REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 1854 & 1855 of 1983

NAHASHON KAHARA…….....…PLAINTIFF

- VERSUS -

KAMUINGI FARMERS COMPANY LTD……..…...1ST DEFENDANT

ASHFORD MACHARIA……...…2ND DEFENDANT

CONSOLIDATED WITH

SAMUEL MUCHERU……..……PLAINTIFF
VERSUS

KAMUINGI FARMERS CO. LTD ……..….1ST DEFENDANT

ASHFORD MACHARIA …….…….2ND DEFENDANT

RULING

1. These are the plaintiffs' two notices of motion dated 28th July 2005 in each of the consolidated suits. The plaintiffs pray that the decrees dated 21st January 1992 and 23rd October 1989 respectively be reviewed. In sum, review is sought to enable the plaintiffs excise 13 acres of land (in total 26 acres of land) from land now known as LR Londiani/Londiani 3/Kamuingi 60 which has been subdivided into Londiani/Londiani block 3/234, 235, 236, 237, 238, 239 and 240. The plaintiffs pray that all those subdivisions be nullified or cancelled.

2. The application is contested. There are two replying affidavits sworn by Patrick Maguta on 29th September 2005 in either suit. The depositions are identical in all respects except for the title of the suits. The key objection is that the motions lack basis in law for three reasons: there has been undue laches; the review is now sought over a different property from that in the decree; there were no amendments to the pleadings at the High Court to plead to the reliefs now sought through the back door; and that the applicants have irregularly relied on materials annexed to their written submissions.

3. I have heard the rival submissions. The motion is expressed to be brought under order XLIV (now repealed), the precursor to order 45 of the Civil Procedure Rules 2010. The parameters within which the court can review its decisions are well settled. The application for review is thus brought under sections 80 of the Civil Procedure Act. Section 80 of the Civil Procedure Act reads as follows;

Any person who considers himself aggrieved –

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 rule 1(1) (formerly order XLIV rule 1) is *pari materia* with section 80 and provides;

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 mater 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.

4. From a plain and natural meaning of the words of the law, an application for review is open to a person aggrieved by a decree of this court and who is entitled to an appeal to the Court of Appeal but has not preferred such appeal or who holds a decree or order from which no appeal is allowed by the Act. It is thus a unique and special power of this court. For an application for review to succeed, it must be brought without delay, it must be on the basis of either new and important evidence not available at the time of trial, or on account of mistake or error on the face of the record, or for other sufficient cause. Those are the parameters set by the authorities. And the authorities abound including *Origo & another Vs Mungala* [2005] 2 KLR 307, *Kisya Investments Ltd Vs Attorney General and another* Civil Appeal No 31 of 1995 (unreported), *Refrigeration Contractors Ltd Vs Lieta* [2005] KLR 506, *Kuria Vs Shah* [1990] KLR 316 and *M'Anthaka M'Mwoga Vs M'Boore* [2006] e KLR.

5. Applying the law to the facts, I find as follows. The applicants are seeking review of judgments made on 23rd October 1989 and 21st January 1992. That is well over two decades ago. The plaintiffs state that unknown to them, the defendants had on 12th May 1987 registered the plaintiffs' 26 acres of land the subject of the combined decrees, in the name of the 2nd defendant (now deceased) as LR Londiani/Londiani/B3/Kamuingi/60. The plaintiffs depone that they became aware of that fact way back on 15th June 2004 when the 2nd defendant's administrator Patrick Maguta entered the suit land and started to subdivide it. Even if one accepts that fact, the present motions for review were not presented to court until 1 year and 2 months later on 15th August 2005. When I consider the age of the decrees sought to be reviewed, I cannot think of a better illustration of undue laches. That delay is not explained at all. The supporting affidavits of Samuel Mucheru in both suits at paragraph 8 and 9 respectively state in similar terms:

*"9. **THAT** on 15/6/04 I learnt that the land from which the 13 Acres was to come from had been incorporated into the second defendants LR Londiani/Londiani/Block 3/Kamuingi/6 and registered in the second defendant's name and that his Administrator Mr. Patrick Maguta Macharia had subdivided it into L.R. Londiani/Londiani/Block 3/Kamuingi/234, 235, 236, 237, 238, 239 and 240 which have not yet been registered since no subdivision on the ground has been done".*

