



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND COURT CASE NO. 353 OF 2009

JOHN MUCHEMI NDUNGU 1ST PLAINTIFF

PETER NGULU KIMULI 2ND PLAINTIFF

KORI KAMUYU 3RD PLAINTIFF

(As Chairman, Vice Chairman, Secretary

Respectively of Maili Saba Mwingenye Self

Help Group)

VERSUS

UPSANA KENT (Sued as the administrator of The estate of Ranbir s/o

Keharchard DEFENDANT

UNITY 45 HOUSING COOPERATIVE SOCIETY LIMITED....INTERESTED PARTY

RULING

1. By a ruling dated 14th July 2014 this court ordered the plaintiffs suit herein against the defendant struck out on the ground the defendant, Upsana Kent sued as the administrator of the Estate of Ramber s/o Keharchard Kent was not the registered owner of the suit property in 2009 when the plaintiffs filed the suit claiming to have acquired title to the land as against the defendant by virtue of adverse possession.

2. The plaintiff being aggrieved by the ruling of this court of 14th July 2014 vide an application dated 18th July 2014 and filed in court on 21st July 2014 expressed to be brought under sections 1A, 1B, 3A, 63(e) and 80 of the Civil Procedure Act, Order 45 Rule 1 (1), 3 of the Civil Procedure Rules, 2010 sought inter alia the following orders:-

(i) An injunction restraining the defendant and the interested party from selling, transferring, entering, occupying, developing, constructing and trespassing or in any manner whatsoever interfering with or otherwise dealing with the property known as LR No. 11531/9.

(ii) That the court be pleased to review and/or vary its orders made on 14th July 2014 with the result that the application dated 15th August 2013 be dismissed with costs.

(iii) That the costs of the application be provided for.

3. The application is premised on the grounds set out on the face of the application and on the affidavit sworn in support of the application by one **Naftali Ogola**. The applicants base their application principally on the ground that there was an error apparent on the face of the record in that the Honourable court failed to take into consideration a pending notice of motion application dated the 15th day of November 2013 which sought the leave of the court to amend the originating summons to substitute the defendant with the current registered owner of the suit property, **Unity 45 Housing Co-operative Society Limited**. The applicants further contend that the plaintiffs' claim for adverse possession of the suit property was continuous and could not have been interrupted by the mere change of ownership of the suit property from the defendant to Unity 45 Housing Co-operative Society Limited. The applicants argue there is good and sufficient cause to warrant the court to review and/or vary the orders made on the 14th July 2014 on the Notice of Motion dated 15th August 2013.

4. The applicants in the present application were not parties in the suit that was struck out following the ruling of 14th July 2014 but they claim they had an interest in the suit property as beneficiaries through the plaintiffs who were the claimants in the suit. My view is that the applicants claim in as far as the claim was through the plaintiff is remote and that their claim would only become viable if the plaintiffs claim is established as against the defendant. The applicants claim that they had purchased some land from the plaintiffs and were issued with certificates of ownership by the plaintiff. The plaintiff could only dispose of the land if they were the owners of the land. The suit the plaintiff had brought against the defendant was seeking to establish their entitlement to the land. The defendant in their response to the suit stated the plaintiffs had sued the wrong party and applied for the suit against them to be struck out on that basis. It is that application by the defendant that the court dealt with and in regard thereof gave the ruling dated 14th July 2014 and in the ruling agreed with the defendant that they were wrongly sued and struck out the suit as against the defendant. The applicants in my view lack any capacity to seek a review of that order and have no *locus standi* to bring the instant application.

5. Even if I had found and/or held that the applicants had the *locus standi* to bring the instant application, I am not satisfied that the applicants would be entitled to a review of the order of 14th July 2014 on the grounds adduced in support of the application. Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya makes provision for review and provides:-

80. 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 the judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.

