



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. CASE NO. 577 OF 2015

GEOFREY MURABULA OGONDA.....PLAINTIFF

VERSUS

OWINO SEWE.....DEFENDANT

RULING

Before me are 2 applications. The 1st application is dated 22/7/2020 whilst the 2nd application is dated 30/11/2020. The application dated 22/10/2020 seeks orders that:

- 1. The Honourable Court be pleased to review vary and/or set aside part of its decree dated 8th November 2017 directing the Defendant/applicant to remove his house or be forcefully evicted after the boundaries have been established and ordering the Defendant to pay costs of the suit.**
- 2. This Honourable court be pleased to review, vary and/or set aside its decision of 8th November 2017 restraining the Defendant/Applicant from using or interfering with North Ugenya/Sega/350.**
- 3. Upon the said review, this Honourable Court be pleased to issue further orders adopting the Defendant/Applicant costs of the suit.**
- 4. The cost of this application be provided for.**

The application is based on grounds that:

- a) That the Honourable Court on 8th November, 2017 directed the County Land Registrar and Surveyor to visit North Ugenya/Sega/350 to establish its boundaries and whether the Defendant/applicant's house and farming activities were on the land.**
- b) That the same court on 8th November 2017 directed the Defendant/Applicant to remove his house or crops in 30 days after the visit by County Land Registrar and Surveyor OR be forcefully evicted.**
- c) That the same court on 8th November 2017 restrained the Defendant/Applicant from interfering with the Plaintiff's use of NORTH UGENYA/SEGA/350.**
- d) That on the 5th December, 2018 the Ugenya Lands Registrar and the District Surveyor visited NORTH UGENYA/SEGA/350.**
- e) That after the survey exercise they established that the Plaintiff/Respondent had purchased NORTH UGENYA/SEGA/1453 and not NORTH UGENYA/SEGA/350.**
- f) That the same report was filed in court on the 27th December 2018.**
- g) That having established that NORTH UGENYA/SEGA/350 does not belong to the Plaintiff/Respondent it would only be fair and in the interest of justice if the orders issued by the Honourable Court on 8th November 2017 are reviewed/varied and OR set aside.**

I have considered the application replying affidavit, the submissions on record and do find that the applicant has not shown the court the green card for parcel number NORTH UGENYA/SEGA/1453 to demonstrate that the same is owned by the plaintiff. The suit property in this matter is NORTH UGENYA/SEGA/350 and not NORTH UGENYA/SEGA/1453. The applicant is attempting to have a second bite at the cherry.

Order 45 rules 1, 2, 3 provides that:

“1. (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. [Order 45, rule 2.] To whom applications for review may be made.

2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed. (2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing. (3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate. [Order 45, rule 3.] When court may grant or reject application.

3. (1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application. (2) Where the court is of opinion that the application for review should be granted, it shall grant the same: Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.”

I do find that the allegation that the plaintiff purchased NORTH UGENYA/SEGA/1453 do not in any way affect the Judgment of the court. In any event the applicant ought to have brought the facts to the court before Judgment was delivered.

The second application is dated 30/11/2020 where the applicant seeks that:-

- a) Owino Sewe, the Defendant, his family, agents or any other person claiming on his behalf be forcefully evicted from land parcel NORTH UGENYA/SEGA/350 pursuant to the judgement/decree herein.**
- b) The requirement for notice to show cause be dispensed with.**
- c) The OCS Ukwala police station or the nearest police post do provide security.**
- d) The court do make such just orders in the circumstance.**
- e) The costs be provided for.**

The application is based on grounds that:

- (i) Judgment was delivered in this case on 8.11.2017 and decree issued on 28.12.2017.**
- (ii) The Land Registrar and surveyors field their report dated 17.10.19 in which it depressingly found the Defendant had structures on the subject matter.**
- (iii) The Defendant has failed to give vacant possession.**
- (iv) The court has declined to issue eviction order unless there is a prior formal application.**
- (v) The reliefs sought meets ends of justice.**

I do find the application is merited as the parcel of land in contention is NORTH UGENYA/SEGA/350 and not 1453. The Judgment of the court is still valid. I do allow the application and do order that **Owino Sewe, the Defendant, his family, agents or any other person claiming on his behalf be forcefully evicted from land parcel NORTH UGENYA/SEGA/350 pursuant to the judgement/decree herein.** Upon the expiry of 30 days from the date of this order. The applicant to use court bailiffs or auctioneers in the eviction process. There be liberty to apply. Costs to the Plaintiff. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21st DAY OF JANUARY, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.