



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC CASE NO. 255 OF 2005

KAZUNGU BAYA KITUNGA & 13 OTHERS PLAINTIFFS

VERSUS

YAA BAYA & 2 OTHERSDEFENDANTS

RULING

(Application for review; principles to be considered; applicant seeking to review judgment delivered more than 3 ½ years ago; issue concerning land that was sold to the applicant by the 1st defendant; plaintiffs filing suit to contend that the 1st defendant could not have sold the land since it was family land; plaintiffs having previously sued the 1st defendant before the Land Disputes Tribunal and award made in their favour; apparent that award could not have been executed as applicant was already registered as title holder hence this suit seeking to cancel the title of the applicant to the land; court hearing the matter and pronouncing judgment in favour of the plaintiffs; applicant now seeking review based on grounds that he was not aware of the judgment and that the court was not made aware that the Tribunal award had been quashed by the High Court; applicant claiming new evidence and error apparent on the face of the record; delay in filing application; 3 ½ years considered unreasonable; applicant had ample time to find that there was judgment delivered; court even doubtful that applicant was not aware of the judgment given his subsequent conduct; new material; High Court decision was available to the applicant when he testified hence cannot be considered new evidence for purposes of review; no error apparent on the face of record; issues raised may sustain an appeal but not a review; application dismissed)

1. This ruling is in respect of the 2nd defendant's Notice of Motion application dated 23 February 2021 and filed on even date. The application is said to be brought pursuant to the provisions of Order 45 Rule 1 (1) (a), Order 9 Rule 9 and 10, Order 51 Rule 1 of the Civil Procedure Rules, 2010, and Sections 1A, 1B and 80 of the Civil Procedure Act, Cap 21, Laws of Kenya. The applicant seeks the following prayers:-

1. Spent (certification of urgency).
2. Spent (change of counsel after judgment).
3. Spent (interim orders pending hearing of the application).
4. Spent (stay of execution of the decree pending hearing of the application).
5. THAT this Honourable court be pleased to review and set aside the judgment delivered on the 13th July 2017, the decree and all consequential orders thereto and subsequently dismiss and or strike out the suit herein with costs.
6. That the costs of the application herein be provided for.

2. It will be seen that what the applicant seeks is a review of the judgment. The said judgment was delivered by Komingoi J (who has since been transferred from this station) on 13 July 2017. The applicant claims that he only got to know of the judgment at Kilifi Police station early in January 2021, after his wife Asha Wanje, was summoned for trespassing into the suit property. He avers that neither him nor his then advocates on record, M/s Kamoti & Company Advocates, were present when judgment was delivered.

3. Having reviewed the grounds raised, it is apparent to me that the applicant seeks review of the judgment on two broad grounds; firstly, that the plaintiffs/respondents have no *locus standi*, and secondly, that the Judge proceeded on an erroneous position regarding an award made by the Land Disputes Tribunal, in *Bahari Division Land Disputes Tribunal Case No. 8 of 2004*. I will come to these later as it is necessary to first lay the background.

4. The respondents commenced this suit through a plaint filed on 30 November 2005. Their contention was that there was family land registered as Majaoni Block 5A/47 measuring 5.4 Ha registered in the name of Sidi Baya Kitunga, the deceased mother of the 1st defendant. The 1st – 12th respondents are half -brothers to the 1st defendant (Yaa Baya) with the 13th and 14th respondents being his step mothers, as their father had four wives. They averred that despite there not being any grant of letters of administration issued in respect of the estate of Sidi Baya Kitunga, the 1st defendant proceeded to subdivide the family land into two portions, registered as Majaoni Block 5A/358 (Plot No. 358) measuring 3.70 Ha, and Majaoni Block 5A/359 (Plot No. 359) measuring 1.6 Ha, and sold both portions to the 2nd defendant/applicant without their knowledge. Despite the claimed irregularities in the title of the 1st defendant, they had no problem with the sale of the Plot No. 359, as they considered this the rightful share of the 1st defendant. They however opposed the sale of the Plot No. 358 which they considered to be their share of the family land. The sales of the land were conducted sometimes in the year 2000 and the transfers in favour of the applicant effected in April and May 2000. Aggrieved by the sales, they lodged a claim before the Land Disputes Tribunal, where they only sued their brother, the 1st defendant herein, seeking orders to reverse the sale of the land to the applicant. The Land Disputes Tribunal, in an award made sometimes in the year 2005, held in favour of the respondents and found that the 1st defendant could only sell his share of 4 acres and thus the rest of the land needed to revert back to the claimants. This award, was on 7 April 2005, adopted as the judgment of the court by the Senior Resident Magistrate's Court in Kilifi, vide the suit, Kilifi SRMCC LDT Case No. 4 of 2005.