6. In a word, there has been lengthy and unexplained delay. For want of explanation, the delay in turn becomes inexcusable. The words of Salmon L J in *Allen Vs Mc Alpine & Sons* [1968] ALL ER 56 are instructive:

"As a rule, when inordinate delay is established, until a credible excuse is made out, the natural

inference would be that it is inexcusable. It is an all time saying which will never wear out however often said that, justice delayed is justice denied"

See also my recent decision in *Geoffrey Gakinya Kamau Vs Joseph Murori Mbochi* Nairobi, High Court ELC No 186 of 2010 (unreported). The applicants have thus failed one key test for review.

7. I then turn to the impugned decrees. The decree of 23rd October 1989 ordered as follows;

*"1. **THAT** the first defendant is hereby ordered to comply with the resolution of 1978 and allocate to the plaintiff his 13 acres in the first portion of land where he had been originally been allocated and the survey and allocation of the plaintiff 13 acres in a different portion of land in the marshy area be and is hereby rescinded.*

*2. **THAT** the second defendant be and is hereby evicted from the plaintiff's original portion of the 13 acres forthwith.*

*3. **THAT** the first and the second defendants do pay to the plaintiff the costs of this suit to be taxed and certified by the Taxing Officer of this court".*

The decree in the other suit dated 21st January 1992 in turn ordered as follows;

*1. "**THAT** the 1st and second defendants to vacate and give 13 acres plot known as Londiani Plot No. 16 to the plaintiff who should be registered as its proprietor.*

*2. **THAT** if the first and second defendants fail to comply then the registrar of the High Court to sign the necessary documents to constitute the plaintiff as the owner of the 13 Acres.*

*3. **THAT** the defendants do pay to the plaintiff the costs of this suit to be taxed and certified by the taxing officer of this court".*

8. On the face of it, I would have to agree with the defendants that there is no reference in both decrees to LR Londiani/Londiani/B3/Kamuingi/60 or the later subdivisions. To be fair to the applicants, even their prayers in the plaints at the High Court made no specific reference to the properties now cited in the application for review. The two suits dealt with properties known as LR No Kericho/Londiani Block 2 Kamuingi/60 and Kericho/Londiani Block 3/Kamuingi/60. The plaintiffs had opportunity at the trial to amend their pleadings. It was not done. If review was to be granted, it would transplant strange properties and make fresh implants on the old decrees. I have no evidential basis to do so. The plaintiffs purported to introduce further evidence by attaching documents to their counsel's written submissions. It was highly irregular and of little probative value. It was simply throwing documents at the court.

4. There is then the evidence in the deposition of Patrick Maguta at paragraphs 4 and 5. He replies that his father (the 2nd defendant, now deceased) obtained a title for Land LR Londiani/Londiani B3/Kamuingi/60 on 22nd April 1988. He is emphatic that that title did not become the subject of litigation in these suits. That was well before the impugned decrees were issued. Clearly, there is no new evidence that has suddenly come to the knowledge of the applicants or which could not have been discovered with due diligence. It is not also not lost on me that on 13th July 2004 the plaintiffs had challenged the issue of a grant in High Court Probate and Administration Cause 1888 of 2002 *Re estate of Ashford Macharia* relating to the suit land. The objection was dismissed. The applicants have not seriously contested those facts. The net effect of all this is that there is no sufficient cause shown for review. This is a land matter. It can be emotive. But there must be an end to litigation. It is clear to me that the extensive nature of reliefs now sought are not the true province of review. And from the reasons I mentioned, the motions are fraught with serious difficulties: There has been inordinate and unexplained delay; there is now new evidence that could not have been obtained with due diligence; and considering all the evidence, no sufficient cause for review has been laid to reopen the decrees made over two decades ago. And I remain alive that under the law of limitations, the force of a decree dies after 12 years.

5. For all the above reasons, the plaintiffs' notices of motion both dated 28th July 2012 are without merit. I order that they be and are hereby dismissed. In the interests of justice, I order that each party shall bear their own costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 22nd day of November 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Kinuthia Mwicigi for the Plaintiffs.

Mr. Mwangi Kigotho for the Defendants.