



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 666 OF 2007

STEPHEN
WANYOIKE.....PLAINTIFF

VERSUS

KANUKI MAREGA.....1ST
DEFENDANT

PETER MUIGAI.....2ND
DEFENDANT

RULING

The application before the Court is brought by the Plaintiff/Applicant and is dated 17th February 2011. The Plaintiff is seeking the following substantive orders:

1. That this Honourable Court be pleased to review and vary or set aside its orders made on the 18th day of November 2010 and further reinstate the Judgment and the consequential Decree dated 8th June 2008 ordered by Honourable Lady Justice Mary Angawa.
2. That the Honourable Court in equity reinstate the orders granted by Honourable Lady Justice Mary Angawa on 8th June 2009 in HCCC 899 of 2004 *suo moto*.

The grounds for the application are elaborated upon in the Plaintiff's supporting affidavit sworn on 17th February 2011 and a Further Affidavit sworn on 15th March 2011, in written submissions dated 15th April 2011 and in oral submissions by Mr. Kimeria, the Plaintiff's Advocate at the hearing of the application on 17th February 2012. The orders sought to be reviewed were given by Honourable Justice Muchelule on 18th November 2010 after an *inter partes* hearing of an application by the Defendants dated 13th August 2009 filed on 14th August 2009. The Defendants application of 13th August 2009 sought to set aside *ex parte* proceedings of 27th and 28th May 2009 and judgment delivered by Honourable Lady Justice Angawa on 8th June 2009, principally on the grounds that the hearing of the matter proceeded in Kericho without the knowledge or participation of the Defendants, and that the matter had been filed in the Nairobi High Court registry. The application was allowed by Honourable Justice Muchelule in his ruling of on 18th November 2010.

The Defendants filed Grounds of Opposition dated 22nd February 2011 wherein they opposed the application on the grounds that it is frivolous vexatious, unmeritorious and an abuse of the process of this Court; that it does not satisfy the laid down legal requirements for the grant of an order of review; and that it is *res judicata* because it raises the same issues that were heard and determined in the ruling of this Honourable Court on 18th November 2010, and the only avenue open to the Plaintiff if dissatisfied with the courts findings is to appeal against the ruling.

I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. The application is brought under section 3A and 80 of the Civil Procedure Act and Order XLV of the Revoked Civil Procedure Rules. The latter two provisions are the substantive provisions and deal with review of decree and orders. The heads under which an order can be reviewed are provided in Order XLV of the Revoked Civil Procedure (now Order 45 of the Civil Procedure Rules) 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 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.

The Plaintiff's Advocate submits that the new evidence discovered is in relation to High Court Succession Cause No 1672 of 2008 filed by the Defendants, wherein they were granted a certificate of confirmation of grant on 29th May 2009 in relation to the suit properties, a day after the hearing of the matter in Kericho. Further, that the certificate of Confirmation of Grant was the one now being used to cancel the Plaintiff's title deed and to alienate the trespassed upon land repossessed by Honourable Lady Justice Angawa.

The Plaintiff also argued that there was error on the face of the record as the order being sought to be reviewed was also setting aside orders made in HCCC No. 1327 of 1978, HCMA No. 179 of 2004, HCMA No. 1056 of 2003 and in HCCC No. 899 of 2004. Further, that for this reason the Defendants application of 14th August 2009 was *res judicata* as a similar application had been made in HCCC No. 1327 of 1978, and that the Defendants were estopped from denying any knowledge of the proceedings and the hearing of the matter in Kericho in the suit filed herein.

The above is a summary of the grounds relied upon by the Plaintiff. I will first consider the ground in which it is argued that there has been new and important evidence discovered. The proceedings and subject matter of High Court Succession Cause No 1672 of 2008 have no relation with what was in issue in the Defendant's application dated 13th August 2009, and were completely separate proceedings. In the ruling delivered on 18th November 2010, Honourable Justice Muchelule states that the issue that was to be decided in the said application was whether the Defendants had no knowledge of the fact that the file had been taken to Kericho, and whether they were unaware of the hearing date.

