



REPUBLIC OF KENYA

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IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 115 OF 2017 (O.S)

ONESMUS MUTHEE MUGO.....1ST APPLICANT
FRANCIS WACHIRA MUGO.....2ND APPLICANT
FRANCIS KIRAGU MUGO.....3RD APPLICANT
JASON MUNENE MUGO.....4TH APPLICANT
NICHOLAS KAGWANJA MUGO.....5TH APPLICANT
EPHANTUS KIROMBE MUGO.....6TH APPLICANT
PARTICK KITHEE MUGO.....7TH APPLICANT
JOSEPH KABICI MUGO.....8TH APPLICANT
DAVID MAINA MUGO.....9TH APPLICANT
STEPHEN WANJOHI MUGO.....10TH APPLICANT

VERSUS

NDUNGU MIANO.....1ST RESPONDENT
DANIEL MURIUKI KIBUCHI.....2ND RESPONDENT
PHILIPH WAMETHI NJIRU.....3RD RESPONDENT
JOHN MURIMI NJIRU.....4TH RESPONDENT
MUTHIKE MIANO.....5TH RESPONDENT

RULING

Introduction

The Applicant vide a Notice of Motion dated 4th June 2020 sought the following orders:-

- (1) Spent.
- (2) That the orders of the Court made herein on 30th April 2020 be stayed pending hearing and determination of this application.
- (3) That the orders of the Court made herein on 30th April 2020 be varied, set aside or set aside.

(4) That the costs of this application be in the cause.

The application is based on the following grounds:-

(a) The orders issued on 30th April 2020 are meant to restrain the respondents from interfering with the applicant's possession of the suit property whereas the applicants, the 2nd, 3rd and 4th respondents had all along been in actual possession of the suit property.

(b) The Court therefore failed to consider the fact that the 2nd, 3rd and 4th respondents had also been in possession of the suit property when it gave the injunctive orders, which is an error apparent on the face of the record.

(c) The orders were issued against all the respondents whereas the 3rd and 4th respondents had already died by 30th April 2020 when the injunctive orders were issued and thus rendering the same null.

(d) The 3rd respondent died on 6th November 2019 when the file was pending ruling before the Judge and it was therefore not possible to bring this fact or evidence to the attention of the Court before the ruling was given.

(e) The death of the 4th respondent was within the knowledge of the previous Judge who was handling the matter (now deceased).

(f) The orders were issued against the 4th respondent whereas the claim against him had abated as per Order 24 Rule 3 of the Civil Procedure Rules due to the fact that he had not been substituted with his legal representative in the suit for over one (1) year since his death.

The respondents through Onesmus Muthee Mugo filed a replying affidavit in opposition to the said application sworn on 29th June 2020.

Applicants Statement of Facts

The applicants through the supporting affidavit of Ndunda Miano, the 1st respondent stated that after sub-division of title No. MWEA/TEBERE/B/26 into title Number MWEA/TEBERE/407, 4071, 4072, she sold the sub-division parcels to the 2nd, 3rd and 4th respondents and handed over possession to them. The 1st respondent further stated that the orders issued by this Court against her were made on an erroneous assumption that the applicants/defendants were the only ones in occupation of all the three parcels forming the suit property whereas the 2nd, 3rd and 4th respondents were too in possession of a portion of the suit property.

The 1st respondent also contends that the 3rd respondent was using his title No. MWEA/TEBERE/4071 to grow rice and keep livestock and his family continued to do so even after his demise and that it is therefore an error apparent on the face of the record for the Court to have issued injunctive orders against the 3rd respondent on that account. The 1st respondent went further and stated that the injunctive orders issued by the Court were made on an erroneous assumption that all the respondents were alive whereas the 3rd and 4th respondents were already deceased by the time of issuing of the orders and that since the 4th respondent was not substituted within a period of one (1) year after his death, the claim against him has abated hence the injunctive orders as relate to him are a nullity and should be varied or set aside.

In supplementary affidavit sworn on 7th July 2020, one Penina Wambui Maganjo, widow to the 3rd respondent in further support of this application stated that her late husband Philip Wamethi Njiru died on 6th November 2019 and that he was the registered proprietor of land parcel No. MWEA/TEBERE/B/4071 after the family purchased the same from the 1st respondent. The said Penina Wambui Maganjo further stated that her late husband and the rest of the family members have been in occupation of the parcel of land since 1977 or thereabouts and have been utilizing the land to rear livestock – cattle, goats and sheep and farm rice. She stated that the family hired a farm manager to take care of the farm and built a building structure for him. She further stated that she planted the current rice crop in February 2020 which have now matured and ready for harvesting and that the Court did not know of these facts when it gave the ruling on 30th April 2020. She deponed that on 25th June 2020, she went to the farm to harvest the rice crop and the 1st applicant and his sons attacked her and her workers. She stated that the 1st applicant and his sons also damaged the barbed wire fence and injured one sheep and two goats. She said that the family is currently in possession and actual occupation of one of the suit parcels of land being L.R. No. MWEA/TEBERE/4071 as shown by photographs annexed and marked **PWN – 4, 5, 6 and 8.**

Respondents Statement of Facts

The respondents through the replying affidavit sworn by Onesmus Muthee Mugo opposed the application and stated that the issues being raised in respect of the suit land and the death of the 3rd and 4th respondents were canvassed by the parties and the Court made a ruling on 30th April 2020 and that the same are therefore res-judicata and the only remedy available for the 1st applicant was to appeal against the orders made on 30th April 2020 and not seek for review. The 1st respondent stated that the 1st applicant has not been given letters of administration to represent the 3rd and 4th respondents who are deceased and cannot therefore seek reliefs on their behalf.

He also stated that the 1st applicant has not been granted authority by the 2nd respondent to file the instant application on his behalf. The 1st respondent further stated that the 1st respondent has stated at paragraph 3 of his supporting affidavit that he doesn't possess any portion of the suit land and therefore is not adversely affected by the order of injunction issued against him and that the application for review and/or setting aside lacks foundation and merit. He stated that together with his co-respondents, they acquired the suit land by way of adverse possession and that they have filed this suit seeking appropriate orders under the law of limitation.

He deponed that him together with his co-respondents have been in possession of the suit land and obtained orders to protect their possession. He stated that any attempt to interfere with their possession and occupation of the suit land would be tantamount to contempt of the orders of this Honourable Court. He deponed that the photos attached to the supporting affidavit show their property and not the applicants' property.

Analysis and Decision

Order 45 of the Civil Procedure Rules provides as follows:-

(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”.

It is clear from the provisions of **Order 45 CPR** that in order to obtain the Court's favour, an applicant seeking review must establish the following:-

(a) There is new and important matter or evidence;

(b) The new and important matter/evidence was not within his/her knowledge even after the exercise of due diligence;

(c) On account of some mistake or error apparent on the face of the record; and

(d) Other sufficient reason(s).

The applicant has stated in his grounds in support of the application that the 2nd, 3rd and 4th respondents had all along been in actual possession of the suit property when this Court granted the injunctive orders on 30th April 2020 which is an error apparent on the face of the record. If the applicant had prevailed upon the Court in their previous application that the 2nd, 3rd and 4th respondents were in actual possession of the suit property and the Court considered such evidence but still went ahead to issue the injunctive orders, then the applicants remedy cannot be by way of a review but appeal. I find those issues being raised by the applicant now were raised, canvassed and considered by the parties whereby this Court rendered itself on 30th June 2020 and are therefore res-judicata. As such, the applicant's remedy lies on appeal against the decision by this Court made on the said 30th June 2020 and not by way of review. The applicant also stated that the orders issued by this Court on 30th June 2020 which are the subject of this application were made on erroneous assumption that all the respondents were alive whereas the 3rd and 4th respondents were already deceased. If that be the case, the 1st respondent therefore lacks capacity to speak on behalf of the estate of the two parties as no letters of administration has been granted to him and cannot therefore seek relief on their behalf. The 1st respondent has not stated that he has been given authority to bring this application on behalf of his co-respondents including the 2nd respondent. I also note that in paragraph 3 of the supporting affidavit, the 1st respondent confirmed that he had sold resultant portions of the sub-division of land parcel Numbers MWEA/TEBERE/26 into title Nos. MWEA/TEBERE/4070, 4071 & 4072 to the 2nd, 3rd and 4th respondents and handed over possession to them. He confirmed that he was not in possession of any of the parcels of the land forming part of the suit land. If that be the case, then the 1st respondent who has no authority from the 2nd respondent and no letters of administration on behalf of the Estate of the 3rd and 4th respondents lack the locus standi to bring this application. I also note that Penina Wambui Maganjo who swore the supplementary affidavit is not a party to this suit and therefore incompetent to swear an affidavit in these proceedings capable of passing as affidavit evidence. The said Penina Wambui Maganjo purports to be the widow of the 3rd respondent but has no letters of administration and has not sought leave to be enjoined as a party to these proceedings. My parting shot is that the Notice of Motion dated 4th June 2020 is incompetent and without merit and the same is hereby dismissed. Suffice to add that the authorities cited by counsel for the respondents are distinguishable and irrelevant to this case. It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 16th day of October, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Kiragu holding brief for Mr. Magee for Respondent

2. 1st Defendant – present

3. Mbogo, Court clerk – present.