REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KERICHO

CIVIL SUIT NO. 5 OF 2012

SAMUEL SIGIRA A KOECH.....PLAINTIFF

VERSUS

VINCENT KIBET.....DEFENDANT

RULING

(Application for review; principles to be applied; plaintiff seeking review of judgment; claim being of trespass of land owned by the plaintiff; defendant being his step son; plaintiff displaying title deed during hearing; court holding that he also needed to display a search; plaintiff arguing that this is an error apparent on the face of record; scrutiny of the judgment showing that the same was not only based on the issue of the title not having a search; court not convinced that there was ample evidence to prove trespass and also of the view that defendant could have an overriding interest; not a good case for review but maybe an appeal; unreasonable delay; application filed more than 2 years after judgment; delay not ably explained; application dismissed)

The application before me is that dated **13th October 2015** filed by the plaintiff. It is an application brought under the provisions of **Order 45 Rules 1 and 2 (2)** of the **Civil Procedure Rules** and **Sections 1A, 1B, and 3A** of **the Civil Procedure Act** and all other enabling provisions of the law. The principal order sought is for review of the judgment delivered on **31st October 2013**. A little background will shed light as to why this application has been filed.

This suit was commenced by way of plaint that was filed on **19th December 2012.** The plaintiff pleaded to be the registered proprietor of the **land parcel Kericho/Kongotik/1200** (hereinafter the suit land). He pleaded that he is married to the mother of the defendant but they later separated and that the defendant is not his biological son. He pleaded that there is a dissolution of marriage case pending in Kapsabet Court being **Civil Case No. 2 of 1989** between the mother of the defendant and himself. In the suit, he asked for orders to permanently restrain the defendant from constructing any building or dealing in any way with the suit land and in the alternative the defendant be evicted from the said land.

No defence was filed and the matter proceeded ex-parte on **28th August 2013** before my predecessor in this station, Honourable Waithaka J. The Judge dismissed the plaintiff's suit vide a judgment delivered on **31st October 2013**. In her judgment the learned Judge held as follows :-

"In the plaint, the plaintiff states that he was married to the mother of the defendant and that there

is a divorce matter pending before a Kapsabet court between himself and the mother of the defendant. However during the hearing of his case, the plaintiff denied knowing the defendant. I find this strange because the defendant is his step son and the suit land may be matrimonial property. If this is the case then there are overriding interests over this land.

***Section 28** of the **Land Registration Act 2012** states as follows :*

28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -

(a) spousal rights over matrimonial property;

(b) trusts including customary trusts.

…

(j) any other rights provided under any written law.

The plaintiff has exhibited a title showing that he was registered as the owner of the suit land in 1998. However, he has not exhibited a certificate of official search or any other document to prove that the suit land is still registered in his name and has no restrictions. Further, although the plaintiff claims that the defendant is a trespasser on the suit land he has adduced no evidence to prove these assertions and has failed to call any witnesses to support his claim.

*Failure to adduce evidence to prove such assertions is clearly in contravention of **Section 107** of the **Evidence Act (CAP 80) Laws of Kenya** which provides :-*

'Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.'

After considering both the oral and documentary evidence adduced herein and applying the law, I am not satisfied that the plaintiff has proved his case to the required standard. In the premises I decline to enter judgment in favour of the plaintiff and I strike out the suit without costs as the defendant did not enter appearance. "

After this judgment, the defendant filed an application dated **24th April 2014.** In the said application, the defendant sought orders to stay execution of the decree and all consequential orders and for the judgment to be set aside or varied. You may probably imagine that I have confused plaintiff for defendant but I have not. In his application the defendant stated that he has a good defence which should be heard on merit. The application was argued again before Honourable Justice Waithaka. The learned Judge found it interesting that the defendant would want to set aside a judgment that was actually in his favour. Curiously, the plaintiff did vehemently oppose the application to set aside the judgment and filed a Replying Affidavit vide which he deposed inter alia that the application is meant to delay the respondent's enjoyment of the fruits of justice. The application and the opposition to it clearly took the learned judge aback. She certainly thought that the parties were a bit out of sorts. This comes out in her ruling of **24th September 2014** where she inter alia commented as follows :-

