of the judgment as errors perceived on record are best suited for appeal, which they have abandoned. He states that the issues raised by the Applicant at paragraph 7 of their Supporting Affidavit do not constitute errors apparent on the face of the record. He contends that he had occupied the suit land from 1978 and used to cultivate it on and off. Further, that he planted trees thereon, but Defendants, despite a Court order, recently cut down some of them. He insists he had planted a fence around the suit land, which was in place at the time of filing the instant suit. Further, that he put up a temporary house on the suit land, which has been utilized by his employees and that the Defendants did not raise these issues in their pleadings in response to the Originating Summons. He avers that the speculative argument as to what strangers to the suit might have testified in Court cannot form the basis for a review and the Defendant is merely attempting to re – litigate a closed issue. He confirms that the meetings at the Chief's office, Lemelepo Location took place in 2010 and that was the first time he was meeting the Applicants and in attendance was one Peter Kaaka who was the deceased nephew, who did not acknowledge the Applicants' as being family to the deceased. Further, the dispute herein was not resolved at the Chief's office. He disclosed the existence of the suit he had initially filed in the High Court at Machakos and contends that the Green Card marked as exhibit 'MWW – 3" was introduced in Court on 2nd October, 2017 and accepted in Court on 3rd October, 2017 by consent of both counsels and is hence not a new matter. He reiterates that the issue of swapping land with the deceased has not been in contention herein and he reaffirms that the deceased approached him for upkeep. He disputes basing his claim for adverse possession on the said transactions but insists he was claiming the entire parcel of land from August, 1978 which was the basis of the judgment. He contends that he stands by his averments in the Originating Summons and states that it is absurd as well as demeaning for the Applicants' to claim the judgment was obtained through trickery, an insinuation that the Judge lacks basic understanding of the law and comprehension of the facts of this case and could easily be tricked into issuing a judgment. He reaffirms that a review process is dependent on the discretion of the Judge which may be exercised upon parties satisfying the requirements of the law. He further states that whether the Applicants are really beneficiaries of Soromeeti Kapore is yet a matter of conjecture, but even if they are, the suit parcel would not be among their entitlement as the deceased title extinguished by operation of law sometime in 1990. Further, that the application herein has been made with unreasonable delay, which has not been explained.

Both parties filed their submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 30th May, 2018 including the supporting as well as the replying affidavits and considering submissions herein, the only issue for determination is whether the Judgment delivered on18th April, 2018 should be reviewed and or set aside.

It was the Applicants' contention that there is an error apparent on the face of the record in the Judgement and there are certain new issues that were not within the Defendants' knowledge, and hence the need to review it. The Applicants highlighted what they deemed to be errors apparent on the face of the record with the first one relating to the Court's finding that the Plaintiff could bring a claim of adverse possession while also claiming purchaser's interest. They relied on the case of **M'MBAONI M'MTHAARA Vs JAMES MBAKA (2017) eKLR** to support this argument. The second error identified is based on the finding that the Plaintiff has fulfilled the conditions for adverse possession yet evidence tabled suggests otherwise and relied on the cases of **TERESA WACHUKA GACHIRA Vs JOSEPH MWANGI GACHIRA (2009) eKLR; GABRIEL MBUI VS MUKINDIA MARANYA (1993) eKLR; RUTH WANGARI KANYAGIA VS JOSEPHINE MUTHONI KINYANNJUI (2017) eKLR; CHRISTOPHER KIOI & ANOTHER VS WINNIE MUKOLWE & 4 OTHERS (2018) eKLR** to support their arguments. They insisted that a nephew to the deceased had been cultivating the land and original entry and continued occupation of the Plaintiff on a portion of the suit land was by consent as well as permission of the deceased. The third error was directed to the court's finding that the deceased's title to the suit land extinguished in 1990 upon expiration of 12 years since the Plaintiff took possession in 1978. They relied on the case of **CHRISTOPHER KIOI & ANOTHER VS WINNIE MUKOLWE & 4 OTHERS (2018) eKLR** to support this argument. Error number four was on the finding that a claim for adverse possession could not lie against the Defendants yet they were only registered as owners in 2014 and relied on the case of **GABRIEL MBUI VS MUKINDIA MARANYA (1993) eKLR** to support this argument. Another error was based on the finding that time started to run from 1978 and relied on the case of **CHRISTOPHER KIOI & ANOTHER VS WINNIE MUKOLWE & 4 OTHERS (2018) eKLR** to support their arguments.

