



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CIVIL SUIT NO. 48 OF 2004(O.S)

LELEI A. TUEI *alias* JOSEPH LELEI KEMEI.....1ST PLAINTIFF
TIROP A. KEMEI2ND PLAINTIFF

VERSUS

KIPSUGE A. LELEI *alias* SUK A. LILE DEFENDANT

RULING

In their Notice of Motion dated 28th May, 2010, the Plaintiffs' seek review of the judgment dated 25th March, 2009 and the decree on the ground that the decree is not capable of being implemented. The judgment of the court (by the Hon. Lady Justice Mary Ang'awa) ordered as follows:
“that the land be accordingly subdivided. I award the costs of this application to the Applicant”.

The decree that ensued was to the effect

“that the Respondent holds the land in trust on behalf of the Plaintiffs” and that the land be accordingly subdivided...”

The suit had been commenced by way of Originating Summons and the Plaintiffs' claim was that they had acquired 1.6 acres of the land comprised in the title **No. Kericho/Ainamoi/699** by way of adverse possession of more than twelve(12) years and that they were entitled to be registered pursuant to **Section 38** of the **Limitation of Actions Act, Cap 22** of the Laws of Kenya in respect of 1.6 acres comprised in the said title.

It is discernible from the judgment that the court made a finding that the Plaintiffs' were in adverse possession to title of the Defendant to the extent of 1.6 acres only. The evidence adduced showed that the entire land comprised in the title number **Kericho/Ainamoi/699** measures 1.9 hectares (i.e. 4.713 acres or thereabouts). As the Defendant's land whose title had been extinguished by the Plaintiffs' adverse possession was 1.6 acres, it was necessary for this fact to be specified both in the judgment and in the decree. As it sits, the decree is not capable of implementation not least because it is not only vague but does not state how much land the Plaintiffs' are entitled to and in respect of which they can compel the Defendant to transfer to them.

The Defendant opposed the application by filing grounds of opposition in which incompetence of the application was alleged. Justice needs to be done and the Defendant cannot be allowed to use technicalities to defeat the relief given by the court to the Plaintiffs.

Under **Rule 1 (1)** of **Order 45** of the **Civil Procedure Rules 2010** the Plaintiffs were entitled to seek as they have done the review of the judgment and decree if they were aggrieved by the decree providing that they could show, *inter alia*, that there was some mistake or error apparent on the face of the record, or that there was sufficient reason for doing so. In the circumstances of this case, it is patently clear that the Plaintiffs have sufficient reason to come to court to seek review as they have done. I so find.

Mr. D. O. Akinyi, learned Counsel for the Plaintiffs, urged the Court to allow the application and to review the judgment and the decree.

In the light of what I have stated above, I find merit in the application and I allow it.

The judgment of the Hon. Lady Justice Mary Ang'awa is hereby reviewed as follows: In paragraph 9 of the judgment, the following shall be added:

*“The Plaintiffs have proved that they were in adverse possession to the title of the Defendant relating to the land known as No. **Kericho/Ainamoi/699** to the extent of 1.6 acres. The Defendant’s title to the said land to the extent of 1.6 acres that is occupied by and is in possession of the Plaintiffs has been extinguished by the Plaintiffs’ adverse possession and the Plaintiffs are entitled under **Section 38** of the **Limitation of Actions Act Cap 22**, to be registered as the joint proprietors of the said 1.6 acres”.*

In paragraph 11 of the judgment after the word “subdivided” will be inserted the following:

*“The suit land No. **Kericho/Ainamoi/699** shall be subdivided into two portions of 1.6 acres and 3.1 acres and the portion of 1.6 acres shall be excised and transferred to the Plaintiffs as joint proprietors while the portion measuring 3.1 acres or thereabouts shall be retained by the Defendant. A decree shall issue in these terms”.*

I make no order as to costs.

DATED at KERICHO this 7th day of March, 2011

G.B.M. KARIUKI, SC
RESIDENT JUDGE

COUNSEL APPEARING

Mr. D.O. Akinyi Advocate for the Plaintiff/Applicant
N/A by Mr. E.M. Orina Advocate for the Respondent
Court Clerk – Mr. Koech