"I cannot in my wildest dreams imagine why the defendant or his counsel would wish to challenge that judgment. By denying the plaintiff the orders he was seeking of permanent injunction and eviction of the defendant from the suit land, the defendant clearly won the case. What is even more puzzling is that counsel for the plaintiff was mum about this issue during the hearing of the application. I choose not to say anymore on this matter. I do not see any point in addressing the merits of the application and I dismiss the same as I find it a total abuse of the process of court, properly so defined. Costs of the application shall be borne by the defendant/applicant. "

Things went quiet until this application was filed on **30th December 2015.** In addition to the orders seeking review of the judgment of **31st October 2013**, the application also seeks change of counsel for the plaintiff from the law firm of M/s Sang & Company Advocates to that of M/s Mwaka & Company Advocates. The application is based upon the following grounds :-

a. There is an apparent error/mistake on the face of the record.

b. The applicant was misled by his advocates that he had succeeded in the matter and upon realizing the contrary he expeditiously moved to court.

c. The respondent had similarly been misled and that is why he had brought application to set aside judgment which was in his favour.

d. ***Under S. 26 (1)*** *of the* ***Land Registration Act, 2012****, a certificate of title issued by the registrar upon registration is prima facie evidence that the person named as proprietor of land is the absolute and indefeasible owner.*

e. This application is made in utmost good faith.

f. The interests of justice shall be served by allowing this application.

In his supporting affidavit, the plaintiff has deposed inter alia that he was not present when judgment was delivered. In the month of **June 2015,** he decided to go and obtain the typed copy of the judgment when to his shock he found that he had not won the case. He also found out that the respondent had tried to set aside the judgment and he thought that the respondent had also been misled in a similar manner like himself. He believes that there is an error apparent on the face of the record based on **Section 26** of the **Land Registration Act.** He has deposed that there is no requirement in law that for one to prove ownership he has to exhibit a certificate of official search or any other document other than the title deed. He has urged that I consider that time started running against him in **June 2015.**

The respondent did not file anything to oppose the motion and neither did his counsels on record, M/s Koech J.K & Company, appear at the hearing of the application. Mr. Mwaka for the applicant urged me to allow the application. His main argument was that there was an error on the face of record on the basis **of Section 26** of the **Land Registration Act**. He relied on the case of ***Nyamogo & Nyamogo Advocates vs Kogo (2001) EA 170.***

This being an application for review, **Order 45** of **the Civil Procedure Rules** applies. The same is drawn as follows :-

Application for review of decree or order [Order 45, rule 1.]

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.

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.

Ordinarily, applications for review are heard by the judge who made the order. This is in line with Order 45 Rule 2 which is drawn as follows :-

2. To whom applications for review may be made [Order 45, rule 2.]

1. 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.

2. If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

It is on the basis of **Order 45 Rule 2 (2**) that I am hearing this application for review, for Honourable Waithaka J was transferred from this station and I am the one currently holding fort.

Going back to **Order 45 Rule 1 (1)** , the instances when a party has recourse to review are set out. One can file an application for review on the following grounds :-

i. Where there is discovery of new subject matter which could not be available when the order sought to be reviewed was made.

ii. Where there is an error apparent on the face of record.

iii. For any other sufficient reason.

In all the above, the application must be made without unreasonable delay.

In our case, the applicant does not pretend to have come across any new matter which he did not have the opportunity at presenting during trial. His sole ground for review is that there is an error apparent on the face of record. The error, which the applicant is of the view is apparent on the face of record, is the holding by the learned judge that the applicant did not exhibit a certificate of official search or any other document to prove that the land is still registered in his name and has no restrictions. It is said that this runs afoul **Section 26** of the **Land Registration Act**, which is drawn as follows :-

Certificate of title to be held as conclusive evidence of proprietorship.

