



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCC No. 118 OF 2015

REUBEN KOTWA MEDA Alias

REUBEN KODIA MENDA.....PLAINTIFF

VERSUS

NORA KOLE.....1ST DEFENDANT

HENRY ANGATIA KOLE.....2ND DEFENDANT

RULING

1. Judgment was delivered herein on 21st April 2021, by N. A. Matheka J, in favour of the plaintiff as follows:

I find that the plaintiff has established his case on a balance of probabilities against the defendants and I grant the following orders;

1. A declaration that the applicant is entitled to land parcel No. Kakamega/Bushu/489 measuring approximately 11.79 acres or thereabouts by virtue of adverse possession.

2. A declaration that the applicant should be registered as the sole proprietor of land parcel No. Kakamega/Bushu/489 instead of the deceased.

3. A declaration that Kole Inzaniaji's (deceased) registration as the sole proprietor of land parcel No. Kakamega/Bushu/489 be cancelled and the respondent's being the administrators of the deceased estate do transfer the said land to the applicant within the next 90 (ninety) days from the date of this judgement, and in default, the Executive Officer of this honourable court do sign all relevant transfer documents in favour of the applicant to effect the transfer.

4. No orders as to Costs.

2. The plaintiff later filed Notice of Motion dated 26th July 2021, seeking the following orders:

1. [Spent]

2. THAT the judgment herein be reviewed to the extent that the orders should read –

1. A declaration that the Applicant is entitled to 11.79 acres or thereabouts comprised in title NO. KAKAMEGA/BUSHU/489 by virtue of adverse possession.

2. A declaration that the applicant should be registered as the sole proprietor of 11.79 acres or thereabouts comprised in land parcel No. Kakamega/Bushu/489 instead of the deceased.

3. A declaration that Kole Inzanijis (deceased) registration as the sole proprietor of land parcel No. Kakamega/Bushu/489 be cancelled and the Respondent's being administrators of the deceased estate do transfer 11.79 acres or thereabouts comprised in land parcel NO. Kakamega/Bushu/489 to the applicant within the next 90(ninety) days from the date of this judgment, and in default the executive officer of this honourable court do sign all relevant transfer documents in favour of the Applicant to effect the transfer.

3. THAT any other order that this Court may deem just and expedient to grant.

3. The application is supported by an affidavit sworn by the plaintiff/applicant. He deposed that there is an error on the record and that he is only entitled to 11.79 acres of land parcel No. Kakamega/Bushu/489. He added that unless the judgment is reviewed, the decree cannot be implemented.

4. The defendants opposed the application through grounds of opposition in which they took the position that they have filed an appeal against the judgment in the Court of Appeal being Civil Appeal No. 176 of 2021 and that the grounds raised in the present application are in dispute in the appeal. That the court is *functus officio* and will be sitting on its own appeal by entertaining the application.

5. The application was canvassed through written submissions. The applicant argued that there is an error apparent on record and that his claim is for 11.79 acres only yet the court awarded him the whole of land parcel No. Kakamega/Bushu/489. He added that the appeal by the defendants is not a bar to his application for review.

6. In response, the defendants argued that they are opposed to the entire judgment and are pursuing an appeal against it. Citing **Section 80** of the **Civil Procedure Act** and the case of **William Karani & 47 others v Wamalwa Kijana & 2 others [1987] eKLR**, they argued that the existence of an appeal is a bar to review.

7. I have considered the application, the grounds of opposition and the respective submissions. As was noted at the opening paragraph of this ruling, the judgment herein, which is what is sought to be reviewed, was rendered by my sister N. A. Matheka J. The Judge has since proceeded on transfer to another station. In the circumstances, the application falls for determination by me under **Order 45 Rule 2 (2)** of the **Civil Procedure Rules**.

8. The law relating to review is found at **Section 80** of the **Civil Procedure Act** which provides:

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

(b) 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. [Emphasis supplied]

9. Additionally, **Order 45 Rule 1** of the **Civil Procure Rules** makes further provisions on review as follows:

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. [Emphasis supplied]

10. The twin provisions of **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procure Rules** make it clear that the existence of any appeal against a decree or order is a bar to any review. The bar applies across the board and is not limited only to the party appealing. In my understanding, that universal application makes a lot of sense; it gives the appellate court room to consider and determine the appeal and avoids a situation where the appellate court would potentially render a decision on a decree or order that no longer exists, having been subsequently altered by an order made upon an application for review.

11. Thus, it is neither permissible nor appropriate that an appeal and an application for review in respect of the same decree or order be pursued concurrently. Where an appeal exists, the matter sought to be remedied by review must merge in the appeal. See **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR** and **William Karani & 47 others v Wamalwa Kijana & 2 others [1987] eKLR**.

12. The defendants have contended through their grounds of opposition that they have filed an appeal against the judgment in the Court of Appeal being Civil Appeal No. 176 of 2021 and that the grounds raised in the present application are in dispute in the appeal. Although they did not file any affidavit to verify their assertions, suffice it to note from the record herein that the defendants filed a Notice of Appeal against the judgment on 6th May 2021, almost three months prior to the filing of the present application. An appeal is deemed to exist once Notice of Appeal has been filed.

13. In view of the foregoing discourse, I do not have jurisdiction to consider Notice of Motion dated 26th July 2021. Any proceedings filed in a court without jurisdiction are dead on arrival and cannot be remedied. See **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**. The applicant will have to pursue the issues raised by Notice of Motion dated 26th July 2021 within the pending appeal.

14. In the result, Notice of Motion dated 26th July 2021 is struck out with no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF JANUARY 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No Appearance for the plaintiff

Ms Eroba holding brief for Mr Nandwa for the defendants

Court Assistant: E. Juma