6. Order 45 Rule (1) of the Civil Procedure Rules 2010 sets out the conditions that an applicant in an application for review needs to satisfy to succeed on such an application. Order 45 rule 1 (1) provides:-

45 (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 any 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.

7. In the premises for an applicant on a review application to succeed such an applicant must prove and demonstrate that:-

(i) The order sought to be reviewed has not been appealed from

(ii) There has been discovery of new and important matter or evidence which was not available and could not after exercise of due diligence have been available at the time the ruling/order was made; or

(iii) There was a mistake or error apparent on the face of the record; or

(iv) There is some other sufficient cause, and

(v) The application has been made without unreasonable delay.

8. In the present matter the record shows that the plaintiffs following the ruling made on 14th July 2014 on the 22nd July 2014 filed a notice of appeal to appeal to the court of appeal against the entire ruling delivered on 14th July 2014. There is no evidence that this notice of appeal was withdrawn and therefore the same remains on record. The plaintiff in the circumstances had exercised their right to appeal against the ruling delivered on 14th July 2014 and accordingly would not under Order 45 Rule 1 (1) (a) of the Civil Procedure Rules be entitled to apply for a review of the same order as a party may either appeal and/or seek a review and cannot pursue both options.

9. The applicants in the present application did not apply to be joined as parties to the suit and as the matter stands they are apparently seeking a review of the ruling on behalf of the plaintiffs. In my view the plaintiffs having exercised their option to appeal against the ruling cannot avail themselves the option of review.

10. On the question whether or not there has been discovery of new and important matter or evidence that was not available at the time of the hearing of the application that gave rise to the ruling sought to be reviewed, my view is that there has been no such discovery. The application dated 15th November 2013 that the applicants' state was pending before the court at the time the court gave its ruling on 14th July 2014 was by the plaintiffs and apart from filing the application, the plaintiffs never fixed the same for hearing and neither were any directions given in respect of the same. The plaintiffs participated in the hearing of the defendant's application dated 15th August 2013 and even filed their written submissions in opposition to the same being fully aware that they had filed their application of 15th November 2013.

11. The defendant's application seeking the striking out of the plaintiffs' suit against them for misjoinder was earlier in time and procedurally the court was entitled to deal with the same without paying regard to the subsequent application by the plaintiffs. The plaintiffs for their part did not seek directions that their application dated 15th November 2013 be heard first if they thought the determination of the defendant's application would prejudice their interest. In determining the application by the defendant the court did not act in error and neither can it be said the existence of the plaintiffs' application seeking amendment of the originating summons in any way impacted on the defendant's application. The intended amended originating summons does not indicate the defendant was to be removed from the proceedings as a party. It is therefore my holding that the proposed amendment even if the court would have considered the same, would have affected the ruling of the court on the defendant's application dated 15th August 2013.

12. The ruling by the court striking out the plaintiffs' suit as against the defendant did not in any way

affect the claim the plaintiffs may have had as against the interested party. Any claim by the plaintiffs as against the interested party could only be against the interested party as a defendant/respondent and the plaintiff had no claim against the defendant who was not the registered owner of the property the plaintiffs were claiming by way of adverse possession and hence the suit against the defendant was misconceived and incompetent.

13. The plaintiffs' have not in my view demonstrated any ground upon which the court could review its ruling of 14th July 2014 and there is no sufficient cause to warrant the court to review the said ruling/order of 14th July 2014. I find no merit in the plaintiffs' application dated 18th July 2014 and the same is ordered dismissed with costs to the interested party who opposed the application.

14. Orders accordingly.

Ruling dated and signed at Kisii this 6th day of October 2015.

J. M MUTUNGI

JUDGE

Ruling **delivered** at **Nairobi** this 23rd day of **October 2015.**

L. GACHERU

JUDGE

In the presence of:

M/s Ben Bella h/b for Mr. Mutua for the 1st, 2nd and 3rd plaintiffs

Mr. Wawile h/b for Mr. Odera for the defendant

N/A for the interested party

L. GACHERU

JUDGE