



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 213 OF 2013

NOORFATMA MOHAMED HAJI ABDULLA1ST PLAINTIFF

ABDULLA MOHAMED HAJI ABDULLA.....2ND PLAINTIFF

-VERSUS-

ASLAM MOHAMED HAJI ABDULLA.....DEFENDANT

RULING

(Application for review; principles to be considered; applicant having been sued by the respondents over ownership of certain property; respondent's case being that the suit property was family property held jointly by their late father and uncle in equal shares; respondents contending that the transfer of the property to the applicant was thus unlawful and it should be declared that it is held in their trust; applicant's case being that he bought the half share of his uncle and the half share of their late father was transferred to him by their mother; court assessing the evidence and finding no proof of purchase of the uncle's share and finding that transfer by their mother was effected after her death; court delivering judgment in favour of the respondents; applicant now applying for review on basis that he now has evidence of the agreement and transfer from his uncle and a receipt showing the purchase; respondents pointing out that the documents, save for the receipt, were tendered in as exhibits by the applicant thus cannot constitute new evidence; no demonstration of when the receipt was received by the applicant and that he had no knowledge of it when the case was heard; application also filed after decree has been executed and title issued to the respondents hence applicant guilty of unreasonable delay; application dismissed with costs)

1. The application before me is that dated 12 February 2021 filed by the defendant. The principal prayer in the application is prayer (4) thereof which seeks orders to review the judgment delivered on 21 September 2020 and enter judgment in favour of the applicant as per the counterclaim. The application is opposed.

2. To put matters into context, the respondents commenced this suit through a plaint filed on 25 September 2013. They pleaded to be siblings with the defendant/applicant and that together they were 11 siblings. They averred that their father Mohamed Haji Abdulla Ebrahim (Mohamed) and his brother Sadiq Haji Abdulla Ebrahim (Sadiq) were joint owners of the land parcel Mombasa/Block XVII/1039 on which was built a house. Upon the death of their father, his share was taken by his wife, Sairabanu Mohamed Haji Abdulla (Sairabanu) as trustee for all the parties. They pleaded that on 2 November 1987, Sadiq purported to transfer his half share in the property to the applicant. They contended that this transfer was illegal because the consent of the beneficiaries for whom Sairabanu was trustee was not sought or given. They pleaded that Sadiq died intestate in 1993 and did not leave a spouse or any children, and they are all therefore entitled to be beneficiaries of his estate. They further pleaded that upon the death of their mother (Sairabanu), the applicant unlawfully transferred to himself the half share that she held. They argued that as children of Mohamed and Sairabanu, they were entitled to a share of this half share that Mohamed held. In the suit, they inter alia sought orders for a declaration that the applicant holds the suit property in trust for all his siblings including the plaintiffs.

3. The applicant filed a defence and counterclaim. He pleaded that Sadiq did not need the consent of the respondents so as to transfer his half share to him (applicant). He further pleaded that Sairabanu effected a transfer to him in the full knowledge of the respondents. He wondered why they took so long to file suit if indeed the transfer was fraudulent. In the counterclaim, he sought orders of eviction against the respondents from the suit property. At the hearing, the case of the applicant was that he purchased the half share of Sadiq for the sum of Kshs. 150,000/= and that Sadiq signed the transfer form. In her judgment delivered on 21 September 2020, the judge noted that the applicant did not produce proof of payment and also admitted that the transfer document did not bear the date of presentation. On the share of his father, the applicant had stated that his father had taken a loan which he was unable to pay and that the property was at risk of being sold. The court noted that he did not have any document evidencing a loan or any agreement reached between himself and his late father. The court further noted that Sairabanu died on 15 May 1998 but that the applicant got title on 25 May 2000. The court found that the applicant had not presented the transfer document to show that it was executed before the demise of Sairabanu. The court further observed that in Sairabanu's application for a grant in respect of the estate of the late Mohamed, she deposed that the children were entitled to 1/14th share in the whole of the net estate and that the applicant did not provide evidence that he objected to this mode of distribution. The court also held that there was

no evidence of any consent provided by the applicant to show that the respondents had conceded to the transfer. Consequently, judgment was entered for the respondents and the counterclaim of the applicant was dismissed. There were no orders as to costs given the relationship of the parties.

4. I am handling this application for review for reason that Omollo J was transferred to another station. The application is based on the grounds inter alia that at the time of hearing of the suit, the applicant did not produce crucial documents in support of his case which documents were not available at the time. In his supporting affidavit, the applicant has observed that the judge in her judgment noted that there was no proof of the averments that he had made and therefore found in favour of the respondents. He deposed that at the time of hearing, he did not produce crucial documents as they were not available at the time. He deposes that he has since retrieved the crucial documents which ought to be considered by the court for a just determination. He avers that he has found copies of agreement between himself and Sadiq in support of the claim that he purchased Sadiq's share of the suit property. He further avers that he has found copies of the transfer of the said share duly registered at the lands office. He states that he also has in his possession copies of receipts to prove payment of the loan advanced to his father upon which the other share was transferred to him. He is thus of the view that he is entitled to the prayer for review.

5. The application is opposed by the replying affidavit of Noorfatuma Mohamed Haji Abdulla, the 1st plaintiff. She has justified the judgment of the court. She has also averred that the applicant has not demonstrated that he has discovered new evidence that was not within his knowledge and that the evidence now being offered could have been produced at the time the judgment was entered. She points out that the applicant has not cared to explain when this new evidence was discovered and why it has taken him 5 months since the judgment to present this application. She contends that the application has been filed after unreasonable delay. She has deposed that they already applied for registration of the decree following which the Land Registrar issued them with a new title to the suit property despite the applicant not surrendering his unlawful title for revocation in compliance with the judgment. She has further deposed that the applicant has not annexed to his application the new evidence that he now wishes the court to consider.

6. A supplementary affidavit was filed by the applicant. In this affidavit, he attached copies of the agreement, transfer and receipt, which are the documents that he states he inadvertently left out in his previous affidavit.

7. I have seen the submissions of both Mrs. Kyalo, learned counsel for the applicant, and Ms. Moka, learned counsel for the respondents. In a nutshell, Mrs. Kyalo submitted that there is discovery of new evidence which could not be produced and/or was not available at the time of the hearing. She submitted that the evidence was obtained by the applicant after the delivery of the judgment and that they are crucial documents for the just determination of the matter. She submitted that the application for review has been made without unreasonable delay and that it is made in the interests of justice. She submitted that failure to consider the applicant's evidence will amount to an injustice and will condemn the applicant unheard. She relied on the case of *Standard Chartered Financial Services Limited & 2 Others vs Manchester Out-Fitters Limited (2016) eKLR*. On her part, Ms. Moka first submitted that the supplementary affidavit has been filed without leave. She also pointed out that the submissions of counsel for the applicant were filed late and should therefore be disregarded. She raised issue that the applicant has not annexed to the application a copy of the decree sought to be reviewed and the effect is to render the application fatally defective. She relied on the case of *Suleiman Murunga vs Nilestar Holdings Limited & Another (2015) eKLR*. Without prejudice to the foregoing, she submitted that no new evidence has been adduced to warrant review. She submitted that the Memorandum of Agreement and Transfer annexed to the affidavit were produced by the applicant at the hearing of the suit through the applicant's further list of documents dated 20 September 2015 and filed on 28 September 2015. On the receipt, she submitted that the applicant has not demonstrated that this could not be obtained during the trial of the suit after exercise of due diligence. She relied on the case of *Republic vs Advocates Disciplinary Tribunal ex parte Apollo Mboya (2019)eKLR*.

8. This is an application for review and I stand guided by Order 45 Rule 1 which 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.

(2) *A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.*

9. It will be seen from the above, that to entitle one to a review, the party needs to demonstrate the following :-

(i) *That there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made; or*

(ii) *That there is some mistake or error apparent on the face of the record; or*

(iii) *That there is sufficient reason to warrant a review of the judgment or order.*

(iv) That the application has been made without unreasonable delay.

10. The current application is not founded on the ground that there is an error apparent on the face of the record, and neither is it grounded on other reason, but is solely based on the reason that there is discovery of new evidence. This purported new evidence is disclosed in the supplementary affidavit filed by the applicant. I am aware that there is an objection on this affidavit on the basis that it was filed without leave. Leave to file a supplementary affidavit is certainly required by dint of the provisions of Order 51 Rule 14 (3) of the Civil Procedure Rules which is drawn as follows :-

14 (3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit.

11. No leave was sought in this instance and thus the supplementary affidavit, styled "further affidavit" is liable to be struck out. Without it, the applicant will not have tendered any of the new evidence and the application automatically fails.

12. But even with the supplementary affidavit considered, the application will still fail. The respondent has pointed out that two of the documents in the supplementary affidavit are actually in the list of documents dated 20 September 2015 and filed on 28 September 2015. I have confirmed that this is actually correct save for the receipts. On 25 June 2019, the parties entered into a consent allowing the applicant to admit the said documents as exhibits. It follows that the agreement and transfer said to be new evidence, is actually not new evidence, but was evidence that the applicant already produced before the court proceeded to write the judgment. If the applicant thought that the court was wrong in how it construed the documents, that would be an error in the assessment of evidence and the avenue is to appeal. An appellate court has jurisdiction to review the evidence tendered and come to its own findings of the same.

13. The only evidence that was not availed before court was the receipts. Still this cannot be allowed to found an application for review unless the applicant demonstrates that he had no knowledge of this document and he could not have been aware of it despite exercise of due diligence such that he was unable to avail it at the hearing of the suit. I have gone through the affidavits of the applicant and nowhere does he state that he was not aware of the existence of this receipt. If at all he was not aware of it, he does not state when he became aware of the document, so as to demonstrate that it was not within his knowledge when the suit was heard, or that he could not be aware of the document despite exercise of due diligence. In fact, if the receipt was issued to him, then it follows that he must have been aware of the document all this time. Nowhere does he state that this receipt was not issued to him but to somebody else who concealed it from him. I am not thus persuaded that the applicant has met the threshold required in Order 45 regarding new evidence.

14. I am also of the view that the applicant fails the test of delay. This application was filed close to five months after delivery of the judgment. Within those five months, the judgment of the court was executed and there is already a new title issued to the respondents. There is no explanation as to why the applicant did not come to court earlier. The application is thus also subject to dismissal for having been filed after unreasonable delay.

15. For the above reasons, I find no merit in this application and it is hereby dismissed with costs.

16. Orders accordingly.

DATED AND DELIVERED THIS 27TH DAY OF JANUARY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.