



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ELC CIVIL CASE NO. 106 OF 1999

MERU CENTRAL FARMERS CO-OPERATIVE

UNION AND 10 OTHERS.....PLAINTIFFS

VERSUS

JOSPHAT KITHINJI MBERIA.....DEFENDANT

RULING

1. Applicant defendant is seeking for a review of the orders of 27.11.2000 to have the summary judgment entered herein set aside vide his application dated and filed on 10.5.2018.
2. The grounds in support of the application are that there are sufficient reason to warrant review as there was a case in Chuka District Magistrate's court land case no. 9 of 1955 which the court did not consider.
3. The applicant has filed a supporting affidavit where he avers that he is settled on the disputed land which was gathered by his father. He avers that in the interest of justice, the application should be allowed.
4. The application was served upon the plaintiffs directly but no response was filed.
5. Applicant has proffered these two authorities in support of his case

- CHUKA HIGH COURT SUCCESSION CAUSE NO. 49 OF 2016 JANE KAGIGE GEOFFREY & ANOTHER VS WALLACE IRERI NJERU & 2 OTHERS

- MERU HIGH CORUT CIVIL CASE NO. 99 OF 2003 NG'OLUA MWAINE VS ALEXANDER KAMATHI M'ITHILI

6. Section 80 of the civil procedure rules provides that:

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 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.

7. Order 45 of the civil procedure rules provides that:

“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”.

8. The application for Review ought to be brought forth without delay, there ought to be discovery of new and important matter, a claimant can state that there was mistake or error on the face of the record and finally an applicant can advance sufficient reason.

9. The judgment which applicant seeks to be reviewed was delivered on 27.11.2000. No reasonable or any explanation has been advanced as to why this application has been filed more than 17 years thereafter. In the case of **Jane Kagige Geoffrey and another (supra)** cited by the applicant, the court had stated that the application must be made timeously or without unreasonable delay. In that case the court had found that applicant had been aware of contents of the subject ruling for a period of 7 months only and hence the application for review was allowed.

10. In the case of **Francis Origo & another vs Jacob Kumali Nansala Court of Appeal Eldoret Civil Appeal No. 149/2001**, the court upheld the ruling of the Commissioner of Assize where it was as follows; **“This application has been brought twenty years after the judgment and order sought to be reviewed were made. It does not only offend the principle that there must be an end to litigation, but it is also brought after inordinate and unreasonable delay. By no stretch of imagination can a 20 year delay be regarded as “Reasonable” considering that the reasons for the delay were poor legal advice and extra judicial interference. Time is now propitious to put this litigation to a permanent end and not to vex the respondent forever”.**

11. In **Gerald Mwithia vs Meru College of Technology ELC 141/1995 Meru**, while dismissing an application to set aside a judgment entered in 2001, I stated that there was **“prolonged and in excusable delay”**.

12. This is a case where defendant had filed a defence (on 29.11.1999), so he was aware of the matter. The decree herein is dated 12.9.2001 and the process of execution appears to have been undertaken thereafter. Defence counsel had also actively participated in the process of assessment of costs.

13. I find that the period of 17 years is prolonged and inexcusable and unreasonable delay in bringing forth this application.

Discovery of new and important evidence

14. Applicant has not stated that there is discovery of any new and important evidence which is a crucial ingredient in an application of this nature see **Francis Origo & another (Supra)**

Mistake or error

15. Applicant has not demonstrated that there was error or mistake apparent on the face of the record.

Existence of sufficient reason

16. In the case of **Ngolua Mwaine vs Alexander Kamathi** cited by the applicant the application for review was allowed as applicant had shown sufficient reason. This was on account of the fact that the court had found that the consent judgment was a conspiracy, a collusion between plaintiff and defendant of which the applicant was not a party. That is not the scenario in the instant suit. For the present applicant, his sufficient reasons are pegged on the existence of Chuka land case no. 9 of 1955 which is to be found in annexure JKMI. I have perused this document. It is titled **“in the District Magistrate’s court at Chuka land case 9/55 between Mberia Kiugu and Karia M. Karuata”**. The proceedings are as follows:

“Claim: I Mburago date of registration 7.7.1955. Date of hearing 30.8.1955. Judgment – for plaintiff with costs Shs.102/=

Court members:

1. Mwindi

2. Rufus”

17. Even if these proceedings were to be considered all over again, of what assistance would they be. The present plaintiff was not party to this case. One cannot also discern the nature of the case and the decision thereof. It is also not fathomable that this court can start to consider a case which is 63 years old!!!. I therefore find that there are no sufficient reasons for reviewing the judgment of 2000.

18. In conclusion, I find that the application is not merited. The same is dismissed with no orders as to costs”.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 28th NOVEMBER, 2018

IN THE PRESENCE OF:-

C/A: Kananu

Mwiraria holding brief for Mwanzia for applicant present

HON. LUCY. N. MBUGUA