The Applicants' further submitted that they had discovered new and important matter of evidence as there were meetings held in 2010 to deliberate on the issue herein. Further, that the Court twice declined to permit the Defendants' counsels to proceed by oral evidence and that the Defendants were deprived of an opportunity of being heard without sufficient reasons. They further submitted that the delay in filing this application is not inordinate.

The Respondent submitted that parties are bound by their pleadings and that the Applicants have only pleaded two grounds of review in the instant application viz discovery of new and important matter or evidence and error apparent on the face of the record but later they introduced a new ground to wit; any other sufficient reason, hence the Respondent had no opportunity to respond to the same. He relied on the case of ROSE KAIZA Vs ANGELO MPANJU KAIZA (2009) eKLR to support his argument. He further submitted that the Applicants have failed to meet the threshold requirements expected of an Applicant seeking to review a decree because the purported errors apparent on the face of record are not obvious and patent mistakes as they require a long drawn process of reading. They raised arguments that are amenable to different legal opinions and not errors apparent. He relied on the case of MICHAEL MUNGAI v FORD KENYA ELECTION & NOMINATION BOARD & OTHERS & 2 OTHERS (2013) eKLR to support his averments. The Respondent further submitted that the Applicants have not pointed out the offending part of the record and referred to any page, paragraph or line that contains the apparent error. He relied on the case of **PETER KIRIKA GITHAIGA & ANOR v BETTY RASHID (2016) eKLR** to support his arguments. He contends that the arguments raised by the Applicants are opinionated and prejudices towards showing that they consider the Judgement as erroneous decision, which they ought to challenge its merits or demerits in an appeal and not at the review proceedings. He submits that the Applicants are inviting the court to reopen the entire case and compel the Plaintiff to re – urge his case afresh but this is not the scope or purpose for review proceedings. On the question of new and important evidence, he submits that the issue of the meeting at the chief and the proceedings annexed therein as 'MWW – 2" do not fall within the scope of new and important evidence as they were aware of the proceedings. The Applicants have failed to establish that they acted with due diligence to obtain annexure ''MWW – 2" before the decree was passed. Further the said annexure is not certified and their veracity cannot be vouched for. He avers that the Chief is not legally mandated to determine any land dispute and nowhere in the said annexures did the Chief pretend to have jurisdiction to do so. He further submits that the Applicants indeed admit that upto 2010 he was in possession of the suit land and any effort to evict him was too late as the same should have been done between 1978 upto 2010. He relied on the case of PUBLIC TRUSTEE v K. WANDURU (1982 – 1988) 1KAR to buttress this argument. He argues that the Applicants have not presented any acknowledgment in writing signed by the Plaintiff and within the period of limitation or ever at all, acknowledging any of the Applicants' rights over the suit land. He refers to the Applicants' List of Witnesses and states that the said Peter Kaaka was not listed therein as a witness and the Applicants' are misleading the court that he was supposed to be a witness. Further, that the Applicants never referred to the said Peter Kaaka in the statement or affidavit and was not a potential witness and this allegation is reckless with the potential to tarnish the repute of, or embarrass, the court. He further submits that the Applicants have failed to prove that the alleged new information was not within their knowledge or could not be presented by them when the judgement was passed.

