REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO 101 OF 2017

PETER KIMANI KABACHI.....1ST PLAINTIFF

WATSON KARANJA KIMUHU (Suing in the capacity as legal representative of the estate of

KABACHI WAIHENYA and KIMUHU WAIHENYA.....2ND PLAINTIFF

VS

JEREMIAH KIMEMIA KARUGA (Sued as the legal representative of the Estate of KIRUGA WAIHENYA.....DEFENDANT

RULING

1. The Plaintiffs filed a Notice of Motion on the 29/10/18 seeking the following orders;

   a. The judgment of this Court that dismissed the suit be reviewed and vacated and set aside and the matter be heard afresh.

   b. That there be a declaration that the Defendant holds half of the land Parcel No LOC 18/GACHOCHO/653 in trust for the Plaintiffs.

   c. Costs of the application be provided.

2. The application is premised on the grounds as thus;

   a. There is an error apparent on the face of the record in that the Court ought to have found that the applicant stays on the suit land and have nowhere else to call home

   b. That the Court should intervene and review its judgment to the extent that the suit land should not be left to the Defendant alone.

   c. That substantive justice demands that the judgment be reviewed as the Defendant will not hesitate to evict the Plaintiffs to the streets.

3. Watson Karanja Kimuhu, the applicant in his supporting affidavit filed on the 23/10/18 deponed that

the judgment is riddled with errors in that there is no specific finding that the Plaintiff's and their families stay on the suit land and that it is the only place they call home. That the dismissal of the suit gave the Defendant a blank cheque to evict the Plaintiff's from the suit land parcel LOC 18/GACHOCHO/653. That the eviction can lead to a probable breach of the peace and substantial justice demand that the judgment be reviewed and set aside. That in all fairness the Defendant should be ordered to dissolve the trust now encumbering the suit land and to transfer the respective portions of the suit land to the Plaintiffs. That if the Plaintiffs are thrown out to the streets this will cause substantial injustice to the Plaintiffs and their families.

4. The application has been opposed by the Defendant vide a replying affidavit filed on the 8/11/18 where he deponed that the application is incompetent, frivolous, vexatious and an abuse of the process of the Court. That the suit was heard and determined and a judgment rendered in the matter. That the applicant appears to be inviting the Court to sit on appeal on its own judgment.

5. On the 12/11/18 the parties elected not to file any written submissions and informed the Court that they wished to rely on the replying affidavits on record.

6. I have considered the application and the affidavits as filed and the key issue for determination is whether the orders for review are mete to grant.

7. Order 45 rule 6(2) provides as follows;

> "Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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".

8. Order 45 Rule provides to whom the review should be made to ;

> "An application for review of a decree or order of a Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed".

9. The operative tone of the above Order demands that the application for review must be based on a). the discovery of new and important matter of evidence which after the exercise of due diligence was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made or b). account of some mistake or error apparent on the face of the record or c). any other sufficient reason.

10. The power to review is a creature of statute. It must be conferred by law either specifically or by necessary implication. Review is not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules of procedures or technicalities of the law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review was under mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration had resulted in miscarriage of justice, nothing would preclude the Court from rectifying the error. The power to review can be exercised for the correction of a mistake and not to substitute a view. Once a review is dismissed no further review can be entertained.

11. The rectification of an order stems from the fundamental principle that justice is above all since the power of review is exercised to remove an error and not for disturbing finality. If reasoning in the judgment is at variance with the clear and simple language in a statute or it suffers from manifest error of the law or if there is an error apparent on the face of the record which is liable to be rectified the powers of review can be exercised. The review Court cannot sit as an appellate Court. It is beyond the purview of the executing Court to scan or review the reasoning provided by the Court in decreeing the suit. The execution Court is a creature of a decree. It cannot be allowed to be above it. A wrong decision can be subject to appeal to a higher forum, but the review is not permissible on the ground that the Court proceeded on wrong proposition of the law. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by a higher forum, the later can only be corrected by exercise of the review jurisdiction.

12. When a review is sought on the ground of discovery of new evidence, the evidence must be relevant and of such a character that if it had been given in the suit it might possibly have altered the judgment. In the case of **Brown Vs Dean (1910) AC 373** Lord Loreburn stated that the new evidence must at least be such as is presumably to be believed, and if believed would be conclusive. Before a review is allowed on grounds of a discovery of new evidence, it must be established that the applicant had acted with due diligence and the existence of the evidence was not within his knowledge. Where a review is sought on the ground of discovery of new evidence but was found that the applicant had not acted with due diligence, it is not open to the Court to admit evidence on ground of sufficient cause. It is not to be supposed that the discovery of new evidence is by itself sufficient to entitle a party to a review of judgement. The provision relating to review contemplates grounds which would alter or cancel the decree.

13. A review can be done based on an error apparent on the face of record. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent from its very nature. It must be left to be determined judicially on the facts of each case. Error contemplated by the Order 45 must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. The line of demarcation between an error simpliciter and an error apparent on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident, and does not require an elaborate argument to be established. In the case of **West Bengal Vs Kamal Sengupta AIR 2009 SC 476**, the Court stated as follows;

> "the term mistake or error apparent by its very connotation signifies an error which is evidence perse from the record of the case and does not require detailed examination , scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of review. …To put it differently an order or decision of judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the Court on a point of law or fact. In any case while exercising the power of review, the concerned Court cannot sit in appeal over its own judgment/decisions."

14. The third ground for review is for any other sufficient reason. The expression means a reason sufficiently analogous to those specified in the rule though cannot be held limited to the first two reasons.

15. Turning back to the application at hand, it is clearly manifest that the applicant has neither shown to the satisfaction of the Court that there is a new and important matter of evidence that has been discovered, an error apparent on the face of the record of the judgment, and or there is ground for review for any other sufficient reasons. Having analyzed the application in depth it would appear to the Court that it is a disguised appeal. The law is clear that if the applicant is aggrieved by the judgment of the Honourable Court it is open for him to proffer an appeal. Otherwise this Court is now functus officio.

16. The upshot is that the application fails. The application is incompetent and is dismissed with costs to

the Defendant.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 6TH DAY OF DECEMBER 2018.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

T M Njoroge for the 1st and 2nd Plaintiffs/Applicants

Defendant/Respondent – Absent

Irene and Njeri, Court Assistants