JOSEPH MACHARIA MWANGI ……...…….……1ST PLAINTIFF

JANE NYAKIARO MWANGI …...…….. 2ND PLAINTIFF

VERSUS

KIMEU NDAMBUKI ……...……..... 1ST DEFENDANT

MATHEW K. KIMEU …….….. 2ND DEFENDANT

RULING

1. Kimeu Ndambuki the 1st defendant and Mathew K. Kimeu the 2nd defendant filed a Notice of Motion dated 1st November 2011 brought under Order l rule 1, 3,12,15 Order XXI Rule 22 (2), Order XLIV Rules 1 and 2 of the Civil Procedure Rules, Sections 1A, 1B, 63, 80 and 3A of the Civil Procedure Act, Section 4 of the Limitations of Actions of the Laws of Kenya, seeking the following orders;

a) That the Court be pleased to review the decree given on the 31/5/1993 but issued the 29/1/2008 and upon consideration set it aside together with all other consequential orders flowing from it.

b) That the Court do order the restitution of land title no. L.R. Makueni/Kikumini/73 to the Defendants who have been illegally evicted and that the Plaintiffs do pay the costs of restituting the Defendants into the land.

c) That the costs of this application be met by the respondent.

The application is premised on the affidavit of Mathew K. Kimeu the 2nd Defendant/Applicant dated 27th September 2010 on the following grounds.

i. That the Decree is unenforceable and incurable defective on account of some mistake and or error apparent on the face of the record.

ii. That Judgment was entered on the 31/5/1993 as is indicated by the decree issued on the 29/1/2008.

iii. a. That no decree upon the judgment was drawn up, approved and issued within 12 years after the delivery of judgment.

b. That neither were the Defendants' Counsel served with a draft of the decree for approval

within the said 12 years.

iv. That the Plaintiffs took no action or proceedings upon the judgment within the period statutory set out of 12 years of the delivery of the judgment.

v. That the decree was only issued on the 29/1/2008 long after the expiry of 12 years since the delivery of judgment thus the same offends section 4(4) of the limitation of actions act, and thus the decree has been rendered impotent and wholly unenforceable.

vi. That Plaintiffs cannot be aided by equity having unduly delayed the observance of the requirements of the law, thus the plaintiffs have soiled their hands and can't come to equity. The defendants having acquired statutory defense of adverse possession against the plaintiffs claim.

vii. That he plaintiff never served the Defendants with the Application dated 7/11/2008, as the application was served through substituted service which was not sanctioned by law, upon a non existent law firm of M/s Kakonzi & Co. Advocates.

viii. That the plaintiffs merely send the application for eviction proceedings through the registered address of M/s Kakonzi & Co. Advocates, which law firm had long ceased practice and closed down. That no effort was made to serve the Defendants in person. That the plaintiffs never sought leave for the said substituted service.

ix. That he service in support of the application dated the 7/11/2008, as the basis of the eviction orders is bad in law and should be expunged off the record.

x. That the Defendants' Advocates having ceased to practice law, the plaintiffs ought to have served the Defendants in person.

xi. That he the Defendants were thus caught unawares by the eviction orders, which had been undefended, just like the proceedings which were conducted ex parte.

xii. That the issuance of the decree and eviction orders without legally valid, proper or sufficient notice or service to the Defendants over 12 years after judgment was wrongful, the Defendants having been condemned unheard and exposed to great injustice and prejudice that affects other innocent persons not parties to the suit and who have been in actual occupation and possession of the land for ages, this being their ancestral land.

xiii. That the plaintiffs bought the land upon a sale, conducted illegally and fraudulently by the charge and their agents, the Auctioneers and as no statutory notice had been issued and that the charge had falsified the account upon which the sale was based.

xiv. That he Defendant challenged the sale vide High Court Case No.3265/1982, which also was never tried, but record (not court file) showed the same was allegedly tried by the court. That without the court file record, it could not really be proved that the said suit was suit was ever tried and determined on merits. The said case file having being lost without trace.

xv. That the judgment having been issued and lapsed and having become unenforceable against the defendants, and the doctrine of Adverse Possession having operated against the plaintiffs from the31/5/1993 and 12 years having lapsed and in favor of the Defendants, there are sufficient reasons and grounds warranting this application be heard.

xvi. That the plaintiff's have never been in possession of the Suitland, but in November 2009 begun the eviction process against the Defendants and their families who have resided on this land measuring over 50 Acres.

xvii. That the Defendants have been evicted in February this year without the due process of the

law being followed.

xviii. That there has been no delay at all on the Defendant's part as the original court file has been untraceable and the defendant had to reconstruct a skeleton file and apply that their new counsels do come or record.

The application was supported by the supporting affidavit of Mathew Kiio Kimeu dated 27th September 2011 and a supplementary affidavit dated 30th March 2011. The application was opposed by the plaintiff respondent Joseph Macharia Mwangi the 1st plaintiff filed a replying affidavit dated 8th February 2011.

2. The background of this application is that the plaintiffs through an auction bought land title No. Makueni/ Kikumini/73 and became the owners. They sought to have the defendants move and thereafter filed this suit seeking to have the defendants evicted. Judgment was entered for the plaintiff on the 31st May 1993 by Justice Githinji. The plaintiff thereafter obtained a decree dated 29th January 2008 and has enforced it against the defendants.

