REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LAND AND ENVIRONMENTAL LAW DIVISION

CIVIL SUIT (ELC) NO.483 OF 2010

MAYA INVESTMENTS LTD….………………......................………..PLAINTIFF

VERSUS

MUTUYA HOLDINGS LTD………..……….........................………..DEFENDANT

R U L I N G

1. Maya Investment Ltd is the plaintiff in this suit. The defendant is Mutuya Holdings Ltd. By a notice of motion dated 15th March, 2011, the plaintiff seeks orders that this court be pleased to review its earlier orders issued on 11th February, 2011. Secondly, that the court be pleased to grant an interim injunction restraining the defendant/respondent, its servants, agents, workers and or employees from trespassing on LR No.9042/605 situated along Mombasa Road (hereinafter referred to as the suit property). The plaintiff also seeks further orders that the defendant be restrained from constructing on the suit property or damaging or wasting it including destroying or interfering with the boundary marks, pending the hearing and determination of the plaintiff's suit.

2. The application is anchored on the grounds stated on the motion as well as the affidavit sworn by Masese John Mabeya. In a nutshell, the applicant is urging the court to review its order made on 11th February, 2011, on the grounds that there has been discovery of some important documents which evidence was not available earlier. The new evidence referred to by the applicant is a report from the survey department indicating that the previous owner of Plot No.9042/305 (which is the title number allotted to the defendant) failed to pay the charges in the letter of allotment and that the allotment was therefore cancelled and the property re-granted as L.R. No.9042/605. The plaintiff has annexed some handwritten document in support of this position.

3. Following an agreement between the parties written submissions were duly exchanged and filed and this court is invited to determine the application taking into consideration those submissions. In short, the applicant maintains that it is entitled to have the order made on 11th February, 2011 reviewed in the light of the new evidence it had obtained. The new evidence showed that the suit property was allotted to Benken Holdings Ltd on or about 21st September, 1995, and that the allotment was cancelled as the allottee did not meet the conditions. This was a clear indication that the suit property had been allocated to a person other than the defendant. The applicant urged the court that the document discovered by it and the evidence relating to the cancellation of the allotment is admissible in evidence. It is maintained that

the application for review is properly before the court as the applicant has merely filed a notice of appeal and has not filed a substantive appeal.

4. For the defendant/respondent, it was submitted that the application for review is not properly before the court as it offends the provisions of Section 80 of the Civil Procedure Act as read with Order 45 of the Civil Procedure Rules. It was argued that the remedy of review is only available in cases where no appeal has been filed. It was noted that in this case the plaintiff/applicant has already instituted an appeal by filing a notice of appeal. Further, it was contended that the application was nothing but a vain attempt at re-litigating the issues which were canvassed and determined in the ruling delivered on 11th February, 2011. It was argued that the court was *functus officio* in so far as that ruling was concerned.

5. As regards the alleged new evidence, it was submitted that the requirements of Order 45 Rule 1 of the Civil Procedure Rules have not been met. It was argued that the documents relied upon had no probative value for the reasons that: The maker or the source of the documents cannot be ascertained from the face of the document; the name of the maker or designation is not indicated; the handwritten letter is not a public document nor is it an official letter from the survey office; the letter is not addressed to anyone; it is not an entry from any public record or official register; it is neither admissible in evidence under Section 38 of the Evidence Act or Section 35 of the evidence Act. Further, it was argued that the applicant had not shown that the documents was not with the exercise of due diligence within his knowledge or could not be produced by him before the order sought to be reviewed was issued. It was therefore argued that there was no discovery of new evidence. Thus, the court was urged to dismiss the application.

6. Upon considering this application, it is evident that the applicant seeks to have the ruling delivered by this court on 11th February, 2011 reviewed under order 45 Rule 1 of the Civil Procedure Rules. Thus, the applicant must satisfy the conditions provided under that rule. The first condition that the applicant must satisfy is that: the order sought to be reviewed is either one from which an appeal is allowed but from which no appeal has been preferred, or an order from which no appeal is allowed. In this regard, the applicant has admitted having filed a notice of appeal against the order it now seeks to review. Nevertheless, the applicant argues that the filing of the notice of appeal "cannot be considered to be a substantive appeal."

7. I have considered this argument, but find that the argument cannot hold. The filing of the notice of appeal envisages more than a mere intention to appeal against an order or ruling of the court. It is in fact the putting into effect of that intention. Indeed under Rule 75 of the Court of Appeal Rules, the filing of the notice of appeal is the first step in the filing of an appeal. The applicant cannot therefore deny the fact that it is appealing against the order it is now seeking to have reviewed. It is trite law that the remedies of review under Section 80 of the Civil Procedure Act as read with Order 45 of the Civil Procedure Rules, and the remedy of an appeal, are mutually exclusive remedies. The case of ***Karani & 45 others vs Kijana & 2 others (1987) KLR 557*** is a case in point. Therefore, in pursuing the remedy of review when the applicant has already initiated an appeal process, the application for review is incompetent and nothing more than an abuse of the court process.

8. The second crucial condition that the applicant must establish in order to succeed in this application, is not only the discovery of new and important evidence, but also the fact that the alleged new evidence was not within his knowledge, even with the exercise of due diligence, at the time the order the applicant seeks to review was made. In this case, the alleged new evidence is based on an undated handwritten document, which has been exhibited.

9. Apart from the fact that the authenticity of this document has not been demonstrated, the facts being raised by the applicant as forming new evidence are not new issues. They are issues which were raised at the time when the application subject of the ruling sought to be reviewed was argued. Indeed, a letter signed by the Commissioner of Lands regarding double allocation was exhibited by the respondent. I find that the alleged new issues are not new issues at all. Nor has the applicant established that with the exercise of due diligence, he could not have obtained the alleged document or got the author to swear an affidavit. I find that the applicant is simply trying to get a second bite of the cherry by raising issues which have already been adjudicated upon by this court.

10. But even if I was to allow the alleged new evidence, it would not really change the position. The respondent has exhibited a copy of a grant made to it on 26th July, 1993. It has also exhibited a copy of letters from the Commissioner of Lands and the Director of survey, showing that the subsequent allocation to the plaintiff/applicant was erroneous. Thus, the respondent has demonstrated that it has a *prima facie* case with a probability of success with regard to the ownership of the suit property. On the other hand, the handwritten document is not sufficient to give the plaintiff/applicant a better claim than the respondent. Therefore, the plaintiff/applicant has not satisfied the conditions for granting an interlocutory injunction.

11. For the above reasons, I find no merit in this application and do therefore dismiss the application with costs.

Dated and delivered this 31st day of May, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Makeri for the plaintiff/applicant
Kabaiku for the defendant/respondent
B. Kosgei - Court clerk