REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 310 OF 2003

IN THE MATTER OF THE ESTATE OF NTHULI MULOKI (DECEASED)

BONIFACE MUTUA KITUNGU.....PETITIONER/APPLICANT

VERSUS

SAMSON KITOTO MUIA & 13 OTHERS.....OBJECTORS/RESPONDENTS

RULING

The Application

The Petitioner has filed an application by way of a Chamber Summons dated 3rd July 2015 seeking the following orders:

a. That the Court be pleased to review , set aside and/ or vary orders given on 11th February 2009 by Hon. Justice Isaac Lenaola.
b. That the Court be pleased to grant eviction orders against the Respondents herein from Plot Nos. 392, 706, 711, 712, 715, 714, 707, 451, 709, 722, 705, 717 and 708 Mangani Adjudication section.

The grounds for the application are that this Court give an order revoking the confirmed grant given to the Petitioner, and also found that the Objectors do not originate at or come from the family of the deceased and had no interest in his Estate. Therefore, that there is an error apparent on the face of the record. Further, that the revocation was made for the reason that the property of the deceased was situated within the adjudication section and that it required consent of the Makueni District land adjudication and settlement officer. The Petitioner sated that he has since obtained consent from the said Makueni District land adjudication and settlement officer.

The Petitioner in his supporting affidavit sworn on 3/7/2015 stated that the grant was confirmed on 20/05/05 by Wendoh J., who also confirmed the property distribution and that the same was served on the Makueni District Land Adjudication & Settlement Officer who declined to transfer the true beneficiaries names. The Petitioner argued that the adjudication started in 1994, but that judgment giving the disputed property to Nthuli Muloki (Deceased) was in 1967, and that the Mangani Administration and his clan family chairman gave him an authority letter to administer the estate of Nthuli Muloki (Deceased) and remove the strangers who had intermeddled. Further, that the Objectors have their grandfather's land, and the Petitioner relied on search certificates of various parcels of land which were attached to a supplementary affidavit he swore and filed in Court on 15th February 2008 .

According to the Petitioner, Lenaola J. revoked the confirmed grant because it was within an Adjudication section, and in his ruling remarked that Objectors were illegally on the plots in dispute, and

further said that their plots are in Ngoni, Mukimwani and Waia. The Petitioner stated that he went to Makueni District Land Adjudication and Settlement Officer who invited both parties and consequently gave a consent letter dated 28th May 2014 allowing him to recover by court process the disputed plots . The Petitioner annexed a copy of the said letter.

The Response

The Objectors relied on a replying affidavit sworn by the 6th Objector on 6th August 2015. The Objectors denied that there is an error apparent on the face of the record to warrant a review of the ruling by Lenaola J., that it was not true that the court revoked the grant because the land was in an adjudication section, and that the issue before the court was whether the said lands belonged to the deceased. Further, that the Petitioner has opted for an appeal and the procedure of review is therefore not available to him, and a Notice of Appeal filed by the Petitioner on 15th February 2009 was attached. It was also averred that the application has been brought after inordinate delay as the ruling sought to be reviewed was delivered on 11th February 2009.

The Objectors averred that the they are the *bona fide* owners of the land parcels number 392, 706, 711, 712, 715, 714, 707, 451, 709, 722, 705, 717 and 708 in Mangani adjudication section, and they attached a copy of a letter by an adjudication officer confirming ownership. Further, that the Petitioner has not annexed anything to show the said parcels of land ever belonged to the deceased, and that the search certificates he referred to do not relate to the Objectors' parcels of land.

It was also contended that the dispute as to whether the said parcels of land belonged to the deceased can only be determined in civil proceedings, and that this court is the wrong forum for determination as to ownership of the land.

The Issues and Determination

The Court directed the Petitioner and Objectors to canvass the application by way of written submissions. The Petitioner filed two sets of submissions on 6th October 2015 and 7th January 2016. The Objectors submissions were filed in Court on 27th October 2015. The Petitioner in his submissions gave a history of this dispute, and provided a sketch map of the lands in dispute while reiterating the arguments in his pleadings, and also submitting that the provisions of the Land Adjudication Act at section 30 do not prevent enforcement of execution of a court order concerning land in an adjudication section.

The Objectors in their submissions reiterated the arguments made in their pleadings, and relied on Order 45 of the Civil Procedure Rules which it was stated applies by virtue of Rule 63 (1) of the Probate and Administration rules. Various judicial authorities were also cited by the Objectors.

I have read and carefully considered the pleadings and submissions made by the Petitioner and Objectors. The first issue to be decided is whether the ruling delivered by this Court (Lenaola J.) on 28th May 2014 is amenable to review. The provisions of Order 45 of the Civil Procedure Rules avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. The said Order is one of the Orders of the Civil Procedure Rules that is listed in Rule 63 of the Probate and Administration Rules as applying to succession causes.

Order 45 rule 1 of the Civil Procedure Rules provides the circumstances under which an order can be reviewed. The said provisions state that:

" any person considering himself aggrieved by:

a. **a decree or order from which an appeal is allowed but from which no appeal has been preferred or**
b. **a decree or order from no appeal is hereby allowed**

and 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 my apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

It was argued by the Objectors that the Petitioner had filed a Notice of Appeal and the option of review is therefore not available to him. The effect of filing a Notice of Appeal was exhaustively discussed in **Christopher Musyoka Musau vs. Daly & Figgis, Nairobi High Court Civil Division Civil Case No. 1100 of 2003** where Odunga J. stated s follows:

> **"Before I deal with the merits of the application, I wish to deal with the preliminary issues raised. It is clear from the foregoing that the review remedy is only available to a party who is not appealing. See Orero vs. Seko [1984] KLR 238. Who, then is a party who is appealing. There are two contradictory decisions from the Court of Appeal. In Kisya vs. Attorney General (supra) the Court held that a party who has filed a notice of appeal cannot apply for review but if application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending. However in Yani Haryanto vs. E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992 the Court of Appeal was of the following view:**
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> > **"The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed...What rule 4(1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal".**
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> **In light of the two decisions emanating from the same Court of Appeal, this Court is entitled to adopt either of the two decisions. In my view the Haryanto Case reflects the true legal position. A Notice of Appeal is not an appeal but just a formal notification of an intended appeal. In fact under Rule 77(1) of the Court of Appeal Rules it is provided that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. Clearly, a strict reading of this rule contemplates a situation where a Notice of Appeal may even be served before the same is lodged. Where that happens I cannot see how such a Notice which has not even been lodged can by any stretch of imagination be equated to an appeal. Accordingly, the mere fact that a party has given a Notice of intention to appeal does not amount to an appeal for the purposes of review…**

It is therefore my finding that as long as an appeal has not been instituted in accordance with Rule 82 of the Court of Appeal Rules, a party who has intimated his intention to appeal by filing a Notice of Appeal is not thereby barred from applying for review of the same decision which is the subject of the said Notice. Under Rule 82 of the Court of Appeal Rules, an appeal is instituted by lodging in the appropriate

registry within sixty days of the date when the notice of appeal was lodged, a memorandum of appeal, the record of appeal, the prescribed fee and security for costs. It has not been shown that the Petitioner had carried out the said actions in this case.

Coming to the substantive arguments by the Petitioner, Order 45 Rule 1 (b) of the Civil Procedure Rules spells out conditions that must be met in an application for review of a decree or order as follows:

i. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,
ii. mistake or error apparent on the face of the record,
iii. or for any other sufficient reason,
iv. the application must be made without unreasonable delay.

The main ground raised by the Petitioner is that there was an error on the face of the record in the ruling delivered by Lenaola J. on 11th February 2009, and he referred to paragraph 4 of the said ruling in this regard, which stated as follows:

> **"The only answer I have seen to this clear document is this; that the Applicants have no relationship with the deceased and they do not own the plots in issue. That their parcels of land as inherited from their grandfathers is in Ngoni Location, Waia Location and Mukimwani Location within Kisau Division. That if they own the parcels of land, then they obtained the same fraudulently."**

It is my finding that paragraph 4 of the ruling by Lenaola J. has to be read together with paragraph 3 of the same ruling, which set out the contents of a letter dated 12th April 2006 by one E.N. Kithumbu, the District Land and Adjudication and Settlement Officer of Makueni County relied upon by the Objectors herein, which confirmed who were the registered owners of the land parcels in dispute herein. A plain reading of paragraph 4 of the ruling is that the Judge was setting out the Petitioner's answer to the said letter, and it cannot be interpreted to mean that the said paragraph was a finding by the honourable Judge.

The finding of the Judge are on the contrary to be found in paragraphs 6-7 of the ruling wherein he held as follows:

> **"6. In the present case, the ownership of the plots are disputed and yet there is evidence that the land is situated in a land adjudication section and that adjudication may not have been completed. It that can be the case, it was an error of both fact and law to confirm the grant without establishing that rights as envisaged under the Land Adjudication Act have been conferred on the deceased and/or his successors. Without doing so, this court may then have acted to overlook the dispute resolution mechanisms in that Act by conferring ownership rights on the Petitioner and his chosen co-beneficiaries without the Applicants being heard on their claim.**
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> **7. That being my holding, I see no reason to go further and address the numerous historical issues raised by the Petitioner. There is good reason to annul and revoke the grant issued and confirmed by Wendoh J., on 29.4.2004. It is so ordered."**

The Petitioner also sought to rely on various search certificates which he had earlier annexed in a supplementary affidavit he filed in Court on 15th February 2008 to bolster this argument. The Court of Appeal in **National Bank of Kenya Ltd v Njau, (1995 – 1998) 2 EA 249** which was also followed in the case of **Nyamogo v Nyamogo Advocates v Kogo, (2000) 1 EA 173**, held that an error should be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points of which there may conceivably be two opinions. It is thus not open to the Petitioner to try and establish the error on record by relying on documents extraneous to the ruling delivered by Lenaola J. on 11th February 2009.

Lastly, the Petitioner sought to rely on a letter dated 28th May 2014 from the District Land Adjudication and Settlement Officer of Makueni Adjudication Area, which he claims has since given him consent to recover the said parcels of land. The said letter reads as follows:

> **"REF: CONSENT TO FILE A SUIT IN COURT FOR THE RECOVERY OF P/NOS. 392, 706, 711, 712, 715, 714, 707, 451, 709, 722, 705, 717 AND 708 – MANGANI ADJUDICATION SECTION**
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> **Your letter dated 28th February, 2014 refers.**
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> **I the District Land Adjudication Officer for Makueni Adjudication Area do hereby grant you consent under section 30(1) of the Land Act Cap 284 to file a suit in court for the recovery of the above mentioned parcels of land in Mangani Adjudication Section, Mbooni East Sub County.**
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> **P. K. NDUATI**
>
> **DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER**
>
> **MAKUENI ADJUDICATION AREA"**

For purposes of review of a ruling, the said letter cannot qualify as new evidence, as the material time under Order 45 Rule 1 with regard to the existence of the new evidence is the time when the decree was passed or the order made, and that such evidence was not within a person's knowledge or could not be produced by him. This rule therefore requires that the new evidence or matter being relied on should have been in existence at the time of the ruling by Lenaola J., and does not therefore apply to any evidence or facts that arise after the orders by the Judge were made. The letter relied upon by the Petitioner as new evidence was written on 28th May 2014 long after the ruling by Lenaola J. had been delivered, and does not therefore qualify as new evidence within the meaning of Order 45 Rule of the Civil Procedure Rules.

The second issue before the Court is whether the eviction orders sought by the Petitioner can issue. Eviction orders are final orders in the nature of a mandatory injunction, and the principles for the grant of mandatory injunctions were set out by the Court of Appeal in **Kenya Breweries Ltd and Another v Washington Okeyo (2002) 1 E.A. 109,** wherein it was held that that there must be special circumstances shown over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

As to what constitutes a *prima facie* case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR stated** as follows:

> "**a prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

The question I must therefore answer is whether the Petitioner has established a *prima facie* case and special circumstances as required by law. It is not in dispute that the parcels of land that are the subject matter of the application herein are the subject of an adjudication process, and ownership over the same is disputed as between the Petitioner and Objectors. In addition the Objectors have provided evidence from an adjudication officer stating that the said parcels of land belong to them, while the Petitioner has not provided any evidence of ownership of the said land by the deceased Nthuli Muloki.

The letter the Petitioner produced dated 28th May 2014 from the Makueni District Land Adjudication and Settlement Officer was given pursuant to section 30(1) of the Land Adjudication Act(Cap 284), which bars a person from instituting civil proceedings concerning land in an adjudication area before the

adjudication is final, unless express consent is given to do so by an adjudication officer. It therefore did not grant the Petitioner any rights over the disputed land.

In addition, the judgment relied on by the Petitioner given by the Magistrates Court at Uuani in Civil Case No L. 35 of 1967 delivered on 7th September 1967 which he annexed to his application, does not involve the said parcels of land or the Objectors and the deceased, and appears to have been on a boundary dispute. Lastly, as the grant issued to the Petitioner still stands revoked, the Petitioner cannot bring any suit with respect to the said parcels of land on behalf of the estate of Nthuli Muloki (Deceased). The prayers for eviction orders cannot therefore issue as the Petitioner has not met the threshold for their grant.

The Petitioner's Chamber Summons dated 3rd July 2015 is therefore found not to have merit for the foregoing reasons, and is hereby dismissed.

There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 20th day of April 2016.

P. NYAMWEYA

JUDGE