The proceedings and decision in High Court Succession Cause No 1672 of 2008 are therefore not relevant to the proceedings before Justice Muchelule and cannot be a basis for reviewing the said orders. The Court of Appeal has held in **National Party and Another vs Head of Civil Service and Director of Personnel Civil Application No. 287 of 2008** that to base an application for review on a prayer which never formed part of the original application to be reviewed is quite improper.

On the grounds put forward by the Plaintiff of error on the face of the record and *res judicata*, the orders made in HCCC No. 1327 of 1978, HCMA No. 179 of 2004, HCMA No. 1056 of 2003 and in HCCC No.

899 of 2004 were well within the knowledge of the Plaintiff at the hearing of the Defendant's application of 13th August 2009, as the Plaintiff in his Supporting Affidavit states that all these matters were consolidated with the suit herein by Honourable Lady Justice Angawa on 6th June 2008. The Plaintiff ought to have exercised due diligence and canvassed the issues he raises in relation the above-cited cases during the hearing of the Defendant's application filed on 13th August 2009.

Finally, this Court will also be sitting on appeal from the decision of a court of concurrent jurisdiction, to the extent that some of the grounds raised by the Plaintiff challenge the correctness of the decision by Honourable Justice Muchelule. I particularly refer to the grounds in the application stating as follows:

1. That the Honourable Judge did not take into consideration the precedents forwarded by the Plaintiff though called upon to do so to wit:

1. CA NO. ANI 180 of 2002 (UR 94/2002) Delaco Limited and another –vs- Stephen Omondi Owino – vs- Guilders International Bank Limited.

2. CAP NAI 128 of 1993 (UR 55 of 1993) African Express Airways (K) Limited and another –vs- Nobel Viajes.

2. The Honourable Judge failed to follow the contents of the proceedings in the file that clearly expressed that the 1st and 2nd Defendants and their Advocates were very aware of the Transfer of the Proceedings from Nairobi to Kericho and further that the same was now a part heard before Honourable Lady Justice Mary Angawa.

3. That the Honourable Judge failed to put emphasis on the plaintiffs sworn on rebutted statements in the Affidavits sworn on the 7th September 2009 envisaging that the Defendants had knowledge of the proceedings in the proceedings at the High Court Kericho but aligned himself with the uncorroborated statements of the Defendants.

4. That the Honourable Judge while setting aside the judgment and Decree of this Honourable Court erred in that he followed the Defendant's allegation that the suit premises was ancestral land while the facts detailed in the proceedings that the Ancestral Land ceased to exist on 6th May 1982 and that land parcel No. Githunguri Giathieko/412 was property of JOHN KINUTHIA MAREKA alone the plaintiff herein.

5. That the Honourable Judge did not take into effect that the Defendants do not have meritorious defence because of Action in this suit was trespass and alienation of 0.8 of an Acre was a result of the Defendants using a fake order later determined to be fake by the following notable points during hearing as evidenced by the proceedings of the High Court.

(a) The hearing in chambers on the 6th August 2000 could not have occurred because the 6th August 2000 is actually Sunday.

(b) Kimani Marega who was the Defendant in HCCC No. 1327 of 1878 consolidated hereto was duly served in the year 2000 while still dead and buried for 17 years since 2nd January 1984.

(c) That the application allegedly dated 4th May 2000 and presented to Court under Certificate of Urgency was supported by an affidavit dated 26th July, 2000.

(d) A general look at the signature of Deputy Registrar M. M. Bhatt (deceased) clearly envisages that when counterchecked with an original of the Deputy Registrar Specimen the signatures in the alleged order are fake.

These grounds go to the merits of Honourable Justice Muchelule's ruling and the remedy available to the

Plaintiff with regard to the above-stated grounds is to appeal the said ruling.

For the reasons given in the foregoing it is this Court's finding that the facility of review is not available to the Plaintiff as he has not established any justifiable ground, and the application dated 17th February 2011 is hereby dismissed.

The Plaintiff shall bear the costs of the application.

Dated, signed and delivered in open court at Nairobi this ____19th____ day of ____June____, 2012.

P. NYAMWEYA

JUDGE