



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 24 OF 2013**

**PAUL WANJUE T. WARUI.....PLAINTIFF**

**VERSUS**

**JAMES KATEGWA T. WARUI.....DEFENDANT**

**RULING**

On 24th April 2015, this Court delivered its judgment in this dispute and ordered as follows:-

1. *“That the defendant holds the suit properties in trust for the plaintiff”*
2. *“That the said trust is hereby determined and the suit properties be shared equally between the plaintiff and the defendant”*
3. *“The Land Registrar Kerugoya do register the plaintiff as the proprietor of half of the suit properties”*
4. *“Each party to meet his own costs as they are family”*

At page six (6) and seven (7) of that judgment, the suit properties are identified as follows:-

- “1. ***KIINE/SAGANA/3221***
2. ***KIINE/SAGANA/3222***
3. ***KIINE/SAGANA/3223***
4. ***KIINE/SAGANA/3224***
5. ***KIINE/SAGANA/3225***
6. ***KIINE/SAGANA/3237***
7. ***KIINE/SAGANA/3232***
8. ***KIINE/SAGANA/3233***
9. ***KIINE/SAGANA/3234”***

The judgment was premised on the plaintiff’s Originating Summons in which he had sought, among other

remedies, the following orders in paragraphs three (3) thereof:-

**3: “That the Land Registrar Kirinyaga do register the applicant as proprietor of the title numbers of half of L.R KIINE/SAGANA/3221, L.R KIINE/SAGANA/3222, L.R KIINE/SAGANA/3223, L.R KIINE/SAGANA/3224, L.R KIINE/SAGANA/3237, L.R KIINE/SAGANA/3232, L.R KIINE/SAGANA/3233 and L.R No. KIINE/SAGANA/3234”**

The Decree that was subsequently drawn by the Deputy Registrar of this Court on 3rd August 2015 indicates that the Land Registrar Kerugoya do register the plaintiff as proprietor of half of the suit properties. The said Decree in paragraph (a) (b) and (c) indicates that among the properties being claimed by the plaintiff included parcel No. L.R KIINE/SAGANA/3227.

Clearly, two errors are immediately discernible:

**1. Land parcel No. L.R KIINE/SAGANA/3225 which was identified in the judgment as part of the suit properties was not among the properties being claimed by the plaintiff. However, this parcel is not part of the Decree Drawn on 3rd August 2015.**

**2. Land Parcel No. KIINE/SAGANA/3227 which is identified in the Decree as part of the properties for which the plaintiff obtained judgment is not among the properties identified in the Originating Summons. That must have been an error because the land parcel subject of this suit is L.R No. KIINE/SAGANA/3237 and not KIINE/SAGANA/3227.**

The plaintiff by his Notice of Motion dated 10th August 2015 sought the registration of the suit properties in his name and an order that the Deputy Registrar do sign the relevant documents for transfer of the said parcels which include land parcel No. KIINE/SAGANA/3227. The defendant filed a Preliminary Objection stating, inter alia, that the plaintiff’s Notice of Motion dated 10th August 2015 is defective as the orders sought cannot be effected since the Commissioner of Land is not a party and, most importantly, that some of the land parcels being claimed by the plaintiff i.e. L.R No. KIINE/SAGANA/3226 and KIINE/SAGANA/3227 do not form part of the suit properties. The defendant also on 1st December 2015 filed an application seeking the setting aside and/or variation of this Court’s judgment dated 24th April 2015 and that the defendant be granted an opportunity to give new evidence that was not previously availed to this Court. That application is premised on the grounds inter alia, that defendant’s advocate failed/omitted to allow the testimony of the defendant’s family members on the real issue surrounding the suit property. When that application was placed before me on 2nd December 2015, I ordered it struck out because it was not in compliance with the provisions of **Order 9 of the Civil Procedure Rules**.

On 6th January 2016 the defendant’s former advocate **M/S GACHERU & COMPANY Advocates** and **M/S MOGERE KABATA & PARTNERS Advocates** filed a consent order allowing the latter firm to come on record for the defendant. The latter advocate has now filed a Notice of Motion dated 7th January 2016 seeking the following substantive orders:-

**1. Spent.**

**2. That the defendant’s expunged pleadings specifically the replying affidavit sworn by JAMES KATEGWA T. WARUI dated 26th October 2015, Notice of Motion of Preliminary Objection dated 26th October 2015, review application by way of a Notice of Motion supported by the affidavit of JAMES KATEGWA T. WARUI both dated 1st December 2015 as well as various submissions be deemed to have been properly filed and served and therefore properly on record.**

