REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

REVIEW APPLICATION NO. 193 OF 2015

GRACE AKINYI.....APPLICANT

VERSUS

GLADYS KEMUNTO OBIRI.....1ST RESPONDENT

UASIN GISHU COUNTY GOVERNMENT.....2ND RESPONDENT

RULING

Grace Akinyi ***(hereinafter referred to as the applicant)*** has brought this Notice of Motion against **Gladys Kemunto Obiri** and **Uasin Gishu County Government** ***(hereinafter referred to as the respondents)*** praying that the honourable court be pleased to review and/or set aside its ruling and orders issued on 30.9.2015 and in its place there be an order maintaining status quo pending hearing and determination of the main suit. The application dated 19.10.2015 is based on grounds:

i. That the honourable court has on 30th September, 2015 dismissed the Applicant's application dated 6th July, 2015 on account of apparent error on the face of the court record.

ii. That the Honourable court did not consider crucial evidence which were not in the record and could have made the Honourable rule otherwise.

iii. That the original receipt issued to one Francis Gicharo Woota on 08.12.1995 when he purchased the said plot from defunct Eldoret Municipal Council was not considered by the Honourable court which evidence is fundamental in this case.

iv. That the Honourable court did not consider the correspondence between the defunct Eldoret Municipal Council and the then owner of the suit land one Francis Gicharo Woota such correspondence include letter allowing erection of temporary structures.

v. That the Honourable court did not analyse the extent to which demolition of her structures in the sued land have been caused by the 2nd respondent since photos taken were not in court record.

vi. That Honourable court made its ruling on the property ELD/17/94/15A Plot No. 78 Zone SA(1) measuring approximately 0.1 ha yet the suit property in court record is ELD/17/94/15A(3) Plot No. 78 Zone S measuring approximately 0.20 ha occasioning an apparent mistake.

vii. That the Honourable court discharged the temporary orders restraining the respondents from interfering with the suit land being ELD/17/94/15 A(3) Plot No. 78 Zone S and not

ELD/17/94/15A Plot NO. 78 Zone SA(1) non-sued land occasioning an apparent mistake.

viii. That the Honourable court in its ruling relied on the report of the Ministry of Lands, Housing and Physical Planning, Uasin Gishu County, dated 01.07.2015, which report determined the owner of the parcel known as ELD/17/94/15A Plot No. 78 Zone A(1) which is not the sued property and different from the sued land ELD/17/94/15 A(3) Plot No. 78 Zone S and also different from ELD/17/94/15A Plot NO. 78 Zone SA(1) non-sued land occasioning an apparent mistake.

ix. That Honourable court in its ruling differentiated the suit land on its record being ELD/17/94/15 A(3) Plot No. 78 Zone S and the non-sued land being ELD/17/94/15A Plot No. 78 Zone SA(1) and finally made its findings on the later the non-sued land hence occasioning an apparent mistake on the record.

x. That the applicant contends that the suit property ELD/17/94/15 A(3) Plot No. 78 Zone S belongs to her and she has been in actual occupation, hence any ruling relating to a different parcel of land which has not been sued is prejudicial to her.

xi. That nonetheless, even if there is a problem on the ground as acknowledged by the Honourable court in its ruling, the orders of the court in favour of the non-sued land will irreparably cause injury to the applicant.

xii. That the applicant's motion dated 6th July, 2015 clearly indicated that she had been prejudiced by the demolition of her structures by the 2nd respondent on the sued land ELD/17/94/15 A(3) Plot NO. 78 Zone S hence the ruling amounts to her being punished for the apparent mistake on the face of the record.

xiii. That the said orders are highly prejudicial to the applicant who will have been unfairly have her structures demolished by the 2nd respondent on the basis of apparent error on the face of court record and for no fault of her own.

xiv. That the Ruling goes contrary to the provisions of Article 159 (2)(d) of the Constitution which enjoins the court to administer substantive justice without undue regard to technicalities.

xv. That there are thus material errors on the face of the court record and there are sufficient grounds for the court to review its earlier orders as prayed.

xvi. That the application has been brought in good faith and without undue delay.

xvii. That it is only just and expedient that the application be allowed.

