



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**HCCC SUIT NO. 1084 OF 1976**

**LAZARO KINUTHIA ICHIGO.....PLAINTIFF**

**VERSUS**

**JERIUS MUGURE W/O MWANGI KAN.....DEFENDANT**

**AND**

- 1. JOHN GICHUHI KINUTHIA**
- 2. PATRICK KAGOIYA KINUTHIA .....APPLICANTS**
- 3. MARY WANYUA ICHIGO**

**RULING**

The Applicants herein filed a Notice of Motion dated 13<sup>th</sup> January 2010 seeking various orders, one of which was to be joined as parties to this suit. They were accordingly joined as Plaintiffs in this suit to substitute the original Plaintiff Lazaro Kinuthia who died on 24<sup>th</sup> September 1996. The outstanding prayers in the said Notice of Motion were then set for hearing and are as follows:

- 1. That this Court be pleased to review and set aside the order/decreed made on 28<sup>th</sup> November 2007 and issued on 29<sup>th</sup> January, 2008.
- 2. That upon review being made, this Court be pleased to order that the status appertaining to LR NYANDARUA/MURUAKI/392 (hereinafter referred to as the suit property) do revert the way it was on 28<sup>th</sup> November 2007 and all or any title issued pursuant to the decree and order made on 28<sup>th</sup> November 2007 be cancelled.

The grounds for the application are that the Plaintiff herein passed away on 24<sup>th</sup> September 1996 and that on 28<sup>th</sup> November 2007, 11 years after the abatement of the suit, the Deputy Registrar adopted an award of a panel of elders as an award of the court. Further, that the registrar had no jurisdiction to issue a decree, which jurisdiction is vested in the judge of the High Court, and that there was an apparent error on the face of the record as there was no suit in which adoption of the award could take place. The Plaintiffs also claim that there was another suit namely Nakuru HCCC No 529 of 1995 over the same suit property, and against the same Defendant, where judgment was entered in their favor.

The Plaintiffs attached copies of the death certificate of the original Plaintiff, of letters of administration issued to them by the High Court of Kenya at Nairobi on 29<sup>th</sup> April 1997, of the pleadings and judgment

in Nakuru HCCC No 529 of 1995 and of the orders issued by the Deputy Registrar herein on 29<sup>th</sup> January 2007. This evidence was attached to the supporting affidavit and supplementary affidavit sworn on 13<sup>th</sup> January 2010 and 13<sup>th</sup> May 2013 respectively by John Gichuhi Kinuthia, one of the Plaintiffs. The Applicants also produced a copy of certificate of official search of the suit property dated 22<sup>nd</sup> October 2009 showing that on 5<sup>th</sup> February 2007 a title was issued to Ibrahim Mwangi Kanyora, which was closed on 23<sup>rd</sup> October 2007 on subdivision.

As there was no response from the Defendant, the Plaintiffs were directed to file submissions on their outstanding prayers in the Notice of Motion. The Plaintiffs' counsel in submissions dated 17<sup>th</sup> May 2013 and filed in court on 21<sup>st</sup> May 2013 argued that the application for review was brought under order 45 of the Civil Procedure Rules and other provisions of the law. Under Order 45 Rule 1 of the Civil Procedure Rules a person aggrieved by a decree of order may apply for review of such order decree where there is an error or mistake apparent on the face of the record, discovery of new and important matter or evidence and for any other sufficient reason.

The counsel submitted that the decision by the Deputy Registrar to adopt an order in a suit which had abated long ago amounts to an error or mistake on the face of the record. Further, that the failure by the Deputy Registrar to consider the fact that the suit land abated before adopting an award is an error or mistake apparent on the face of the record as the same does not require an elaborate argument to be established. He relied on the decision in the case of **Njeri Onyango vs Patrick Musimba (2005) eKLR** where the court referred to the decision of the Court of Appeal in **National Bank Ltd vs Ndungu Njau Civil Appeal No. 211 of 1996** that a review can be granted to correct an error or omission that is self-evident.

The counsel further submitted that the Plaintiffs have complied with all the requirements of the law in making the application, and have attached all the requisite documents as to the order and decree sought to be reviewed. He relied in this respect on the decision in **Orchird Pharmacy Ltd vs Southern Credit Banking Corporation Ltd & 2 Others (2005) eKLR** where the court dismissed an application for review where the Applicant had not attached to it the extracted decree and order sought to be reviewed. The counsel urged the court to allow the application for review in the interest of justice.

I have considered the pleadings and submissions made by the Plaintiffs and find that there are two issues for determination. The first is whether there are grounds to set aside and/or review the order and decree issued by the Deputy Registrar of the High Court on 28<sup>th</sup> November 2007 and 29<sup>th</sup> January 2008 respectively. Secondly if the said order and decree are set aside and/or reviewed, whether the *status quo* with regard to the suit property can revert to the way it was on 28<sup>th</sup> November 2007.

I have perused the court record and find that on 26<sup>th</sup> March 1983, Muli J. (as he then was) ordered upon consent by the parties that the dispute herein be referred to elders under the chairmanship of the District Officer of North Kinangop, and the findings and award of the elders be submitted to the court. The said findings and award were submitted to the Court in a letter from the District Officer, North Kinangop dated 27<sup>th</sup> September 2006 and filed in court on 4<sup>th</sup> October 2006. The reading of the award and the disputed orders by the Deputy Registrar of the High Court were made on 28<sup>th</sup> November 2006, and issued on 29<sup>th</sup> January 2007.

I have also perused the death certificate produced in evidence by the Plaintiffs and it is indeed the case that original Plaintiff herein died on 24<sup>th</sup> September 1996. As there is no record of substitution of the Plaintiff having been made herein after one year, this suit accordingly abated on 25<sup>th</sup> September 1997, pursuant to the provisions of Order 24 Rule 3 of the Civil Procedure Rules. Under Order 24 Rule 3 the only application a Defendant can make to court after a suit has abated is for costs.

I also note from the decree issued in Nakuru High Court Civil Suit No 524 of 1995 which was annexed by the Plaintiffs, the original Plaintiff herein was declared the owner of the suit property and granted an injunction with respect to the said property. The parties in Nakuru High Court Civil Suit No 524 of 1995

were the original Plaintiff herein who had sued Mwangi Kanyora, the husband of the Defendant herein over the same property that is the subject of this suit. Judgment in the said suit was delivered on 4<sup>th</sup> July 2002.

It is therefore apparent that at the time of the reading of the Elders' award and orders, and the issue of the decree by the Deputy Registrar of the High Court herein on 28<sup>th</sup> November 2006, and 29<sup>th</sup> January 2007 respectively, this suit had abated and was not in existence, and there was also a judgment delivered by this court confirming the Plaintiff's ownership of the suit property. There is thus an error on the face of the record of the said order and decree that makes them liable to be set aside. The Plaintiffs' Notice of Motion dated 13<sup>th</sup> January 2010 is therefore allowed for these reasons, and I accordingly order as follows:

1. The order made on 28<sup>th</sup> November 2007 and decree issued on 29<sup>th</sup> January, 2008 herein by the Deputy Registrar of the High Court are hereby set aside.
2. All new titles to and subdivisions of the property known as LR NYANDARUA/MURUAKI/392 issued pursuant to the order made on 28<sup>th</sup> November 2007 and decree issued on 29<sup>th</sup> January, 2008 herein by the Deputy Registrar of the High Court are hereby cancelled.
3. The Plaintiffs shall meet the costs of the Notice of Motion dated 13<sup>th</sup> January 2010.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_24<sup>th</sup>\_\_\_\_ day of

\_\_\_\_September\_\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**