**3. That the hearing and determination of the defendant’s Notice of Motion dated 1st December 2015 be given precedence over the hearing and determination of the plaintiff’s application dated 10th August 2015.**

**4. That the defendant’s Notice of Motion dated 1st December 2015 be set down for hearing.**

That application is supported by the affidavit of the defendant's advocate **Mr. ALLAN LUMUMBA** in which it is deponed, inter alia, that the striking out of the defendant's application dated 26th October 2015 was due to the regrettable error in failing to file a consent signed by the defendant's former advocate as required under **Order 9 of the Civil Procedure Rules**. That that was only a procedural issue and this Court should invoke **Article 159 of the Constitution**.

Grounds of opposition have been filed by the plaintiff who claims that the application is incompetent, bad in law and is an abuse of the Court process,

When the matter was mentioned on 8th February 2016, this Court directed that the ruling on the plaintiff's application dated 10th August 2015 seeking orders to execute the Decree herein be put on hold while this Court considers the defendant's Notice of Motion dated 6th January 2016.

I shall now deliver my ruling both on the defendant's Notice of Motion dated 1st December 2016 and 7th January 2016 and the plaintiff's Notice of Motion dated 8th August 2015. This Court is satisfied that although no submissions have been filed on the Notice of Motion dated 1st December 2015, there is sufficient information from the filed affidavit of the defendant to enable me determine the same.

With regard to the defendant's Notice of Motion dated 7th January 2016, this Court is satisfied that the striking out of the defendant's Notice of Motion dated 1st December 2015 was due to the mistake of his advocate which has been readily admitted. It would be harsh to punish the defendant due to an error of his advocate. As was held in the case of **PHILIP CHEMWOLO & ANOTHER VS AUGUSTINE KUBENDE 1982-88 KAR 103**:

***“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit ---- I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.***

Prayer No. 2 of the defendant's Notice of Motion dated 7th January 2016 is therefore well merited and I allow it.

Prayer No. 4 of that application seeks that the defendant's Notice of Motion dated 1st December 2015 be set down for hearing. As I have already indicated above, there is an elaborate affidavit by the defendant in support of that application and although submissions have not been filed on the same, it would not, in my view, be in the furtherance of the overriding objective of expeditious disposal of cases to further delay this suit when there are sufficient pleadings on the file to enable me determine the said application.

That application seeks the following two orders:-

- 1. That the judgment made on 24th April 2015 in favour of the plaintiff's Originating Summon dated 10th May 2010 together with the consequential order be set aside and/or varied.***
- 2. That the defendant be given an opportunity to adduce new evidence that was not availed to this Honourable Court.***

That application is premised on the grounds set out therein which are that:

- (a) The defendant's former advocate on record failed to mention the fact that the plaintiff had already been allocated land elsewhere but has since sold it and encroached on the suit property.***
- (b) The defendant's advocate failed/omitted to allow the testimony of the defendant's family members on the real issues surrounding the suit property.***

*(c) The judgment outcome entered by this Honourable Court on 24th April 2015 was made through no fault or wrong-doing on the part of the defendant but through the fault of his former advocate.*

*(d) The learned Judge erred in law by putting a time limit to the defendant's right to property.*

*(e) The learned Judge erred in law and fact by awarding the plaintiff equal share of the suit property according to Kikuyu Customary Law yet the defendant is the second eldest son.*

*(f) The application had been made immediately the said judgment came to the knowledge of the defendant's new advocate and without any delay as to be considered inexcusable.*

*(g) The defendant's former advocate on record's failure to present pertinent information in support of the defendant's case was inadvertent.*

*(h) That in the interest of justice, the said judgment dated 24th April 2015 together with the orders issued thereto be set aside and the said defendant be allowed to adduce new evidence that was not previously presented before this Honourable Court.*

In his twenty six (26) page supporting affidavit, the defendant raises several issues which in essence are a re-visit of the previous evidence adduced herein. For instance, he depones to previous suits between the parties (paragraph 7), that the plaintiff only instituted this suit to deprive him of his property (paragraph 8), that his advocate failed to act on his instructions and call some witnesses (paragraph 10, 15 and 17), that the Court was kept in the dark (paragraph 12) etc. The Notice of Motion is brought under **Section 1A, 1B and 3A of the Civil Procedure Act, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules**.

