



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 67 of 1996

DOMINIC NGUGI WAITHIRU.....PLAINTIFF/APPLICANT

VERSUS

**MILKA WANJIRU MUIGAI.....1ST DEFENDANT/RESPONDENT
(substituted by LYDIA GACHAMBI NDUNGU)**

VERONICAH WANJIRU MUIGAI.....2ND DEFENDANT/RESPONDENT

R U L I N G

1. The application that is before court is the Notice of Motion dated 20/05/2009 brought under Sections 3A and 80 of the Civil Procedure Act, Order XLIV Rules 1, 3, 6 and 7 and Order L Rule 1 of the Civil Procedure Rules seeking orders that this Honourable Court be pleased to review the order of the Hon. Osiemo J given on 10/12/2008 and set the same aside. The Applicant also prays that pending the hearing and determination of the application, there be a stay of execution. The Applicant also prays for costs of the application.
2. The application is premised on the ground that there is a fundamental error on record in that the order issued on the 10/12/2008 by the Hon. Osiemo J departs in substance from the decree by this court on the 18/03/2005. The application is also premised on the averments in the affidavit sworn by Veronica Wanjiru Thigai on the 25/05/2009. The deponent says that the order by Hon. Osiemo J is at variance with the decree issued by this Honourable Court on 18/03/2005.
3. For the avoidance of doubt on the 26/02/2004, Hon. Aluoch J (as she then was) gave judgment in favour of the Plaintiff in the following terms:-
“I am satisfied that the Plaintiff has proved on a balance of probability that he has “beneficial interest” as given to him by the deceased David Mungai Kamau, in land parcel No. GITHUNGURI/KANJAI/1164 and GITHUNGURI/KANJAI/ 1163. I therefore declare that the 2nd Defendant Veronica Wanjiru Muigai holds half share of land parcel No. LR. No. GITHUNGURI/KANJAI/1163 and GITHUNGURI/ KANJAI/ 1164, in TRUST for Dominic Ngugi Wathiru and is therefore prohibited from selling the 2 portions without first determining the Plaintiff’s share.”
4. The deponent says that on the 25/06/2008, the Plaintiff filed a Notice of Motion application dated 25/06/2008 seeking authority of the court to have the Deputy Registrar to sign transfer documents to transfer 0.0455 Ha of LR Githunguri/Kanjai/1163 and 0.177 Ha of LR No. Githunguri/Kanaji/1164 to the Plaintiff in compliance with the decree of 18/03/2005. The deponent says that the decree of 18/03/2005 never decreed a transfer of any portion of any land to the Plaintiff. On the 10/12/2008, Hon. Osiemo J allowed the application authorizing the Deputy Registrar of the High Court to sign transfer documents in respect of the respective parcels of land. It is this order of 10/12/2008 that is the subject of this

application.

5. The application is opposed. The Replying Affidavit is sworn by Dominic Ngugi Waithiru the Plaintiff/Respondent. The deponent says that the application is incompetent and that infact there is no variance between the Order of 10/12/2008 and the decree issued herein on 18/03/2005. The Plaintiff/Respondent says that the order given on 10/12/2008 was given after both parties argued the application and therefore that there is no discernible error on the face of the record to warrant a review.

6. During the hearing of the application, the Applicant was represented by Mr. Okeyo while the Respondent was represented by Mr. Kinuthia. They each relied on the averments in the respective affidavits. Mr. Okeyo submitted that the error on the record was very apparent on looking at the order issued on 10/12/2008 vis-à-vis the decree issued on 18/03/2005.

7. On his part, Mr. Kinuthia for the Respondent submitted that if the Applicant was dissatisfied with the order of Hon. Osiemo, J she should have preferred an appeal against the ruling. Mr. Kinuthia also submitted that the Applicant filed this application as an afterthought since the Applicant also intends to appeal the ruling of Osiemo J.

8. Under Order XLVI of the Civil Procedure Rules an application for review of a judgment or order is premised on the following grounds:-

(i) *Discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced or the order made;*

(ii) *On account of some mistake or error apparent on the face of the record; or*

(iii) *On account of other sufficient reason.*

9. This application is based on the ground that there is some mistake or error apparent on the face of the record. After carefully considering the submissions made and the law as above cited, I am not persuaded that the application has any merit. As correctly submitted by counsel for the Respondent the order of Hon. Osiemo J dated 10/12/2008 was simply giving effect to the judgment by Aluoch J dated 26/02/2005. In the case of **National Bank of Kenya Ltd. –vs- Ndungu Njau – Civil Appeal No. 211 of 1996** (unreported) the Court of Appeal held that

“a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error and/or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter --- misconstruing a statute or other provision of law cannot be a ground for review”.

10. In the instant case, the Applicant is saying that the order by Hon. Osiemo J purports to enforce a decree that is at variance with, the order made by the Hon. Aluoch J (as she then was). In my view, the Applicants contention is a misapprehension of the decree dated 18/03/2005 and is therefore invalid. Infact the Notice of Motion application dated 25/06/2008 which gave birth to the order of 10/12/2008 was clear in its prayer, namely that the order sought was to assist the Plaintiff/Applicant to comply with the decree of 18/03/2005. The order that was granted was in terms of the prayer sought by the Plaintiff.

11. Further, the application of 25/06/2008 was fully canvassed before Hon. Osiemo J. I believe that the Hon. Judge granted the orders on the basis of what was urged before him by the parties on the matters in controversy. If the Applicant herein feels aggrieved by the decision of the Hon. Judge he should proceed on appeal to the Court of Appeal and not by way of review.

12. For the reasons given above, I find and hold that the Notice of Motion application dated 20/05/2009 lacks merit. The same is dismissed in its entirety with costs to the Plaintiff/Respondent.

Delivered and Dated at Nairobi this 22nd day of January, 2010.

**R.N. SITATI
JUDGE**

Delivered in the presence of:-

Mr. Kinuthia (present) for the Plaintiff/Applicant

M/s Otieno Okeyo Advocate (absent) for the Defendant/Respondent

Weche – court clerk