5. I think that the respondents ran into hurdles because they had not sued the applicant at the Tribunal, for title was already with him, and they therefore filed this suit on 30 November 2005 as I have earlier mentioned. In the plaint, they reiterated that the sale to the applicant was illegal on more or less the same grounds that they had raised before the Tribunal. They sought orders to have declared the sale of the Plot No. 358 to the applicant as void ab initio and for cancelation of the title of the applicant to the said Plot No. 358 (hereinafter referred to as the suit land). They further sought orders for the eviction of the applicant from the suit land.

6. The 1st defendant did not file any defence. The applicant did enter appearance and filed defence. He justified the sale of the suit land to himself mainly on the ground that at the time of sale, the suit land was registered in the name of the 1st defendant. Within his defence, he also pleaded that he has filed a judicial review motion, being *Mombasa High Court Miscellaneous Civil Application No. 641 of 2005*, seeking orders to quash the award of the Tribunal.

7. The matter proceeded for hearing and judgment was delivered on 13 July 2017. The judge was persuaded that the whole land was family land and faulted the sale of the suit land to the applicant. The judge also held that although in his defence the applicant had pleaded to have filed a challenge to the award of the Tribunal, he did not avail evidence of the suit, and was of opinion that since the award of the Tribunal had not been set aside, the same bound the applicant.

8. No appeal has ever been filed contesting the judgment and it is apparent that what the applicant has opted to do is to seek a review of the same through this application.

9. In his supporting affidavit, the applicant asserts that his purchase of the land from the 1st defendant was lawful. He has deposed in his supporting affidavit that his suit *Mombasa HCCC Miscellaneous Application No. 641 of 2005* to quash the Tribunal award was allowed through a ruling delivered on 13 February 2007. He has deposed that after he gave his evidence in the year 2011, he does not know what happened to this suit, and that he only got wind of the judgment in January 2021 after his wife was summoned on claims of trespass. He avers that in March 2020, he filed a suit, *Malindi CMCC No. 12 of 2020* against the 2nd respondent and two others, and he obtained orders of interim injunction in his favour against them. He believes that the judge proceeded on a misconceived and erroneous position that the award of the Tribunal had not been set aside by the High Court yet a decision had already been made by the time this judgment was being written. He has argued that the respondents had no *locus standi* to file this suit as they did not hold letters of administration of the estate of Sidi Baya Kitunga (deceased). It is thus his contention that the judgment herein is incurably bad in law and should be vacated.

10. The respondents filed a replying affidavit to oppose the motion. The introductory part of the replying affidavit states that it is being sworn by Kazungu Baya Kitunga, the 1st respondent, but the Jurat, states that it is sworn by Karisa Baya Kitunga, who would be the 2nd respondent. That affidavit more or less justifies the judgment of the court. It is further deposed that the applicant could have obtained the ruling in *Mombasa HCCC Miscellaneous Application No. 641 of 2005* and availed it to court since judgment was delivered in the year 2007.

11. I invited counsel to file written submissions and I have taken note of the submissions filed by Mr. Lewa, learned counsel for the applicant (having taken over the matter, after judgment, from the law firm of M/s Kamoti & Company Advocates previously on record for the applicant) and Mr. Ondieki, learned counsel for the respondents.