**Order 12 Rule 7 of the Civil Procedure Rules** which has been cited deals with situations where a judgment has been entered or a suit dismissed in the absence of the other party. This case was heard in the presence of both parties and their advocates. I do not see the applicability of **Order 12 Rule 7 of the Civil Procedure Rules** and also **Section 1A, 1B and 3A of the Civil Procedure Act** which deal with the overriding objectives of the **Civil Procedure Act** that encourage the just, expeditious, proportionate and affordable resolution of disputes. The defendant had his day in Court and with the presence of his advocate then on record. If anything, the judgment sought to be set aside or varied was delivered on 24th April 2015 and this application was filed on 1st December 2015 some eight (8) months later. The defendant is himself in breach of those overriding principles, yet, **Section 1A (3) of the Civil Procedure Act** provides that:-

***“A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the process of the Court and to comply with the directions and order of the Court”***

There is really no reason to set aside this Court's judgment dated 24th April 2015.

Even if the defendant's application dated 1st December 2015 was meant to be an application to set aside a judgment under **Order 12 Rule 7 of the Civil Procedure Rules**, it is misconceived as both parties were heard before it was delivered.

From my perusal of the defendant's affidavit, he appears to be seeking a review of this Court's judgment dated 24th April 2015 by trying to introduce evidence afresh. He depones, to the failure of his advocate then on record to call some witnesses, that the Court was kept in the dark, that the plaintiff is trying to deprive him of his property through this suit etc etc. Grounds for review under **Order 45 of the Civil Procedure Rules** are based on discovery of new and important matter or evidence which was not within the knowledge of a party or could not be produced or an account of some mistake or error apparent on the face of the record or for other sufficient reason. If the defendant's advocate did not call witnesses in support of his case, that cannot be a ground for review because those witnesses were all along known to

the defendant. It cannot also be a ground for review if a party prosecuted his case poorly. It is also a requirement under **Order 45 of the Civil Procedure Rules** that an application for review be filed “**without un-reasonable delay**” – **FRANCIS ORIGO & ANOTHER VS JACOB MUNGALA 2005 2 K.L.R 307**. This application, as I have already found above, was filed eight (8) months after the judgment sought to be reviewed. That is un-reasonable delay which has not even been explained. The other grounds raised in the said application are that the Judge erred in law and fact in awarding the plaintiff an equal share of the suit property. If the Judge erred in law and fact, that is a ground for appeal and not review. The defendant’s Notice of Motion dated 1st December 2015 must therefore be dismissed.

Turning now to the plaintiff’s Notice of Motion dated 10th August 2015. It seeks the following orders:-

- 1. That the Honourable Court be pleased to order that the applicant’s equal share out of the suit property is comprised of L.R No. KIINE/SAGANA/3224, KIINE/SAGANA/3226, KIINE/SAGANA/3227, KIINE/SAGANA/3221 and KIINE/SAGANA/3232.**
- 2. That the Honourable Court be pleased to order the Deputy Registrar to sign all the relevant documents for the transfer of L.R No. KIINE/SAGANA/3224, KIINE/SAGANA/3226, KIINE/SAGANA/3227, KIINE/SAGANA/3221 and KIINE/SAGANA/3232 to the applicant.**
- 3. That the Honourable Court be pleased to order the Land Registrar to dispense with the production of the original Title Deed for L.R No. KIINE/SAGANA/3224, KIINE/SAGANA/3226, KIINE/SAGANA/3227, KIINE/SAGANA/3221 and KIINE/SAGANA/3232, respondents Identity Card, photographs and Pin Certificates.**
- 4. That costs of this application be provided for.**

In opposing the application, the defendant filed objections thereto claiming that land parcels No. L.R KIINE/SAGANA/3226 and KIINE/SAGANA/3227 are alien to the defendant.

As already indicated above, the land parcel No. KIINE/SAGANA/3227 which is captured in the Decree drawn on 3rd August 2015 was included in error. This Court must order the decree to be amended in that regard. Save for that minor amendment, the plaintiff’s application dated 10th August 2015 is meant to execute this Court’s judgment dated 24th April 2015. It is accordingly allowed in the following terms:-

- 1. This Court’s Decree as drawn by the Deputy Registrar on 3rd August 2015 to be re-issued by deleting land parcel No. L.R KIINE/SAGANA/3227 therefrom as it was not subject of the claim herein.**
- 2. Each party to meet their own costs of all the applications as they are family.**

It is so ordered.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> DECEMBER, 2016**

Ruling delivered, dated and signed in open Court this 9<sup>th</sup> day of December, 2016

Ms Kiragu for Plaintiff/Respondent present

Mr. Miano for Mr. Komu for Defendant/Applicant present.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> DECEMBER, 2016**