The application is supported by the affidavit of Grace Akinyi who reiterates the grounds and states that the honourable court in its ruling discharged the temporary injunction issued on 7.07.2015 on apparent error on the face of the record and non-consideration of crucial evidence which could have made the Honourable court rule otherwise. That the Honourable court did not consider crucial evidence which were not in the record and could have made the Honourable court rule otherwise and that the original receipt issued to one Francis Gicharo Woota on 08.12.1995 when he purchased the said plot from defunct Eldoret Municipal Council was not considered by the Honourable court which evidence is fundamental in this case.

That the Honourable court did not consider the correspondence between the defunct Eldoret Municipal Council and the then owner of the suit land one Francis Gicharo Woota such correspondence include letter allowing erection of temporary structures. That the Honourable court did not consider a copy of the map by the then defunct Eldoret Municipal Ministry of Lands & Settlement of Physical Planning on the suit land ELD/17/94/15 A(3) Plot No. 78 Zone S. That the Honourable court made its ruling on the property ELD/17/94/15A Plot No. 78 Zone SA(1) measuring approximately 0.1 ha yet the suit property in court record is ELD/17/94/15 A(3) Plot No. 78 Zone S measuring approximately 0.20 ha occasioning an

apparent mistake. The Honourable court discharged the temporary orders restraining the respondents from interfering with the suit land being ELD/17/94/15 A(3) Plot No. 78 Zone S while making the findings on ELD/17/94/15A Plot No. 78 Zone SA(1) non-sued land hence occasioning an apparent mistake.

She argues that the Honourable court in its ruling relied on the report of the Ministry of Lands, Housing & Physical Planning, Uasin Gishu County, dated 01.07.2015, which report determined the owner of parcel known as ELD/17/94/15A Plot No. 78 Zone A(1) which is not the suit property and different from the suit land ELD/17/94/15 A(3) Plot No. 78 Zone S and also different from ELD/17/94/15A Plot No. 78 Zone SA(1) non-sued land hence occasioning an apparent mistake and that the Honourable court did not analyse the extent to which demolition of her structures in the suit land has been caused by the 2nd respondent since photos taken were not in court record. That the Honourable court in its ruling differentiated the suit land on its record being ELD/17/94/15 A(3) Plot No. 78 Zone S and the the other land being ELD/17/94/15A Plot No. 78 Zone SA(1) and finally made its findings on the latter the hence occasioning an apparent mistake on the record.

She claims to be in actual possession of the suit land being ELD/17/94/15 a(3) Plot No. 78 Zone S and have made developments in the said land hence the apparent error and/or mistake in the face of the record is prejudicial to me. That there are thus material errors on the face of the court record and there are sufficient grounds for the court to review its earlier orders as prayed. She makes this application before the Honourable court to review its ruling and correct the apparent error and/or mistake on the face of the record since the same is prejudicial.

In his replying affidavit, Mr. Kenneth Mutai, a Legal Officer, Uasin Gishu County Government states that there was no error apparent on the face of record as the applicant merely failed to put evidence before the judge and intends to rely on this new evidence to obtain an order for review but has not explained why the same could not be availed during the hearing of the application.

M/s Gladys Kemunto Obiri, the 1st respondent states that she has read the applicant's/plaintiff's application under Certificate of Urgency dated 19th October, 2015 and and replies that there is no error on the face of the record as alleged by the Applicant who failed to put her house in order and adduced all the relevant documents. That further, the original receipt issued to Francis G. Woota was never adduced by the Applicant/Plaintiff when she filed her pleadings and when the dispute was brought before the defunct Eldoret Municipal Council for determination. That the documents marked GA 3 (2-C) and GA 4 were not part of the list of documents that the Applicant/Plaintiff adduced when she filed her case, neither were they annexed to her application for an injunction. That this Honourable court is not in any position to consider the documents marked GA2, GA3 and GA 4 since they were never adduced by the plaintiff at the hearing of the application for injunction.

That it is un-procedural and contrary to the Civil Procedure Rules for the Applicant/Plaintiff to adduce new documents at this state of the hearing without the leave of the court. That the Applicant/Plaintiff cannot adduce new evidence that she had not earlier disclosed and seek to use them in an application for review. This is an abuse of the process of this Honourable court. That in response to paragraph 8, as far as she is concerned, the subject matter to the suit relates to Letter of Allotment of Residential Plot – ELD 17/94/15A, PLOT 78 ZONE SA(A). That the contents of paragraph 9 are preposterous since the contents of the court order are clear and plain. With regard to paragraph 10, the presiding Judge in his ruling did not rely on the 2nd defendants documents as alleged as clearly depicted in the Learned Judge's ruling. That the learned Judge in his ruling clearly stated at paragraph 9 on page 7 that ***"...Documents held by her (plaintiff) do not support her (plaintiff's) case..."*** this is to her understanding is that the applicant/Plaintiff did not produce adequate evidence to support her case. That it is now apparent that the Applicant/Plaintiff seeks to adduce fresh or new evidence to this Honourable court and seek to review the ruling of this Honourable court based on the new evidence.

According to Obiri, the Applicant/Plaintiff has conceded at paragraph 11 of her replying affidavit that the photos marked GA 8 were not in the court record and now seeks the indulgence of this Honourable court to ***"analyze them"*** (sic). In response to paragraph 12, the contents of the Applicant's/Plaintiff's letter of allotment which states ELD 17/94/15 A(3) Plot NO. 78 ZONE S and her letter of allotment ELD

17/94/15A PLOT NO. 78 ZONE S A(1) is a matter for determination by this Honourable court when this matter comes for hearing. She is of the view that there are no material, apparent errors or mistakes on the face of the court record or ruling of the presiding Judge. That this application does not meet the threshold for an application for review as depicted in the provisions of Order 45 1(b).

That the Applicant has not demonstrated to this Honouranble court in her application that the new or fresh documents marked GA2, GA3, GA4, GA8 were not within her knowledge when she filed her application and even after exercise of due diligence could not have been produced the said documents at the time the ruling was passed. The plaintiff now seeks to adduce new evidence without following the due procedure of law after her application was dismissed with costs. That the review of the orders of this Honourable court on the inclusion of new evidence will prejudice their case at this stage. This is because they will need to scrutinize these documents and seek the services of expert witnesses who will end up being their witnesses in this suit. That the failure of the Applicant/Plaintiff to put her house in order as and when required has never been a ground for review of a ruling. That the application is not brought in good faith but with a view to correct the Applicant's/Plaintiff's omissions made at the hearing of her application.

I have carefully considered the submissions of the applicant and the respondents and do find that the the application is based on the fact that the learned Judge did not consider crucial evidence. This is not a ground for review but it is a ground for appeal. Moreover, failure to analyze evidence is not a ground for review. The applicant states that the court made a finding on property No. ELD/17/94/15A Plot No. 78 Zone SA(1) measuring approximately 0.1 ha yet the suit property is ELD/17/94/15A(3) Plot No. 78 Zone S measuring approximately 0.20 ha which has occasioned mistake.

The issue of the two plots was extensively deliberated and determined by the Honourable Judge and I do not see any mistake or error apparent on record in the Judge finding that Francis G. Woota who sold land to the applicant had been allocated ELD/17/94/15A(3) Plot No. 78 Zone S whereas, the 1st respondent was allotted Plot No. ELD/17/94/15A Plot No. 78 Zone SA(1).

Whether the applicant shall suffer irreparable injury or will be highly prejudiced by the ruling is a matter for the Court of Appeal as it is clear that the applicant is dissatisfied with the decision of the court and can only appeal against the decision.

Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

> ***"(1). 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***
>
> ***(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.***
>
> ***(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."***

The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states as follows:

> ***"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.***

Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However this discretion should be exercised judiciously and not capriciously.

I agree with ***Mr. Chemoyai,*** learned counsel for the 2nd respondent that the plaintiff seeks to introduce new evidence and that there is no mistake or error on the face of record.

In Court of Appeal, ***Civil Appeal No. 2111 of 1996, National Bank of Kenya Vs Ndungu Njau***, the Court of Appeal held that;

> ***"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law".***

The upshot of the above is that the applicant has failed to demonstrate that there is mistake or error apparent on the face of record and/or any sufficient reason to enable this court set aside its decision. The application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF JANUARY, 2016.

ANTONY OMBWAYO

JUDGE