



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

THIKA LAW COURTS

ELC.CASE NO.389 OF 2017

[FORMERLY ELC CASE NO.542 OF 2010 – NAIROBI]

MUASYA KITHEKA & 20 OTHERS.....PLAINTIFFS/APPLICANTS

-VERSUS-

SAMUEL MAINA NJOROGE.....1ST DEFENDANT/RESPONDENT

JANE WANJIKU NGUGI.....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiffs filed this suit on **12th November 2010**, against the Defendants and sought for order of permanent injunction to restrain the Defendants from evicting and/or demolishing the Applicants' structures on land parcels known as **Ruiru/Ruiru East Block 2/943**, and **Ruiru/Ruiru East Block 2/944**, plus costs of the suit.

Simultaneously, they filed an application under Certificate of Urgency dated **10th November 2010** and sought for an order of temporary injunction to restrain the Defendants from interfering with the Applicants' quiet possession and occupation of all that parcel of land better known as **Ruiru/Ruiru East Block 2/943** and **Block 9/944** pending the hearing and determination of the suit.

The said interlocutory application was canvassed interparties and **7th March 2011**, the Court delivered a **Ruling** and dismissed the Applicants' application for temporary injunction as the Court held that they did not meet the conditions for grant of temporary orders as was established in the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973 (EA 358)**.

The above **Ruling** was delivered on **7th March 2011**, but instead of setting the matter down for hearing of the main suit so that the issues in dispute can be resolved or determined, the Plaintiffs/Applicants filed a **Notice of Motion** application dated **19th March 2013**, and sought for these orders:-

- 1. That this Honourable court be pleased to review, vary and or set aside the orders given by this Honourable court on 7th March 2011.**
- 2. That there be a temporary order of stay of the execution of the orders issued by this Honourable Court on 7th March 2011 pending the hearing and determination of this suit.**
- 3. That the cost of this application be provided for.**

The Applicants alleged that the Court on its **Ruling** delivered on **7th March 2011** held that the 2nd Defendant is the valid owner of the suit land without verifying how the two titles were acquired. The Plaintiffs contended that the said holding amounts to an error apparent on the face of the record which warrants an order of review.

The application is supported by the affidavit of **Muasya Kitheka**, the 1st Plaintiff herein. He averred that it is apparent that the 1st and 2nd Defendants have title deeds over the suit properties. However the validity of the two titles cannot be conclusively determined without an inquiry into how the two titles were obtained. That it was an error on the face of record for the Court to hold that the 2nd Defendant's title is valid merely because it was allegedly registered earlier. He also averred that the 1st Defendant had initiated the process of evicting them

from the said parcel of land and thus the order of temporary stay.

The application was supported by the 1st Defendant, **Samuel Maina Njoroge**, who alleged that he sold the parcels of land to the Applicants herein. However, the said application is opposed by the 2nd Defendant who averred that there was no mistake apparent on the face of record to warrant review of the orders granted on **7th March 2011**.

The Court directed the parties to file their **written submissions** in support of their respective positions which they dutifully did. The Court had on **30th July 2014**, directed that Ruling would be delivered on Notice. However the instant file was erroneously filed away in the Registry without being brought to the attention of the Judge until **7th February 2017**, when it was listed for Notice to Show Cause and thus the delay in writing of this Ruling.

The file was thereafter transferred to Thika Environment and Land Court on **16th March 2017**, when the Court reserved the Ruling on Notice.

The Court has carefully considered the court record and the written submissions. The Court has also considered the provisions of **Order 45 Rule 1** of the **Civil Procedure Rules**, which provides:-

(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.

From the above provisions of law, it is apparent that the court has discretion to review an order or decree passed by the court. However, the said discretion as usual must be exercised judicially. From the above provisions of law, the application for review must be brought up upon:-

i. Discovery of new and important matter or evidence which was not within the knowledge of the Applicant.

ii. On account of some mistake or error apparent on the face of record.

iii. For any other sufficient reasons.

iv. Application must be made without unreasonable delay.

From the Applicant's averments and submissions, they have stated that the Court erred in finding and holding that the 2nd Defendant held a valid title without having heard evidence from any of the parties. In essence the Applicants alleged that the determination of who is the valid title holder was done at the interlocutory stage without calling evidence.

The above stated averment is a ground for Appeal but not for review. The Applicants have not shown any **discovery of new and important evidence** which was not within their knowledge when they argued their application dated **10th November 2010**.

Further, the court gave reasons why it dismissed the Applicants' **Notice of Motion** dated **10th November 2010**. It had not met the threshold for grant of grant of injunctive orders as stated in **Giella...Vs...Cassman Brown & Co. Ltd**. There is no evidence that there were some mistakes or error apparent on the face of record. The Applicants have not given any other sufficient reasons to warrant the review of the orders given by the Court on **7th March 2011**.

Further, there is an unreasonable delay in filing of this application. The **Ruling** was delivered on **7th March 2011** and application for review was filed on **19th March 2013**. That was after a **delay of almost 2 years**. The Applicants should have set the matter down for hearing of the main suit instead of delaying the hearing of the main suit through filing of an interlocutory application.

For the above reasons, the **Court finds the instant Notice of Motion** dated **19th March 2013 is not merited**. **The same is dismissed entirely with costs to the 2nd Defendant**.

This is a 2010 matter and should be concluded by end of this year.

For that reason, the parties are granted **leave of 30 days** from the date hereof to comply with Order 11 and thereafter come for mention before this Court for further orders on **15th May 2018** for further directions and taking of a hearing date.

It is so ordered.

Dated, Signed and Delivered at Thika this 13th day of April 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiffs/Applicants

No appearance for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open Court in the absence of the parties.

L. GACHERU

JUDGE

13/4/2018