12. Mr. Lewa in his submissions, inter alia submitted that the replying affidavit was defective for indicating the deponent as Kazungu Baya Kitunga yet it is signed by Karisa Baya Kitunga. He relied on the case of *Gedion Sitelu Konchellah V Julius Lekakeny Ole Sunkuli & 2 others (2018)eKLR*. Counsel submitted that the court was wrong when it held that the award in Bahari Division Land Dispute Tribunal Case No. 8 of 2004 had not been set aside, yet it was quashed by the High Court on 13 February 2007, which was ten years earlier. Counsel maintained that this error made by the judge, led to the judge finding in favour of the plaintiffs. He submitted that in his evidence, the applicant had testified that the High Court had quashed the award of the Tribunal which was not challenged during cross-examination. He submitted that the misconception that the award still stood, led to the judge making a finding in favour of the respondents, and that this was an error on the face of the record, and amounts to a sufficient and compelling reason to warrant the court to review and set aside the judgment. Counsel further submitted that the respondents had no *locus standi* to institute the suit herein making this suit a nonstarter in law and void ab initio. He submitted that the suit property was registered in the name of Sidi Kitunga Baya (deceased), and that the plaintiffs ought to have first obtained letters of administration to have legal capacity and locus to institute and maintain this suit. He relied on the case of *Isaya Masira Momanyi V Daniel Omwoyo & Another (2017) eKLR*, where it was held that the estate of a deceased person can only be represented in legal proceedings by a person who is duly authorized to do so on behalf of the estate. Counsel submitted that the fact that this suit was sustained by plaintiffs without locus standi amounts to a sufficient and compelling reason to warrant this court to review the judgment herein.

13. Counsel sought to explain to court why the application was filed long after judgment was delivered. He submitted that judgment was

entered 6 years after the closure of the defence case, and neither the 2nd defendant nor his advocate were present in court when the judgment was delivered. Counsel maintained that the 2nd defendant only became aware of the judgment in Mid-January 2021. He submitted that the 2nd defendant cannot be said to be inordinate, since the delay in filing the application, was a result of factors beyond his control.

14. For the respondents, Mr. Ondieki, submitted inter alia that the applicant ought to have appealed the judgment as opposed to filing an application for review. Counsel submitted that the said judgment was delivered after the court heard and considered all the evidence including that alleged by the applicant. Counsel argued that the applicant has not fulfilled the requirements set in Order 45 of the Civil Procedure Rules to entitle the applicant to an order for review. Counsel contended that neither did the application demonstrate new and important evidence nor did it establish error on the face of the record that would warrant review. It was also argued that the applicant is guilty of unreasonable delay for filing this application four years after the judgment. He submitted that the judgment has already been executed. To support his submissions, counsel relied on the case of *Stephen Githua Kimani vs Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR*.

15. I have carefully considered the application, the response, as well as the submissions made by counsel. Before I delve into the meat of the matter, there is the issue regarding the replying affidavit filed by the respondents. I have looked at it. That affidavit is defective for it is alleged to be sworn by one Kazungu Baya Kitunga, yet it is signed by one Karisa Baya Kitunga. An affidavit can only be competent if it is sworn and signed by the same person. It cannot be competent if it is sworn by one person then signed by another. An affidavit which is not signed by the deponent is certainly incompetent as was held by the Supreme Court in the case of *Gideon Sitelu Konchellah vs Julius Ole Sunkuli & 2 Others* cited by Mr. Lewa. There is really no need to belabor the point. The replying affidavit is incompetent and I have no option but to strike it out. I will not consider it while assessing this application and I will therefore wholly rely on what is on record.

16. What is before me is an application for review and review is well addressed in Order 45 of the Civil Procedure Rules, 2010. Order 45 Rule 1 provides 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.

17. It will be discerned from the above that an applicant can anchor a review application on the following grounds :-

(i) Discovery of new and important matter or evidence which could not be produced by him when the decree was passed or order made;

(ii) A mistake or error apparent on the face of the record;

(iii) Other sufficient reason.

In all these, the application must be made without unreasonable delay.