3. The applicants in their grounds of opposition and supporting affidavit has given details of what took place when the matter was heard and finally culminating on the decree that was issued. The applicants argue that the decree that was issued was issued 12 years after the delivery of judgment and that this offends section 4(4) of the Limitation of Actions Acts Cap 22 and thus the decree has been rendered impotent and wholly unenforceable. In their grounds and supporting affidavit the applicants have stated that they had a counsel J. K. Kakonzi & Co. Advocates whose offices were closed in 2007 and he was struck off the roll of advocates around November 2009 as a result they were not aware of the position of the Court proceedings. That after they learnt they made continuous efforts to trace the file and they managed to do so and reconstruct the file. They also learnt that the plaintiffs advocates kept serving their counsel office by way of substituted service; that the application dated the 7/11/2008 for eviction was not served on them at all and thus the consequential orders for eviction were issued exparte. That his co-defendant and him had no way of knowing and were not aware of such proceedings and they have accordingly been condemned unheard; that the decree that was issued on the 29/1/2008 was done without a draft being properly served for approval. That they filed HCCC 3265 of 1982 Kimeu Ndambuki V/S Industrial & Commercial Development Corporation, but the same was dismissed for want of prosecution.

4. The applicants further argue that there are errors and discovery of new matters on the face of the record that warrant a review of the said orders in that:

a) M/s Kakonzi & Co-advocates having ceased to practice, could not have been served with any court process, even the application dated the 7/12/2008.

b) There was no leave authorizing the substituted service that was done, thus the service is defective.

c) The decree was issued 12 years after the judgment and thus is unenforceable by law and is ipso facto invalid.

That on the 14th February 2010 the 1st plaintiff together with a group of young men, descended on the applicants and their family members, evicted them out of the land, demolished and burned up all their house and properties; that the 1st plaintiff did not follow up the laid down procedure for evicting the defendants' and thus the eviction is illegal as it is a nullity. That, even in spite of being served with papers indicating that a restriction had been entered, the respondent still evicted the defendants.

5. The 1st respondent filed a lengthy replying affidavits opposing the application. In the affidavit he states that they are the joint registered owners of the suit premises which they bought through an auction. They give a background of how they bought the suit premises and sought to remove the defendants from the land, negotiations they had with the defendants, the Court proceedings and how they obtained the decree. They deny that they acted irregularly and that they filed an application for eviction and obtained orders where they were to give the defendant 30 days to vacate. The rest of the affidavit

counters the applicants' averments on how the file went missing and how their previous counsel was served. The respondents aver that the applicants are relying on two grounds that there was an error on the face of the Court record and discovery of a new and important matter as captured in paragraph 19 of the supporting affidavit, however the applicants application for review is reliant on matters that are extraneous to the granting of the judgment and decree made on 31st May 1993, the same is incompetent and fatally defective. That the defendants have not established any ground necessary to cause the Court to review the decree and the same should be dismissed with costs.

6. Counsels for the parties filed written submissions which are quite detailed and which I have carefully considered. The application is brought under the old civil rules for review under order XLIV rules 1 & 2 which states as follows;

"*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 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.

2. An application for review of a decree or order of a Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed".

7. For this Court to review the decree the applicant has to demonstrate that his case falls within the provisions of order 44. A decree was issued 12 years after the judgment. The applicants is concern is that no action could have been taken upon the judgment dated 31/5/93 after the lapse of 12 years. The applicants seek a review of the decree. I note that the applicant did not prefer an appeal against the judgment. I will now deal with the provisions of the said order as I consider the merits of the application. The first issue that the applicant has to demonstrate is whether there is discovery of a new and important matter or evidence which after exercise of due diligence was not within their knowledge or could not be produced by them by the time the decree was passed or the order made. From the facts deponed the applicants instructed an advocate to defend them. The said advocate was served and the suit was fixed for hearing and heard in their absence. After the plaintiff obtained judgment they sought to have vacant possession. From the facts deponed the applicant was aware that there was a suit against them and judgment was obtained and also that their counsel offices had been closed. It is evident that the parties in this suit attempted to negotiate when the plaintiff sought vacant possession. The applicants had a chance during this time to apply to have the judgment set aside but they did not. I therefore find that they have failed to demonstrate that they have any new and important matter or evidence which after the exercise of due diligence was not within their knowledge or could not be produced by them at the time the decree was passed or order made.

8. The next limp is on account of some mistake or error apparent on the face of the record. The decree the applicants seeks to review gives effects to the judgment. The applicant did not seek to set aside the judgment. The decree as it is has no mistake or error as it reflects what was the Court order in the judgment. The applicant has failed to demonstrate the error on the face of the record. The applicants main issue is that the decree was drawn 12 years after the judgment. That cannot be an error on the face of the record but a point to be challenged by way of appeal. The reasons given by the applicant at paragraphs 19

of their replying affidavit are reasons that ought to have been advanced by them if they sought to have the exparte judgment set aside.

9. On the last limp of sufficient cause, I find that it can only be conversed if there was demonstration of due diligence by the applicant and I have made a finding on this aspect. I therefore decline to grant prayer (b) as I find no cause to review the decree given on the 31st of May 1993. On prayer (c) the order sought is a mandatory order and if granted it would mean the Court is reinstating the applicants back to the suit premises and in effect reversing the findings of Justice Githinji's Judgment dated 31st May 1993. This judgment has not been overturned and remains valid. I therefore decline to grant prayer (c). I find no merit in the application dated 1st November 2011, and I dismiss it with costs to the respondents.

Dated and delivered this 11th Day of May 2012

R. OUGO
JUDGE

In the Presence of:-

……. For the Applicants

…… For the Respondents

…….. Court Clerk