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."**

Further, Order 45, rule 1 (1) of the Civil Procedure Rules provides as follows: **' 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.'**

The Applicants have alleged that they were denied a chance to present oral evidence in court. As per the Court records, on 21st September, 2016 the Court directed that the Parties were to proceed and file written submissions to the Originating Summons within 30 days from the said date. There was no other time the Court thereafter ordered the matter to proceed by way of oral evidence as alleged by the Applicants. Later on 2nd October, 2017 the Defendants filed another application seeking to file supplementary list of documents as well as further affidavit, which application was allowed by consent and the documents formed part of the court record after which the parties highlighted their submissions. I note the Applicants are alleging they were denied a chance to present oral evidence, yet as per the court record, they filed a replying affidavit and witness statements, which they were not denied to rely on, in their submissions. it is my view that an Originating Summon can be canvassed either by way of Written Submissions or oral evidence, and the procedure adhered to, is immaterial so long as the parties present their evidence. I opine that parties are bound by their pleadings and a Court cannot make a decision on matters not properly before it.

On the issue of the Applicants' claim that the Court failed to undertake a site visit on the suit land. From the records, no party had made an application for site visit before the Court gave directions on 21st September, 2016 that the matter was to proceed through written submissions. Further, from the court records, the Applicants took a while to even file their submissions and had to be given more time to do so.

References were made to errors apparent on the face of record which were on the findings of the court and enumerated as follows: the Plaintiff could bring a claim of adverse possession while also claiming purchaser's interest; Plaintiff had fulfilled the conditions for adverse possession yet evidence tabled suggests otherwise; the deceased's title to the suit land extinguished in 1990 upon expiration of 12 years since the Plaintiff took possession in 1978; a claim for adverse possession could not lie against the Defendants yet they were only registered as owners in 2014; and that time started to run from 1978.

In the case of MUYODI v INDUSTRIAL AN COMMERCIAL DEVELOPMENT CORPORATION AND ANOTHER EALR (2006) EA 243, the Court of Appeal while describing an error apparent on the face of record, held 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 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. This laid down principle of law is indeed applicable in the matter before us."***

In relying on this Court of Appeal decision which binds me and applying it to the current scenario, I opine that the alleged errors cited by the Applicants which I have stated above, have been drawn from a long process of reasoning on the judgment of the Court as well as opinion of the Applicants. I find that the said highlighted areas and the arguments supporting the same, form a basis for appeal and it is my finding that they do not meet the threshold for review.

On the question of discovery of new and important matter of evidence, I note the applicants furnished court with the minutes of deliberations held at the Chief's office in 2010. A cursory look at the documents that the Applicants had presented earlier, I find that the said meeting at the Chief was already within their knowledge before the judgment herein was delivered. In the case of **ROSE KAIZA Vs ANGELO MPANJU KAIZA (2009) eKLR** the Court stated that: **'In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.'**

In the current case, the Applicants had just filed a replying affidavit and furnished court with various documents to buttress their case. The Green Card annexed to the instant application formed part of the Applicants' documents that they had produced in court as exhibits. Further, the reference made to the meetings at the Chief's office were referred to in the witness statement of JAMES GATHECA KARANJA, who confirmed that there was a meeting of village elders and Chief Mr. Leimpa who intervened in the land dispute and passed a resolution. In relying on the facts as presented including the above cited decision I find that there is no new evidence to warrant a review of the judgement. On the issue of stay, I note the Applicants withdrew their notice of appeal and have not canvassed any reasons to warrant the stay, I will hence not grant the same.

On the question of delay to file the instant application, I note the Applicants had initially filed for Appeal and it is my view that this application was filed as an afterthought.

It is against the foregoing and after analyzing the evidence before me that I find the Notice of Motion dated the May, 2018 unmerited and disallow it.

Costs will be to the Respondent.

Dated and delivered at Ngong this 22nd Day of October, 2018.

CHRISTINE OCHIENG

JUDGE