REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 114 OF 2014

PETER NJUGUNA GITAU……………..…. PLAINTIFF/RESPONDENT

VERSUS

AGNES MUTHONI NYAGA……...…….1ST DEFENDANT/APPLICANT

MARK KABUTE…………………...…...2ND DEFENDANT/APPLICANT

LEWIS KABUTE…………………....…..3RD DEFENDANT/APPLICANT

MERCY WAWIRA………….....……..……4TH DEFENDANT /APPLICANT

RULING

On 27th November 2015, this Court delivered a judgment in favour of the plaintiff/respondent in which it declared the defendants/applicants as trespassers on land parcel No. GICHUGU/SETTLEMENT/SCHEME/232 (the suit land) and further granted a permanent injunction restraining them or any other beneficiary of the Estate of the late **CYRUS NYAGA KABUTE** from cultivating, sub-dividing, entering or trespassing onto the suit land. The Court also ordered the eviction of the defendants/applicants from the suit land six months from the date of service upon them of the decree.

Aggrieved by that judgment, the defendants/applicants filed a Notice of Appeal dated 11th December 2015 which was however withdrawn on 18th April 2016.

Instead, the defendants/applicants filed an application dated 13th February 2016 seeking this Court to set aside the judgment dated 27th November 2015 and hear their defence. That application was dismissed with costs on 19th August 2016.

The defendants/applicants have now filed a Notice of Motion dated 8th September 2016 premised under the provisions of **Article 159 (2) (d) of the Constitution, Sections 1A, 1B, 3A 63 (e) and 80 of the Civil Procedure Act** and **Order 45 of the Civil Procedure Rules 2010** seeking the following orders:-

1. Spent.

2. Spent.

3. The Ruling and Order of this Court made on 19th August 2016 dismissing the Notice of Motion application filed herein on 19th August 2016 (the Notice of Motion was infact dated 13th February 2016 and filed on 15th February 2016) together with all other consequential orders be

reviewed, varied and set aside.

4. That the judgment entered on 27th November 2015 as against the defendants/applicants be set aside and this suit be set down for defence hearing.

5. That costs of this application be provided for.

The application is based on the grounds set out therein and supported by the affidavit of **AGNES MUTHONI NYAGA** the 1st defendant/applicant in which it is deponed, inter alia, as follows:-

- That the defendants/applicants filed their defence dated 27th May 2014 on 25th May 2014.

- That the ruling dated 19th August 2016 is erroneous as this Court states that there is no appeal pending over the matter while there is civil appeal No. 6 of 2008 scheduled for hearing on 3rd October 2016.

- That the suit property was sold prior to the demise of her late husband but they only got to know about it after his demise.

- That the ruling ought to be reviewed as the Court has made no directions in its judgment dated 27th November 2015 on what ought to happen to the burial site of her late husband who is buried on the suit property.

- That there is an error on the record when this Court held that there is no affidavit on record from their advocate on record Ndegwa Njiru giving his explanation about the suit whereas there is an affidavit on record by him dated 25th November 2015 and filed on even date.

- That the Civil Procedure Rules make it mandatory for a hearing notice to be served.

- That a defence had been filed on 28th May 2014 and was in the file yet the plaintiff/respondent told the Court at the Ex-parte hearing that no defence was filed which was an error.

- That there is an error by this Court on finding that there are temporary mud structures on the suit property yet there are permanent stone structures on the suit property.

- That the Court in its ruling made findings that the issue of fraud has been canvassed upto the Court of Appeal whereas the issue of fraud has never been canvassed before any Court of law.

- That the judgment of this Court dated 27th November 2015 and the ruling dated 19th August 2016 greatly and negatively affects their rights to be heard on merit and amounts to denying them a remedy yet under Article 45 they deserve to be heard.

-That the defendants/applicants reside on the suit property and shall be rendered destitute.

When counsel for the defendants/applicants appeared before me on 26th September 2016 for the hearing of the application, he informed the Court that the same had been served and as there was no reply, I should grant the orders therein. However, as the application seeks the review of this Court's ruling dated 19th August 2016, I found it prudent to consider it, un-opposed as it is, and render my ruling thereon because all that I needed was on the record.

I have considered the application, the supporting affidavit of **AGNES MUTHONI NYAGA** and the annextures thereto.

This application basically seeks the review of this Court's ruling dated 19th August 2016. Although there is also a prayer for the setting aside of this Court's judgment dated 27th November 2015, that prayer cannot be the subject of this ruling as the same was the subject of my ruling dated 19th August 2016 and

cannot therefore be revisited again. It is res-judicata.

The power to review an order or decree of a Court is donated by ***Order 45 Rule 1 (1) of the Civil Procedure Rules*** in the following terms:-

> ***"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***
>
> ***(c) 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"***

It is clear from the above that the remedy for review is only available in the following circumstances:-

> ***1. Discovery of new and important matters or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced when the order or decree sought to be reviewed was made.***
>
> ***2. On account of some mistake or error apparent on the face of the record.***
>
> ***3. For any other sufficient reason.***
>
> ***4. The application must be made without un-reasonable delay.***

The ruling and order sought to be reviewed was made on 19th August 2016 and this application was filed on 8th September 2016. I find therefore that there has been no un-reasonable delay.

The application, from what I can glean in the supporting affidavit of **AGNES MUTHONI NYAGA**, is based on the claim that there has been a mistake or error on the part of this Court from the face of the record. In ***NATIONAL BANK OF KENYA LTD VS NDUNGU NJAU C.A CIVIL APPEAL No. 211 of 1996,*** the Court while considering an error or omission on the part of the Court as a ground for review held as follows:-

> ***"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review".***

What then are the errors or omissions attributed to this Court on account of the ruling dated 19th August 2016?

In paragraph 8 of his plaint filed herein on 8th May 2014, the defendant/respondent had pleaded that the deceased **CYRUS NYAGA KABUTI** in whom names the suit land was registered had filed multiple suits to stop the sale of the property including Civil Appeal No. 158 of 1996 which had conclusively determined that the only way the property could be redeemed was by paying the loan. In their joint defence dated 27th May 2014 and filed herein on 28th May 2014, the plaintiffs/applicants pleaded in

paragraph 3 thereof that infact there was pending **NAIROBI COURT OF APPEAL CASE No. 6 of 2008**. However, since the defendants/applicants did not appear at the trial to avail any evidence of a pending appeal, there was no way that this Court could have known that Court of Appeal Civil Appeal No. 6 of 2008 was pending. On the other hand, only the defendant/respondent attended the trial and testified that the following cases instituted by the deceased **NYAGA KABUTE** with respect to the suit land were all dismissed. These are:-

1. ***H.C.C.C No. 149 of 2008 EMBU***

2. ***H.C.C.C No. 4610 of 1990 MILIMANI COURT***

3. ***C.A CIVIL APEAL CASE No. 158 of 1996 NAIROBI.***

This Court considered all those cases in its judgment dated 27th November 2015. If the attention of this Court had been drawn to the fact that there was indeed a pending appeal at the Court of Appeal over the same dispute, that would immediately have brought into play the provisions of Section 6 of the Civil Procedure Act. It is the responsibility of a party pleading sub-judice or res-judicata to place the evidence before the Court. Since the defendants/applicants and their advocate did not attend the trial for reasons that are clear in my ruling dated 19th August 2016, they are entirely to blame for not availing that evidence. That cannot be an error on the face of the record and it does not help their cause that the hearing notice in respect to that appeal has only now been annexed to this application. That is rather late in the day.

The other alleged error is that there is an affidavit on record from their previous advocate **NDEGWA NJIRU** dated 25th November 2015 and filed on the same date. Indeed there is that affidavit in the file stamped 25th November 2015. However, that affidavit could not have been filed on 25th November 2015 because the Court file was by then in my Chambers for drafting of the judgment which was delivered on 27th November 2015. It is clear from the record herein that the defendant/respondent closed his defence on 12th October 2015 and this Court reserved judgment for 27th November 2015. That explains why in paragraphs 3, 4 and 5 of that affidavit by **NDEGWA NJIRU,** he depones that when he went to the Registry on 5th November 2015 to file an amended defence, he could not trace the file and he was informed that it was pending judgment on 27th November 2015. It could not therefore be possible for that affidavit or any other document for that matter, to be filed on 25th November 2015 because the file was in my Chambers for drafting of the judgment. It was therefore mischievous for any party to purport to file any affidavit on that day. It was also dishonesty on the part of the officer who stamped that affidavit knowing very well that any document received or stamped at the registry must be filed and if there is no file, the parties should be told so. The truth of the matter therefore is that no affidavit could have been fled on 25th November 2015 because the file was not available in the registry.

It is also alleged that this Court did not give directions on its judgment dated 27th November 2015 on what ought to happen on the burial site of the 1st defendant/applicant's husband who is buried on the suit land. Again, the simple answer to that is that the defendants/applicants were not in Court on the hearing date to inform the Court about the burial site of the deceased. Courts can only make orders in response to matters placed before them.

The defendants/applicants also allege that during the hearing on 12th October 2015, the plaintiff/respondent informed the Court that no defence had been filed yet there is a defence on record filed on 28th May 2014. The truth of the matter is that on 29th September 2015, **Mr. NGANGAH** advocate then holding brief for **Mr. NDEGWA NJIRU** advocate for the defendants/applicants sought an adjournment to file an amended defence. However, by the time the case came up for hearing on 12th October 2015, and notwithstanding the fact that leave had been granted to file and serve an amended defence within seven (7) days, none had been filed. There is however a defence on record dated 27th May 2014 and filed on 28th May 2014 and even in my ruling sought to be reviewed, I referred to it and said:-

> ***"I have considered the applicants' defence dated 27th May 2014. It questions the propriety of***

> ***the sale by public auction of the property by Housing Finance Company of Kenya to the respondent and alleges fraud and conspiracy to defraud the late CYRUS NYAGA KABUTE of the suit property"***

I then referred to the previous proceedings over the suit land upto the Court of Appeal Case No. 158 of 1996 which had been availed by the plaintiff/respondent. I then said:-

> "***Therefore, given all the above, the applicants defence in which they allege fraud in the manner in which the suit property was sold cannot raise any triable issues as the same have been canvassed upto the Court of Appeal"***

It is clear therefore that despite the fact that the defendants/applicants were not in Court at the time of the trial and although I dismissed their application to set aside the judgment dated 27th November 2015, I went on to consider their un-prosecuted defence filed on 28th May 2014 and found that it raised no triable issues.

The defendants/applicants also plead that there is an error in the record because there are permanent stone structures on the suit land and not temporary mud structures. Again, the record is clear that on 12th October 2015, when the plaintiff/respondent finished testifying, and in view of the fact that he had sought to evict the defendants/applicants and demolish their structures on the suit land, the Court required to know what type of structures were on the land. The plaintiff/respondent then said as follows:-

> ***"There are semi-permanent structures made of clay".***

Obviously the Court could not have been in a position to know what type of structures were on the suit land. The defence filed herein on 28th May 2014 did not have the pictures of structures that have now been annexed to the supporting affidavit of the 1st defendant/applicant and this Court could only rely on the information given to it by the party who was present in Court at the time of the trial. A trial Court cannot be said to have errored where a party fails to attend Court and adduce evidence to support his case and produce any relevant documents. If there is any error, it is really on the party of the litigant and his counsel. That is not the error contemplated under the provisions of ***Order 45 of the Civil Procedure Rules.***

The other error referred to is that it is mandatory for a hearing notice to be served which ought to be done. That is correct. However, the hearing date of 12th October 2015 was taken in the presence of **Mr. NGANGAH** advocate then holding brief for **Mr. NDEGWA** advocate for the defendants/applicants. There was therefore no need for service of any hearing notice.

Finally, it is alleged that the ruling dated 19th August 2016 greatly and negatively affects the defendants/applicants' rights and they have a right to be heard. The right to be heard is not alien to our jurisdiction. ***Article 50 (1) of the Constitution*** provides as much. It says:-

> ***"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or if appropriate, another independent and impartial tribunal or body"***

In ***THE UNION INSURANCE COMPANY OF KENYA LIMITED VS RAMZAN ABDUL DHANJI C.A CIVIL APPLICATION No. 179 of 1996 (NBI)***, the Court of Appeal said:-

> ***"The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it***"

The defendants/applicants cannot be heard to say that they were denied the right to be heard. The opportunity was availed to them. They and their counsel who had notice did not utilize that opportunity. That cannot be an error on the part of the Court.

Ultimately therefore, the defendants/applicants Notice of Motion dated 8th September 2016 is dismissed with no order as to costs. The stay orders earlier granted are hereby vacated.

It is so ordered.

B.N. OLAO

JUDGE

14TH OCTOBER, 2016

Ruling dated, delivered and signed in open Court this 14th day of October 2016

Mr. Nyangayo for Applicants present

Mr. Ndubi for the Respondent absent

Mr. Gichia Court Clerk present.

B.N. OLAO

JUDGE

14TH OCTOBER, 2016