Njagi v Ngoriadomo (Environment & Land Case 97 of 2011)
[2022] KEELC 3079 (KLR) (31 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3079 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 97 OF 2011

FO NYAGAKA, J

MAY 31, 2022

BETWEEN

JANE KARIMI NJAGI ..... PLAINTIFF

AND

RICHARD NGORIADOMO ..... DEFENDANT

RULING

1. The Notice of Motion before me for determination was brought by the defendant. It was dated January 14, 2022 and filed on January 21, 2022. It was anchored on the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act*, order 45 of the *Civil Procedure Rules*. It sought the following reliefs:

    1. That this honorable court be pleased to review its judgment delivered on May 29, 2013 and substitute it with an order setting aside the judgment and re-open the case for re-hearing.

    2. That the defendant/applicant be granted leave to file a further list of documents and list of witnesses.

    3. ...spent

    4. Costs be provided for.

2. The application was supported by only two grounds on the face of it and by the affidavit of, one Richard Kapunton Ngoriadomo Lokolinyang, the defendant. It was sworn on January 14, 2022. The application followed the delivery of a judgment of this court on May 29, 2022.

3. It would appear that the applicant was initially satisfied with the judgment of the court but argued that over time, he discovered a new important matter that warranted this court to disturb the judgment. Otherwise, had he been dissatisfied with the judgment, he would have appealed from it or moved the court differently. Thus, this court reproduces the grounds herein in summary. In the first one the applicant states that "there has arisen a new and important matter and which was not in the applicant's

possession at the time of hearing." In the second, he contended that "it is necessary and in the interest of justice that the orders sought be granted."

4. The 'Judgment' impugned arose from the hearing and determination of an application dated November 1, 2011. I would do well to indicate here that on the 2/11/2011 the plaintiff filed an application together with a Plaint both dated the November 1, 2011. By the said Notice of Motion, the plaintiff sought an injunction against the defendant. The application was opposed and went through the process of *inter partes* hearing. It was the ruling thereon that was delivered on May 29, 2013; not a judgment. Perhaps the applicant should have worded the application to reflect "ruling" rather than judgment. Instead, later on, particularly on October 3, 2018, this suit proceeded to hearing and judgment was delivered on October 30, 2018, effectively concluding this matter. The plaintiff never appealed against the said judgment.

5. As stated above, the applicant herein annexed to the application an affidavit sworn by him on January 14, 2022. He deponed in it, that a new and important matter which he did not have at the time of hearing, was now in his possession hence necessitating the instant application. He then annexed to the affidavit and marked as RKNL 1 a letter of allotment dated December 16,2016. He also annexed and attached a copy of an official receipt of kshs twenty-seven thousand nine hundred and sixty-one (kshs 27,961/=) only marked RKNL 2 and a copy of a cheque marked as RKNL 3 for the sum of Kenya Shillings twenty thousand (kshs 20,000/= only dated April 7, 2017 and March 23, 2017 respectively. The amounts and dates on all the three documents do not add up but this court leaves these issues at that for the moment.

6. The applicant did not explain how these documents would not have been in his possession at the time of hearing of October 03, 2011. If it is true that the documents, assuming they are genuine, were discovered in the process of the pendency of the suit, then, between December 16, 2016 and April 07, 2017, the applicant having been busy making payments to the government regarding the suit land, cannot be said to have discovered a new and important matter not available to him, with due diligence, before the suit was heard. He only went on to state how he had built on the suit land, and that he would suffer substantial loss if the application was not granted. The applicant did not explain how the second ground forms the basis of review of the 'judgment' of this court. Thus, this court will not take much time to analyze.

7. The respondent opposed the application through an affidavit she swore on March 4, 2022. In it, she deponed that there was no judgment delivered on May 29, 2013. She alleged that the letter of allotment and the other documents were suspect. She reproduced numerous points relating to the facts the applicant gave regarding various ownership of other plots other than the suit land. She deponed that the application was brought in bad faith and no good reason had been advanced for it.

The submissions

8. The applicant's submissions dated April 20, 2022 were filed on April 21, 2022. The applicant maintained that he had satisfied the conditions precedent for grant of an order for review of the 'judgment'. He relied on the cases of *Khalif Sheikh Adan v The Honourable Attorney-General*, Garissa ELC. Case no 20 of 2018 which discussed the grounds for review and that of *Ruth Kwachmoi Cheloti & Another vs Charles Nalika Cheloti and Another*, Bungoma ELC no 141 of 2013. The case too restated the grounds for review.

9. The respondent filed her submissions dated May 04, 2022 on May 09, 2022. She reiterated that there was no judgment on May 29, 2013. She then submitted in brief the summary of the proceedings leading to the final judgment in the matter. She submitted that the defendant pleaded in the defence filed on

January 18, 2012 that he was not allocated plot no 176 and did not reside on it. Rather, that he was allocated plot nos 427, 429 and 435. She repeated that the applicant ought to prove that there was discovery of new evidence not easily within his reach at the hearing and also that the application was not brought with undue delay. She urged the court to dismiss the application. She relied on the cases of *Rose Laiza v Angelo Mpanju Kaiza* (2009) eKLR and that of *Stephen Gathua Kimani v Nancy Najira Wariungi T/A Providence Auctioneers* (2016) eKLR, among others.

Analysis and disposition

10. I have considered the application, the Supporting Affidavit and the Replying Affidavit. I have also considered the relevant law, namely, section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* and the respective written submissions by rival parties. I find two issues for determination before me. One is whether the application is meritorious, and the other, who shall bear the costs of the application. I will determine them jointly starting with the former.

11. The applicant's substantive prayer is for review of the judgment of the court allegedly delivered on May 29, 2013. The grant or refusal of and order of this nature is discretionary and ought to be granted judiciously. Order 45 of the Civil Procedure Rules indeed makes provisions for this. Section 80 of the *Civil Procedure Act* also provides for this. Particularly, Order 45 Rule 1 of the *Rules* is important in this regard. In brief, the provisions in the Act and the Rules make it clear that for a party to succeed in an application for review and setting aside of a judgment, decree, ruling or order of a court, he must prove that:

    i. There is discovery of a new and important matter or evidence which after the exercise of due diligence, was not within the applicants' knowledge and which could not therefore produce at the time the order was made or;

    ii. Some mistake or error apparent on the face of the record or;

    iii. Any other sufficient reason;

    iv. Again, he must bring the application without undue delay.

12. In the application before me, the applicant alleges that he has discovered a new and important matter which was not in his possession at the hearing. Given the nature and facts of the application before me, there are two things this court is not prepared to do. One, I will not spend time to discuss in detail the provisions of the law relating to setting aside. Secondly, I will not delve into the merits or otherwise of the contention about discovery of new and important evidence once more over and above that which I have stated in paragraph 6 above since by doing so, this court would have been swayed by the applicant's erroneous argument that this court delivered a judgment on May 29, 2013. To consider the full merits of an application made over a non-existent judgment would be absurd and a waste of the court's time.

13. As stated in paragraph 3 above, this court did not deliver the judgment in this matter on the May 29, 2013 but on October 30, 2018. For this reason, the instant application and the prayers are all directed to a non-existent judgment. It is misconceived and a proper candidate of dismissal in limine. Consequently, I do not find the application meritorious in any way. I dismiss it with costs to the respondent.

    Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 31ST DAY OF MAY, 2022.

DR *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.