18. I opt to start with the element of delay. The judgment in this matter was delivered on 13 July 2017. This application was filed on 23 February 2021 more than 3 ½ years after the judgment. That is a considerable amount of time, and unless good reason is given, it will fall under the category of unreasonable delay. I have seen that judgment was delivered in absence of counsel for the applicant and I am not sure if his counsel was served with the date for I do not have any affidavit of service before me. But this really is no excuse for not knowing the position of the matter for more than three years. A simple check at the registry and due diligence would have informed the applicant that judgment had already been delivered. I am not even persuaded that the applicant was not aware of the judgment for he filed a suit in the Chief Magistrate's Court at Malindi in March 2020 and sought orders of injunction against some of the respondents herein. Why was he filing another suit yet he was already aware of this pending suit? The only conclusion I can reach is that he filed that suit because he knew that he had already lost this case, otherwise he would have filed his application for injunction in this file. Bar any explanation why he did not file his application for injunction in this matter, and there is none, that is the only reasonable conclusion I can arrive at. I think that as at March 2020, the applicant was already aware of the judgment herein but was trying to steal a march by filing another suit before the subordinate court. That was clearly an abuse of the court process.

19. My holding is that the reasons for not filing the application early are not convincing and thus I find that this application has been filed after unreasonable delay and must be dismissed on that ground alone.

20. Even if I am wrong on the aspect of delay, and was of opinion that the application has been brought timeously, I would still dismiss it for I do not think that the grounds for review as set out in Order 45 Rule 1 above, have been met.

21. Within this application, I observe that the applicant seeks to introduce the judgment in *Mombasa HCCC Miscellaneous Application No. 641 of 2005* which judgment was delivered in the year 2007. The applicant testified before this court in the year 2011. It was his duty to present the said judgment before this court and he cannot try to fault the court for finding that there was no evidence of any judgment in the said matter. This is not new evidence which could not be produced at the time that he testified, and does not therefore meet the threshold of a new matter or evidence, which could not be produced at the time the order was made as required by Order 45 Rule 1.

22. Neither can the applicant try to hinge his application on an alleged error apparent on the face of the record. He cannot blame the court for not finding that there was no proof of the judgment in the miscellaneous suit yet it was him who failed to provide the said judgment.

23. The above aside, I am not persuaded that the entire judgment of the court was hinged solely on the award of the Tribunal. I have combed through the judgment and I am of the view that even without the award of the Tribunal, the court was convinced that the suit land was family land which the 1st defendant could not sell to the applicant. Part of the judgment reads as follows :-

“The title deeds produced by the 2nd defendant as exhibits D1 and D2 show that they were issued in the 2000 (sic). Specifically for land parcel Number Majaoni/Block 5A/358 shows that it was issued on 9th May 2000. It measures 3.70 hectares. Under the proprietorship section it states who was the owner of the plot before. It does not state how the 2nd defendant acquired it. A glance at the said title deed one can tell something is amiss (sic).

From the evidence of the 1st plaintiff though land parcel number Majaoni/Block 5A/358 was registered in the names (sic) of Side Baya Kitunga she held the same in trust for herself and the plaintiffs. She was the oldest of Baya Kitunga’s wives. The evidence of the 1st plaintiff confirms that this was ancestral land hence all the plaintiffs were entitled to the same. It is also clear from the evidence on record that the Plaintiffs consented to the 1st Defendants (sic) disposing of four (4) acres only. This is why they are not claiming land parcel number Majaoni/Block 5A/359.”

24. These were independent findings of the court that were not based on any finding by the Tribunal. Thus even without the benefit of the award, or without the evidence that the award had indeed been quashed, the court was persuaded that this was ancestral land and the 1st defendant could not sell the whole of it. The applicant cannot therefore allege that the court was misled because it was not aware that the award had already been quashed.

25. The other ground upon which this application is based is that the respondents lacked *locus standi* to bring this suit. The issue of locus was there all along and needed to be raised before judgment was delivered. It cannot now be raised as the court is *functus officio*. The only way to raise it is through an appeal. Indeed, all the reasons presented before me would be reasons for appealing the decision and not reasons for review of the decision.

26. I am not thus persuaded that this application is merited and it is hereby dismissed with costs.

27. Orders accordingly

DATED AND DELIVERED THIS 13TH DAY OF JANUARY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA.