REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 103 OF 1998

LAWRENCE KINYUA MWAI…….....……PLAINTIFF

VERSUS

NYARIGINU FARMERS COMPANY……...……..1ST DEFENDANT

FLORENCE WAIRIMU…….2ND DEFENDANT

R U L I N G

The plaintiff/applicant through a notice of motion dated 3rd September, 2013 seeks review of this court's order dated 10th July, 2013 and revocation of the same and also the cancellation of title deed No.Laikipia/Daiga/Umande/Block 6/125(Nyariginu) of Florence Wairimu Muita. The applicant further seeks the court to order the 2nd defendant Wairimu is not a member of Nyariginu Farmers Company Limited and being therein is a trespasser and therefore she should cease to claim any plot in Nyariginu Farmers Company Limited so far by using the names of the late Martin Muriuki Muchina.

The applicant prayed for costs of the application. The application is said to be premised on the following grounds:-

That the order made on 10/7/2013 does not point out the difficulties facing the disputed plots.

a. **That the disputed plots need a survey to show beacons on the boundaries of the plots and the rightful owner according to the origin survey in 1979 for the plots 473, 438, and 439.**
b. **That the Executive Officer is not essential to visits to the disputed suit land, as she is not qualified to read the map of the ground and especially the disputed suit land of which is very important to settle the matter before this court.**
c. **That before such visits to the suit land ground by the Executive Officer or any other there are several grounds to be clear before this Honourable Court.**
    i. **That the 2nd defendant should clear herself that she is a member of Nyariginu Farmers Company Limited and was registered to plot Number 437,438 and 439.**
    ii. **That the 2nd defendant does not own any land in Nyariginu Farmers Company and would be very funny for her to claim out any land in Nyariginu Farmers Company Limited as no record in the company registers shows the late Mr. Martin Muriuki Muchina sold his plots to the 2nd defendant.**

The application is further supported by an affidavit by the applicant dated 3rd September, 2013. The

applicant attached copy of the court's order sought to be reviewed as annexture "LKMI". The court's order is very brief and simply ordered that status quo be maintained and that no trees should be cut anymore. It further directed the Executive Officer of this court to visit the suit land in presence of parties and file a report as to who is in occupation of the suit land. The parties were to share charges and OCS Nanyuki Police Station was to provide security.

The 2nd defendant/respondent filed a replying affidavit dated 3rd October, 2013 in opposing the applicant's application. The respondent deponed that the applicant's application is devoid of merits and that the application is meant to further delay the hearing and determination of this suit and waste precious judicial time.

When the matter came up for hearing both parties made their oral submissions in support and in opposition of the application. I have very carefully perused the court's order subject of this application for review, the application and the prayers sought, the affidavits in support and the replying affidavit to the application. I have also perused the pleadings generally in this matter in view of prayer No.2 and 3 of the application. The court has also carefully considered the pleadings and submissions by parties in this matter and their opposing submissions.

The issue for consideration in this application is whether the applicant has met the condition to warrant review of the court's order dated 10th July, 2013.

Further whether court can grant substantive orders in an application without the orders sought having been pleaded and without evidence.

In the instant application the applicant did not cite the provision of law under which the application is brought, however this court is alive to the relevant provision being Order 45 (1),(a) and (b) of the Civil Procedure Rules which provides:-

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.

In the instant application the application seeking to review the court's order of 10th July, was not filed until after a period of 60 days. The delay is not explained and a delay of 60 days is unreasonable delay. The applicant has further not shown in his application that there is a discovery of a 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 any other sufficient reason to warrant the issuance of the order of review. The applicant did not meet the conditions for review in this application. That if the applicant felt aggrieved by the said order, he ought to have filed an appeal to the Court of Appeal which todate he has not done. Be as it may, the compliance with the court's order dated 10th July, 2013 would have gone a long way in assisting this court come up with a logical conclusion in this matter. It is

instructive to note that the plaintiff/applicant in this matter failed to pay the requisite surveyor's charges/expenses in blatant disregard of the court's order. This can only impute bad faith on part of the plaintiff/applicant and his willingness to have this old matter continue pending before this court and causing unwarranted case backlog.

On prayers on cancellation of title deed No.Laikipia/Daiga/Umande/block 6/ 125(Nyariginu) and a declaration that the 2nd defendant/respondent Florence Wairimu is not a member of Nyariginu Farmers Company Limited and that she is a trespasser thereto and that she should cease to claim any plot in Nyariginu Famers Company Ltd so far using the names of the late Martin Muriuki Muchina, cannot be dealt with in the present application. The application seeks review of this court's order of 10th July, 2013. The court did not deal with the said issues to begin with and it would be against the rules of natural justice to proceed to issue substantive orders in an application for interim orders and more so in an application for review. The prayers sought in this application upon quick perusal of the plaint, it is revealed that they were not pleaded in the plaint and none of them is sought.

The applicant is in addition to the above bound by his pleadings. He cannot seek to be granted what has not been pleaded. That even if the two prayers were pleaded it would be against the rules of natural justice to order cancellation of a proprietor's title deed or declare one not a member of a society which has not complained so and order him or her a trespasser without evidence and without affording a party right of audience. What the applicant is seeking is against the Bill of rights and more specifically against Article 45 of the Constitution of Kenya, 2010 which deals with protection of right to property and Article 50 of the Constitution of Kenya, 2010 which deals with fair hearing.

Having said so much I come to the conclusion that this application has no merits and the same is dismissed in its entirety with costs to the respondents.

Before I come to the conclusion of this ruling, I wish to unfortunately note that this is a fairly old matter whose delay has been occasioned by myriad of applications that have been continuously filed by the plaintiff herein. The matter is also partheard having commenced hearing on 21/10/2004. I do not wish to comment on their merits or their necessity or otherwise but I have noted that they have continued to greatly delay the proceedings of this matter for both parties causing them a lot of anxiety and enormous costs and/or expense. I shall in view of Article 159 of the Constitution of Kenya, 2010 bearing in mind justice delayed is justice denied, direct and order that all pending applications be set down for hearing within the next 30 days from today or be withdrawn for failure of setting them down for hearing or be deemed as abandoned and this matter be set down for hearing and determination on merits and on priority basis. That if any further application is to be filed in this matter it be filed with the leave of this court, so as to ensure this matter comes to its conclusion without further delay. Sixteen years of waiting is mockery of justice and unjustified to say the least .

I find 16 years of waiting for hearing and determination of a suit of this nature to be a great injustice to the parties.

The parties are directed to comply with this court's order and take hearing date at the registry on priority basis so that this matter can be heard and determined leading to its logical conclusion thereof.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF MARCH, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Applicant in person – present

2. Mr. M. Mutunga h/b for Mrs Ndorongo & Co. Advocate for the respondents.

J. A. MAKAU

JUDGE