



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 340 OF 2009

BENJAMIN K. KOMEN.....	PLAINTIFF	1 ST
JOYCE TAPLULEI.....	PLAINTIFF	2 ND
JEREMIAH CHEPKEITANY.....	PLAINTIFF	3 RD

VERSUS

HENRY KIBET ROTICH.....
.....DEFENDANT

RULING

By a Notice of Motion dated and filed on 18th October 2010, the Defendant/Applicant sought the orders following -

- (1) Certification of the application as urgent.
- (2) Review of the court's ruling made on 31st March 2010.
- (3) Costs of the application be provided for.

The application was supported by the Affidavit of the Defendant/Applicant sworn on 18th October 2010 and the principal ground that the Plaintiffs'/Respondents have not complied with the ruling of 3rd March 2010 and have continued to frustrate the Defendant/Applicant efforts to use the disputed suit premises.

The application was opposed by the Replying Affidavit of the 3rd Plaintiff/Respondent expressed to be sworn on his own, and on behalf of the other two plaintiff/respondents. The application raises one issue, whether the orders of 3rd March 2010 should be reviewed.

The application herein is expressed to be brought under the provisions of Order XLV rule 1 of the Civil Procedure Rules. Under that rule an order or decree may be reviewed on three grounds -

- (1) *discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time the decree was passed or order made, or*
- (2) *on account of some mistake or error apparent on the face of the record,*

- (3) any other sufficient, and
- (4) the application is made without unreasonable delay.

Those are conditions which are prerequisite to exercise by the court of its discretion to review orders or decree of court.

In this case the order to be reviewed was made on 3rd March 2010. The application herein was made on 18th October 2010, that is some seven (7) or so months after the orders of injunction were made. I think that is a very inordinate period of delay even for an order of injunction. The application therefore fails the test of time. What of the other tests?

The Defendant/Applicant's application did not show any new and important matter or evidence which in the exercise of due diligence, was not within the knowledge or could not be produced by the Defendant/Applicant. Neither is there any other sufficient cause as ground for review. No error or mistake on the face of the record was pleaded or shown by the Applicant in his application. The application fails in those tests too.

Having failed all the four tests for review, the situation is left as Hon. Justice Maraga ruled on 31st March 2010,

"That to avoid bloodshed, I grant a temporary injunction to restrain the Defendant by himself, his agents and/or servants from disposing, constructing a permanent or any other structure on the suit land or in any way interfering with the portion occupied by the Plaintiffs until this suit is heard and determined."

The only aspect that has changed is that the Defendant/Applicant has applied for and obtained a Grant of Letters of Administration issued in Eldoret Succession Cause No. 270 of 2009 and dated 27th January 2010.

The 3rd Plaintiff/Respondent avers in his Replying Affidavit that he has or they (*plaintiffs*) too, have applied for Grant of Letters of Administration in respect of the estate of Gideon Chepketiny Rotich (*the deceased in Eldoret High Court Succession Cause No. 252 of 2010*). I direct counsel for the Plaintiffs/Respondents and the Defendant/Respondent to discuss with their clients so that only one grant is issued and progress towards the resolution of the dispute which is, who is the rightful beneficiary of the parcel of land known as BARINGO/KAPROPITA/2 originally held and still in the name of Gideon Christopher Rotich, now deceased.

In the meantime, the Defendant's Application dated and filed on 18th October 2010, if for the reasons given above, dismissed with costs to the Plaintiffs/Respondents.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 27th day of May 2011

M. J. ANYARA EMUKULE
JUDGE