26. *(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

It indeed does appear from a reading of **Section 26 (1)** that the Certificate of Title is supposed to be taken

by all courts as prima facie evidence that the person named therein as proprietor is the absolute and indefeasible owner. The learned judge was of course not persuaded that the display by the plaintiff of his title was enough evidence to prove that the suit land is still registered in his name. But this was not the only reason that the learned judge dismissed the plaintiff's case. An assessment of the judgment will reveal that the applicant's case was dismissed on various grounds. First, the learned judge thought that the defendant could have been holding an overriding interest as the land may be matrimonial property. The learned judge was also of opinion that the plaintiff did not adduce ample evidence to prove the assertion that the defendant is a trespasser on the suit land and that he failed to call any witnesses to support his claim. She in fact quoted **Section 107** of the **Evidence Act,** to bring in home the point that he who asserts must prove. She clearly was of the view that the plaintiff had not adduced sufficient evidence to persuade her that the defendant was a trespasser on the suit land.

It follows that it does not matter if I am persuaded by the argument of the applicant that there was an error apparent on the face of record in the decision that an official search had to be displayed to prove title.

I think the proper avenue for the applicant was to file an appeal as the judgment was not defined solely by the holding that the plaintiff did not display the official search. We are therefore not dealing with a case of a mere error apparent on the face of record. If the plaintiff is not happy with what was decided on merits then he can argue on appeal that the judge made an erroneous decision. The issue was indeed succinctly put in the case of ***Nyamogo & Nyamogo Advocates vs Kogo*** cited by Mr. Mwaka. The learned judges of appeal held as follows :-

> *"There is a 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 reasonable 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 a 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.*

My view of the matter is that the case was substantially dealt with and the judge who heard the case was of the opinion that the applicant had not made out a case of trespass against the defendant. That is a decision, which if the applicant does not agree with, can attempt to overturn on appeal. I am not persuaded that it is a good case for review.

Even if I was so persuaded, and I clearly am not persuaded, I do not think I would have allowed this application, for in my view, it has been filed after unreasonable delay. The judgment was delivered on **31st October 2013**. This application was filed on **30th December 2015** more than two years after the judgment. There is of course no specific time within which an application for review must be filed. What is required is that the application should be filed without "unreasonable delay" which means that the lapse of time before the filing of the application must be considered alongside all surrounding circumstances so as to determine whether the delay in the case is unreasonable. In our case, it was upon the plaintiff to find out and confirm the judgment that was given on **31st October 2013**. He cannot blame anybody for opting not to be present at the time of delivery of judgment. In fact, I would think that any vigilant litigant would want either to be present at the time the judgment is delivered, or would want to confirm the contents of the judgment soon after delivery. If one chooses to be absent and not to confirm what was delivered, he only has himself to blame. Even if I am to excuse his ignorance of the judgment after it was delivered, the applicant has not explained where he was since ruling on the motion to set aside judgment was delivered on **24th September 2014**. The application herein has been filed more than one year from this time. For this period to be excluded, the applicant must give an account of it, which I am afraid he has not done. He only gives an account from **June 2015** which is the time he states he went to obtain a copy of the judgment. I am afraid that is not good enough. There was clearly delay on the part of the plaintiff filing this application which in my view constitutes unreasonable delay.

There is really no point of adding more words to the circus and comedy that has played out in this case. I

find no merit in the subject application and it is hereby dismissed. I make no orders as to costs since the defendant did not deem it fit to oppose it.

The order seeking the law firm of M/s Mwaka & Company Advocates to come on record is otherwise allowed.

It is so ordered.

Dated, Signed and delivered on this 29th day of July, 2016

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT

Mr. Joshua Mutai holding brief for Mr. Mwaka for Plaintiff/applicant

No appearance on part of M/s Koech J.K. & Co. for defendant/Respondent

Court Assistant; Gladys Wambany