REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 189 OF 2001

JAMES MWANIKI GATURU…….APPLICANT/DEFENDANT

VERSUS

ESTHER WANGUI NDUNGU…….RESPONDENT/PLAINTIFF

RULING

On 15th October, 2009, Maraga, J, who has since been transferred from this court, in his judgment of that date, ordered the eviction of the applicant herein from the suit land and also granted perpetual injunction to restrain him, his family, agents or servants, having been evicted, from returning to the suit land. The judge, however, ordered that the applicant be allowed one year within which to harvest his trees on the suit land.

From the date of that judgment, three things have happened:

i) On 21st October, 2009, the applicant filed in this court's registry a notice of his intention to challenge the judgment in question in the Court of Appeal.

ii) On 1st November, 2010, the applicant's son, Robert Mwangi Mwaniki filed an originating summons claiming ownership by adverse possession of NYANDARUA/SOUTH KINANGOP/3377, part of the suit land.

iii) On 10th December, 2010, the applicant brought the present application in which he wants the court to review the judgment of Maraga, J of 15th October, 2009 on the sole ground that there is a mistake or error apparent on the face of the record.

It has been averred that the mistake or error in question arises from the fact that whereas the respondent in her suit sought orders of injunction and to evict the applicant from NYANDARUA/SOUTH KINANGOP/3377, 3379, 3380, 3381 and 3382 purporting that these were subdivisions of original title No.501, it has now been brought to the attention of the applicant that these parcel numbers are infact a sub-division of former NYANDARUA/SOUTH KINANGOP/733 and not No.501. It is the applicant's contention that the judgment of 15th October, 2009 having been based on the wrong premise that the suit land was a sub-division of parcel No.501 ought to be reviewed.

In reply, the respondent has deposed that an order of review is not available to the applicant, the latter having already preferred an appeal against the judgment in question; that the application has been brought after an inordinate delay; that the suit land was a sub-division of No.501 and not No.733; that execution of the decree will not be prejudicial to the applicant.

Having duly considered these arguments and the authority cited in support thereof, it is established by dint of **Order 44** of the revoked **Civil Procedure Rules** (reproduced in **order 45** of the **2010 Rules**) and on the basis of a long line of authorities that a court will review its decree or order, *inter alia,* on the discovery of new and important matter or evidence which was not within the applicant's knowledge, or could not be produced by him at the time when the decree was passed or the order made. Application for review must be brought without unreasonable delay. It is equally trite that the court from which a review is sought will have jurisdiction to entertain such application only if no appeal challenging the decree or order has been filed.

In this application, it has been submitted that since the applicant has filed a notice of appeal, he is precluded from bringing this application. That argument cannot be correct in view of the holdings in a stream of cases both of this court and of the Court of Appeal to the contrary. It has been held that **Order 44** aforesaid only bars an applicant from seeking review if the appeal has been preferred in the sense that the record of appeal has been lodged in the registry of the appallate court (in this case the Court of Appeal) the prescribed fees paid and security for the costs of the appeal deposited. In other words, when the appeal to the Court of Appeal has been instituted in terms of **Rule 81** of the revoked **Court of Appeal Rules**.

See **Yani Haryanto** Vs. **E.D. & F. MAN (Sugar) Limited**, Civil Appeal No.122 of 1992, **Motel Schwatzer** Vs. **Thomas Cunninghan & Another, (**1955) 22 EACA 252, **Ujagar Singh** Vs. **Runda Coffee Estate Limited** (1966) EA 263 and **Gucokaniriria Kihato Traders & Farmers Co. Limited** Vs. The Attorney General, H.C.C.C.No.1251 of 2002.

Having disposed of that issue, I turn to consider whether the applicant is entitled to a review of the decree. It is common ground that the applicant entered into a sale agreement with the respondent's husband in which the latter sold to him 10 acres from plot No.501, South Kinangop Settlement Scheme. In the plaint it is averred that plot No.501 was sub-divided into parcel Nos.3377, 3379, 3380, 3381 and 3382. I reiterate that the applicant seeks to review the decree on the ground that those sub-divisions emanated from 733 and not 501; that this information was obtained from the District Land Registrar, Nyandarua District on by his letter dated 4th December, 2010. Does this amount to discovery of a new and important matter in terms of **Order 44** aforesaid?

An applicant seeking to rely on this ground for review must satisfy the court of the following:

i) that the new material or evidence discovered is important;

ii) that it was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made

iii) that he exercised due diligence and could not avail or discover the new and important matter or evidence.

One month after the judgments was delivered on 15th October, 2009, learned counsel for the applicant wrote to the District Surveyor, Nyahururu on 18th November, 2009 to confirm if parcel Nos.3377, 3379, 3380, 3381 and 3382 were indeed created from the sub-division of plot No.501. In reply, the District Land Registrar, Nyandarua noted that there was a duplication of the sub-divisions between the two parcel Nos.501 and 733 and further that the District Surveyor had been instructed to rectify the anomaly.

I need only to note two matters regarding the alleged discovery of a new matter or evidence. It is not a discovery that could not have been availed had the applicant exercised due diligence as is evident from the fact that it took only two weeks from the date of the applicant's counsel's letter to the District Surveyor to the revelation of the alleged anomaly. One may also ask why this inquiry was only made after the judgment.

Secondly, the question of whether the subdivision was of No.501 or No.733 is immaterial in the circumstances of this matter. The original portion sold and subsequently occupied by the applicant was

curved from 501 and it is from that portion measuring 10 acres that he is being evicted from. Even if the decree was to be reviewed, the applicant's fate would not change on account of lack of consent of the land control board and in view of his own alternative prayer in the amended defence as well as the terms of the sale agreement, that applicant be refunded the equivalent value of the suit property. In a nutshell, the alleged material or evidence sought to be relied on in this application are neither new nor important.

For these reasons the application is dismissed with costs.

Dated, Delivered and Signed at Nakuru this 6th day of May, 2011.

W. OUKO
JUDGE