



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
ENVIRONMENT AND LAND CASE NO. 30 OF 2013

PETRONILLA N. MAKOKHA PLAINTIFF

VERSUS

EVANS WAFULA WEPUKHULU DEFENDANT

RULING

This application for review is brought under Order 45 Rule 1, Order 9 Rule 9, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The applicant's counsel G. Fwaya & Co. also sought leave to come on record in place of Kraido & Co. advocates previously representing the defendant.

The application is premised on the general grounds listed on the body and on the supporting of Evans Wafula Wepukhulu. There are two main grounds for seeking review i.e

(a). The High court in Kakamega civil appeal No. 133 of 1989 set aside the judgment and vesting orders in Bungoma SPMCC No. 193 of 1988.

(b). The High court in Kakamega Succession cause No. 124 of 1986 canceled all the registrations and subdivisions of L.R. No. E. Bukusu/N. Sangalo/661.

The application is opposed. The plaintiff/Respondent filed affidavit in reply in opposing it. According to her, the application is frivolous vexatious and lacks merit. It is her argument that there were no material facts hidden from the court and the court heard both parties before reaching its determination. That there is no material placed before the court that E. Bukusu/N. Sangalo/1704 belongs to Amos Wanambisi – deceased. She said the application is an afterthought.

The advocates for the parties orally submitted for and against the application. I have considered those submissions and need not reproduce them here. There are two issues raised for determination in this application.

(a). Whether the firm of Gabriel Fwaya & Co. advocates are properly on record and has complied with provisions of Order 9 of the Civil Procedure Rules.

(b). Whether the grounds for review have been established by the applicant to merit the orders sought.

In answer to (a), Mr. Fwaya urged the court to rely on article 159 of the Constitution and Order 9 Rule 10. He submitted further that the former advocates already gave him consent. Mr. Juma argue however

that consent was given after the application was filed hence the application is defective. Under Order 9 Rule 9 and 10 provided as follows ;

Rule 9 “*When there is a change of advocates, or when party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court.*”

9(b). *Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.*

Rule 10; “**an application under Rule 9 may be combined with other prayers provided the question of change of advocate or party shall be determined first.**”

From the reading of the rules cited above, the applicants advocate in the instant was within the law to put together his prayer for leave to come on record together with prayers for review. The issue of representation is already determined as they filed a consent between his law firm and the previous advocates in accordance with rule 9(b). My answer to the first issue is positive and I find the application as properly filed.

On issue No. (b), has the applicants proved grounds for review. Order 45 Rule 1 lists grounds upon which a court can exercise review i.e ;

- *Discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicants knowledge and could not be produced by him at the time the decree was passed.*
- *On account of some mistake or error apparent on the face of the record.*
- *For any other sufficient reason.*

The applicant is seeking a review of my judgment delivered on 8th April 2013. He submits that the court reached its decision without reference to the decision of Kakamega High court in Civil appeal No. 133 of 1989 being presented to it. The decision of the Kakamega High court sitting on appeal, set aside the earlier orders of the trial magistrate which vested the portion of land in dispute to the Respondent's husband. In that appeal, the applicant herein was the appellant. The appellate court reached its decision on 29th April 1998 in his favour. While testifying before this court, he did not refer to those proceedings or decision on appeal. He was represented by counsel.

Mr. Fwaya advocate submitted that, had this decision been brought to the attention of this court, It may have reached a different decision. He did not however explain why the applicant did not bring it to the attention of the court during the trial of the case. He cannot therefore rely on ground 1 for review. He relied on case law of **Kithoi Vs. Kioko [1982] KLR page 177**. The holding No. 1 in this case reproduced Order 45 Rule 1 verbatim, it does not help the applicant's case.

He also relied on the ground “**for any other sufficient reason**” he cited the case of **Orero Vs. Seko [1984] KLR p. 238**. Would this provision be available to a party who did not exercise due diligence where the new evidence was within his knowledge? In the case of **Michael Mungai Vs. FORD KENYA ELECTIONS & NOMINATIONS BOARD AND 2 OTHERS [2013] e KLR HC, at Nairobi Misc. Civ. Application No. 53 of 2013**, a 5 judge bench quoted the court of appeal in the case of **NGORORO NDUTHA & ANOTHER [1994] KLR p. 402** where the C.A held **that any person though not a party to the suit whose direct interest is affected by a judgment is entitled to apply for review, such reason can be “sufficient reason” for the purposes of Order 45 Rule 1**. The appellant was a party to the proceedings both in the appellate court and the proceedings whose judgement he seeks to review. He does not fall within the ambit of the people anticipated in *Ngororo case*.

Similarly section 80 of the Civil Procedure Act gives a wide discretion. It states that any person who considers himself aggrieved;

(a). *By a decree or order from which an appeal is allowed but no appeal has been preferred may apply for a review of judgment. No appeal to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

The applicant although was entitled to appeal has opted for review. The submission by the Respondent that this application is an afterthought after time for appealing has no pride of place. In any event the applicant feels aggrieved by the judgment so he falls within the provisions of Section 80 of the Civil Procedure Act.

In my judgment, I found that I did not agree that the consent order of 25th April 2012 in the succession cause canceled the vesting order which bestowed land to the Respondent's husband. I had taken this view based on the provisions of **sec 93** of the Succession Act. In any event the Respondent title was acquired by way of a court order. I will not change from this position as it would amount to sitting on appeal of my own decision. The applicant, I must say has not been candid with information both to this court and the court handling the succession cause. Had he produced the decision of the Kakamega High court in Civil Appeal No. 133 of 1989 reached on 29th April 1998 then all the subsequent suits would not have been filed. All the suits for which he annexed the plaints (HCC 55 of 2010 both of Bungoma) are seeking eviction of his brothers from the land.

The applicant did not forward this decision to the Land Registrar Bungoma to effect the changes in the register that would cancel the Respondent's title, alongside others that were created as a result of the vesting order. However in spite of all the misgivings I have on the conduct of the applicant, I will give my analysis on status of the judgment of the court in Kakamega HCCA No. 133 of 1989. This decision set aside the decree which vested the title to the respondent. Does it vest the land as it were now to the applicant? If he has not presented the decree to the land registrar to rectify the register, does that grant the Respondent title any validity?

Section 4(4) of the Limitation of Actions Act provides that " an action may not be brought upon a judgement after the end of 12 years from the date on which the judgement was delivered". In the case of Njuguna vs Njau (1981) KLR 225, the court of appeal held ***'That "action" in the context of Sec 4(4) of Cap 22 is not intended to bear a restricted meaning and therefore embraces all kinds of civil proceedings including execution proceedings'***. At pg 229 par 25, the court said ***"...and the time limit for the execution of a judgement is twelve years."*** The new evidence sought to be introduced is a decree on appeal delivered on 29th April 1998, more than 12 years has passed. Introducing it in this proceedings without it having been enforced first is attempting to execute it through this application.

Consequently for the reasons set out in the body of this ruling, I decline the application for review for these summarised reasons;

1. I cannot sit on appeal to change the finding I made as regards the consent entered in Kakamega Suc Cause no 124 of 1986
2. The new evidence sought to be introduced was within the knowledge of the applicant and he has not proved that he qualifies to enjoy review under the head 'for any sufficient reason' for the court to exercise discretion in his favour.
3. The new evidence sought to be introduced is a judgement that is over 12 years old and has not been executed and is therefore time barred.

Given the circumstances of this case, I will order that each party bear their respective costs of the application.

RULING DATED, DELIVERED AND SIGNED in open court this 29th day of August 2013.

A. OMOLLO

JUDGE