



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVL MISC. NO. 74 OF 2016**

**EUNICE MAKORI**

**HELLEN MAKONE (Administrators of**

**JOHNSON O. MAKORI (deceased).....PLAINTIFFS**

**-VERSUS-**

**THE HON. ATTORNEY GENERAL.....DEFENDANT**

**RULING**

1) The Honourable Attorney General, the defendant herein, took out the motion dated 22<sup>nd</sup> March 2018 and filed in court on 22.3.2019 in which he sought for the following orders:

***1. THAT this application be certified urgent and heard ex-parte in the first instance.***

***2. THAT service of this application be dispensed with in the first instance.***

***3. THAT pending the interparties hearing, this honourable court be pleased to grant a stay of the execution and proceedings in miscellaneous application no. 74 of 2016 pending the hearing and determination of this application.***

***4. THAT pending interparties hearing this honourable court be pleased to review, vacate and or set aside its judgment dated 19<sup>th</sup> June 2015 in HCCC no 168 of 2009 and all consequential orders emanating from the said judgment.***

***5. THAT the claimant/respondent herein bares the cost of this application.***

2) The motion is supported by the supporting and supplementary affidavits of Major George Moses Otieno. When served, Eunice Makori and Hellen Makone, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs herein filed grounds of opposition and the replying affidavit of Hellen Makone to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in this matter this court gave directions to have the motion disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the competing affidavits. I have also considered the rival written submissions.

4) The main order being sought is that for review. It is the submission of the defendant/applicant that it has discovered new and important evidence which after the exercise of due diligence, was not within the knowledge of the defendant therefore it could not be produced at the time when the matter was heard and judgment delivered.

5) The defendant pointed out that he has learned through a report from the National Land Commission dated 4<sup>th</sup> July 2018, that the subject land parcels no. 5002/3 and 5002/4 were gazzeted as protected areas under the Protected Areas Act, Cap. 204 Laws of Kenya vide Protected Areas order of 1976.

6) It is also argued that the aforesaid parcels were listed in the commission of Inquiry into the Illegal/Irregular allocation of Public Land commonly referred to as the 'Ndungu Report' to have been irregularly allocated to the plaintiff/respondent from military land.

7) The defendant further argued that before satisfying the decree issued in favour of the estate of John Onduko Makori, deceased it sought for an approval from the National Land Commission which in turn wrote back stating that the aforesaid parcels were not private properties but were gazzeted under the Protected Areas Act Cap. 204 Laws of Kenya of 1976 and had not been degazzeted, hence not available for

allocation. It was also argued that the alleged surrender of the parcels to the Government was void from the beginning.

8) The plaintiffs urged this court to dismiss the application for review stating that the same was filed in bad faith and after a period of more than 4 years had lapsed from the date of judgment. They pointed out that the defendant was hellbent to frustrate the estate from enjoying the fruits of its judgment.

9) The plaintiffs argued that the ownership of the properties was never contested by the defendant at the time of hearing this suit. The plaintiffs further pointed out that the application does not meet the threshold applicable in applications for review.

10) Before determining the application, it is important to set out the brief background of this dispute. The plaintiffs herein in their capacities as the administratrixes of the estate of John Onduko Makori, deceased, filed this suit claiming to be paid compensation for the parcels of land surrendered by the deceased to the Republic of Kenya for purposes of expansion of the Kenya Navy Camp at Nyalı in Mombasa.

11) The defendant filed a defence to contest quantum. The suit for hearing before Mr. Justice Hatari Waweru who on 19<sup>th</sup> June 2015 pronounced judgment in the sum of kshs.9,200,000/= in favour of the deceased's estate and against the defendant.

12) In the aforesaid judgment the learned judge noted that the deceased was the registered proprietor of the parcels of land known as L.R. nos. 5002/3 and 5002/4.

13) It is also stated that the late John Onduko Makori surrendered the aforesaid parcels of land to the Republic upon the request of the Republic. The learned judge expressly stated in his judgment that the only issue which was in contention before him was quantum of compensation and not ownership.

14) The defendant has now urged this court to review theforejudgment by setting it aside so that he can be heard to show that the parcels of land in question were illegally acquired by the deceased and therefore the estate is not entitled to compensation.

15) The principles to be considered in determining an applicationfor review are well settled. First an applicant must establish the discovery of a new and important matter or evidence which after due diligence was not within the knowledge or could not be produced by him at the time of passing the decree or order. Secondly that on account of mistake or error apparent on the face of record. Thirdly, for any other sufficient reason. Fourthly, the application must be made without unreasonable delay.

16) The defendant has stated that he has discovered new andimportant evidence which after applying due diligence could not be supplied at the time of hearing of this suit. The new and important evidence is a letter from the National Land Commission stating that the land surrendered by the deceased was public land and secondly, that the 'Ndungu Report' had shown that the land was illegally acquired.

17) This suit has been pending before court since the year 2009and was conclusively determined in 2015. It is apparent that the defendant wrote to the National Land Commission seeking for the investigation on how the lands in dispute were acquired in the year 2018. The National Land Commission responded to the request in the same year. It is obvious that the request was made after this case was heard and determined. The National Land Commission came into existence in the year 2012. The defendant did not deem it fit to consult the National Land Commission early enough but waited to do so four years after judgment was delivered.

18) The 'Ndungu Report' has been lying on the library shelves for along time and was available to the defendant to obtain and rely on it in evidence. The defendant took a considerable period of time to discover its existence. I am not convinced that the defendant applied due diligence. With respect, I agree with the submissions of the plaintiffs that the defendant was not diligent in this matter. The defendant is plainly indolent and cannot therefore benefit from the discretion of this court.

19) The other issue which deserves some commend is the purposesintended to be achieved by the application. I have already pointed out that the Hon. Mr. Justice Hatari Waweru expressly stated in his judgment that the defendant did not contest the ownership of the parcels of land save for quantum of compensation.

20) The defendant now seeks to introduce a new line of defence tocontest the plaintiff's title yet he had the opportunity of doingso had he been diligent.

21) In the end, I find no merit in the motion dated 22<sup>nd</sup> March 2018. The same is dismissed with costs to the plaintiffs.

Dated, signed and delivered at Nairobi this 27<sup>th</sup> day of September, 2019.

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent