



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT HOMA BAY

ELC CASE NO. 11 OF 2021

(FORMERLY MIGORI ELC CASE NO. 801 OF 2017)

JOSEPH OTIENO OCHERE.....PLAINTIFF/RESPONDENT

VERSUS

AKONGO OWINO.....DEFENDANT/APPLICANT

RULING

1. On 5th July 2021, the defendant/applicant namely Akong'o Owino (the applicant herein) through the firm of G. M. Nyambati and Company Advocates mounted a Notice of Motion of date under, inter alia, Order 22 Rule 22, Order 45 Rules 1, 2 and 3 (2) of the Civil Procedure Rules, 2020, sections 34 and 80 of the Civil Procedure Act Chapter 21 Laws of Kenya (Hereinafter referred to as the application). He is seeking the orders hereunder;

a) Spent

b) Spent

c) Spent

d) **THAT** this Honourable Court be pleased to vary, review and set aside its ruling delivered on 26th May, 2021 and 14th May 2018 respectively.

e) **THAT** this Honourable Court be pleased to cancel and or nullify and resultant subdivisions arising from LR. GEM/KAJULU/37 (the suit land herein)

f) **THAT** this Honourable Court be pleased to make any other Order as it may deem Just and Expedient.

g) **THAT** costs of this Application be in the cause.

2. The application is founded upon the applicant's supporting affidavit of 24 paragraphs sworn on even date and the documents marked as "AO-1" to "AO-7" and annexed thereto. The documents include: Judgement delivered in August 1997 and decree issued on 2nd July 1998 (AO-01) transfer and green card of the suit land (AO-05) and this court ruling delivered on 14th may 2017 (AO-07). The application is also based on grounds (a) to (k) set out on it's face.

3. Briefly, the applicant's complaint is that on 26th May 2021, this court rendered a ruling dismissing the applicant's application dated 27th October 2021 which was intent to cure a defect in the ruling of the court in the application delivered on 14th May 2018 conferring the ownership of the suit land, LR No. Gem/Kajulu/37 in favour of the plaintiff/Respondent, Joseph Otiemo Ochere. That by the judgment of Justice Mbaluto rendered in 1997 and a decree issued on 2nd July 1997, the respondent's claim was dismissed as the court found that the respondent had obtained registration over the suit land by fraudulent means. That this court's rulings delivered on 14th may 2018 and 26th May 2021 seem to be contrary to the judgment. That in light of the apparent error on the face of the record and new evidence thereon, the said rulings be reviewed and or set aside in the interest of justice.

4. The respondent appears in person pursuant to a notice of intention to act in person dated 28th October 2021 and filed on even date. Previously, he was represented by the firm of Odinga and Khabuli Company Advocates.

5. By a 24 paragraphed replying affidavit sworn on 21st July 2021 and duly filed in court on 26th July 2021, the respondent termed the

application incompetent, misconceived, malicious, a waste of the court's time as the matter is clearly res judicata, an abuse of the court process and purely intended to deny him justice. He deposed, inter alia, that;

'It should be noted that the Defendant/Applicant has not come to court with clean hands as he is yet to vacate the suit parcel 3 years down the line despite there being a ruling against him and is therefore blatantly in violation of the court orders and his only intention is to waste the court's time with this matter and deny me justice'.

6. The respondent further deposed that there is no new evidence availed in this matter which was fully litigated. That there is inordinate delay in commencing the application. That this matter should come to an end as shown by green card of the suit land (JOO-1) and this court's ruling delivered on 26th May 2021 (JOO-2) and that this court is functus officio as per the court's ruling on 31st January 2011 (JOO-3).

7. Originally, the application was lodged at Migori Environment and Land Court. On 16th September 2021, it was transferred to this court upon its establishment, for further hearing and determination in the spirit of access to justice as stipulated under **Articles 6 (3) and 48 of the Constitution of Kenya, 2010**.

8. The application was heard by way of written submissions and oral highlights of the same further to the orders of this court dated 5th July 2021 and 5th October 2021 respectively; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014**.

9. In that regard, learned counsel for the applicant filed an 11-paged submissions dated 23rd July 2021 on 28th July 2021 giving the background of the matter, the present application and the ruling of this court delivered on 14th May 2018 regarding the application dated 27th June 2017. That the court erroneously held that the respondent was the registered proprietor of the suit land as captured in order enumerated as (d) therein. Counsel framed six (6) issues for determination including whether the orders of Justice Makhandia (now JA) that reviewed the orders of Mbaluto J, conferred any proprietary rights over the suit land and whether this court has the jurisdiction to review its orders of 14th May 2018 and 21st May 2021.

10. Counsel discussed the said issues in favour of the orders sought in the application which he termed merited and brought without unreasonable delay. To reinforce the submissions, counsel cited **Article 50 of the Constitution, section 13 of the Environment and Land Court Act, 2015 (2011) and Order 45 (1) (supra)**, the case of **Nyamongo and Nyamongo-vs-Kogo (2001) EA 174** and the decision in **Muyondi-vs-Industrial and Commercial Development Corporation and another (2006) 1 EA 243**, among others.

11. On his part, the respondent filed a 9-paged submissions dated 14th September 2021 on 15th September 2021 giving the background of the application including the application and the replying affidavit. Four (4) issues for determination, among them, whether there is sufficient reason to warrant a review and whether the review was brought in good time, are identified and analyzed in the negative therein. He urged the court to find the application fatally defective for failure to annex the ruling of 26th May 2021 hence, it be expunged together annexed documents from the record and dismiss the application with costs.

12. To buttress the submissions, the respondent referred to **section 80 and Order 45 (1) (supra)** with regard to review. He also relied on authoritative pronouncements, among them, **Francis Njoroge-vs-Stephen Maina Kamore (2013) eKLR and Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates-vs-Salama Beach Hotel Limited and 3 others (2017) eKLR**.

13. On 8th November 2021, learned counsel for the applicant highlighted the submissions and urged the court to allow the application. Counsel orally submitted that the court (Mbaluto J) rendered judgment that the respondent had obtained documents fraudulently to evict the applicant from the suit land. That since the suit initiated by the respondent against the applicant was dismissed, there is an error apparent on the record thus, the application be allowed accordingly.

14. On the other hand, the respondent orally restated his submissions. He asserted that he acquired the suit land on 22nd October 1973 and obtained title deed thereto on 16th November 1977. That he sued the applicant for trespass thereunto. That he was awarded the suit land per a ruling delivered by Makhandia J (now, JA) on 31st January 2011 in Kisii HCCC No. 177 of 1991. Further, he termed the application devoid of merits and implored upon this court to dismiss the same.

15. I have thoroughly read and considered the application, the replying affidavit, the written and oral submissions including the issues framed as well as the authorities cited therein in their entirety. So, I approve the issues identified in the applicant's submissions and are hereby condensed to whether the application has attained the conditions for the grant of the orders sought therein.

16. The provisions of the law under which the application was commenced are all borne in mind. The application is founded on grounds (g) and (h) namely;

- a) THAT there is an error apparent on the face of the record to warrant a review of the said orders for the interest of justice.
- b) THAT there is now new evidence on record to confirm that indeed the plaintiff/respondent obtained registration over the suit property by fraudulent means which is contrary to the provisions of Article 40 of the Constitution of Kenya 2010.

17. Regarding new and important matter of discovered not within the knowledge of the applicant, I note the assertion by the applicant; see also the decision in **Muyodi case (supra)**. The respondent's submissions with regard to the ruling delivered on 31st January 2011 affirm

18. In the case of **Kaiza-vs-Kaiza 2009 KLR 499**, it was held that not every new fact would qualify for review. That the application must be clear and specific upon the basis made that:

a) due diligence was exercised and

b) the fact was not within the knowledge of the applicant or could not be produced by him at the time the court made the orders.

19. At page 7 of the judgment delivered in 1997, the court (**Mbaluto J**) observed that the Applicant was in possession and occupation of the suit land. That the respondent found him thereon. That the respondent committed several criminal offences in connection with the matter. Therefore, the court determined the respondent's claim thus;

“His claim lacks merit and is dismissed with costs.”

20. The respondent's claim against the applicant was for eviction, permanent injunction and mesne profits. Pursuant to its dismissal, a decree was issued on 2nd July 1998.

21. By an application dated 20th August 1998, the applicant sought that the Executive officer of this court be authorized to sign transfer documents of the suit land to him. Surprisingly, the application was allowed by the orders of the court issued on 5th November 1998. However, on 31st January 2011, the Respondent's application dated 15th September 2009 for review of the orders issued on 5th November 1998, was allowed accordingly.

22. In reviewing the orders, the court was emphatic that;

“It is as clear as snow that the order given by Mbaluto J. dated 5th November 1998 was made in error. In other words there is an error apparent on the face of the record. That order could only have been made if there was judgment and decree to that effect in favour of the defendant.”

23. Again, the respondent mounted an application dated 27th June 2017 seeking, the following orders:

a) **THAT** all the transfer documents for transfer of land parcel no GEM/KAJULU/37 signed by the HIGH Court executive officer pursuant to the orders of Justice TOM MBALUTO and dated 5th November 1998 be rescinded recalled and annulled.

b) **THAT** all the entries made on the register of land parcel No. GEM/KAJULU/37 pursuant to the orders of justice, Tom Mbaluto dated 5th November 1998 be cancelled and annulled.

c) **THAT** LAND PARCEL NO GEM/KAJULU/37 reverts to the registration status it was before the entries made pursuant to the orders of 5th November 1998.

d) **THAT** there be restitution of the plaintiff/applicant as the registered proprietor of all that parcel of land known as GEM/KAJULU/37.

24. On 14th May 2018, the court found the said application duly served on the applicant, unopposed and merited. The same was allowed in terms of orders (a) to (d) sought therein.

25. In an application dated 27th October 2020 filed herein on even date, the applicant sought review of the court orders made on 14th May 2018. By a ruling delivered on 26th May 2021, the application was disallowed with no order as to costs.

26. The principal bone of contention in this application concerns order number (d) granted on 14th May 2018. Can this Court review its rulings of 14th May 2018 and 26th May 2021?

27. Notably, Order No. (d) sought in the Notice of Motion dated 27th June 2017 is in line with order No. (c) sought therein and granted on 14th May 2018. Both orders are in consonant with the entry Nos. 4 and 5 of the green card /register of the suit land (JOO-1 and AO-05 herein) and as noted at paragraphs 6 and 2 above respectively and as pointed out at paragraph 42 of my ruling delivered on 26th May 2021 in this matter.

28. An error apparent on the face of the record as it was not supported by the pleadings, evidence, judgment and or decree, was borne in mind by the court as disclosed at paragraphs 21 and 22 hereinabove. Clearly, the application for review of the orders made on 14th May 2018 was also disallowed on 26th May 2021 as discerned at paragraph 25 hereinabove.

29. In the foregone, this Court cannot entertain the instant application. **Order 45 Rule (6) of the Civil Procedure Act Chapter 21 Laws of Kenya** reads:

“No application for review an order made on an application for a review of a decree or order passed or made and a review shall be entertained”.

30. As regards Order 6 sought in the application and in the spirit of sections 3 and 13 (7) (a) Environment and Land Court Act, 2015(2011) and as well as sections 1, 1A, 3 and 3A of the Civil Procedure Act, there shall be stay of execution of this ruling and or orders within the next 30 days from this date without further orders.

31. Thus, the Notice of Motion date 5th July 2021 and filed on even date be, and is hereby strike out.

32. Each party to bear own costs of the application.

DATED AND DELIVERED AT HOMA BAY THIS 25TH JANUARY 2022

G M A ONG'ONDO

JUDGE

In the presence of:

i) Mercy Otieno holding brief for G.M Nyambati, learned counsel for defendant/applicant

ii) The plaintiff/respondent in person.

iii) Okello, court assistant

G M A ONG'ONDO

JUDGE