



REPUBLIC OF KENYA

1. MWINYI HAMISI ALI KOMBO

2. MOHAMMED KARISA MWISHO

3. CHENGO NGUMA BENGUMA

4. BARDALE TAPATA

5. PATRISON KAHINDI NYUNDO

6. NGALA CHIGUNDA JIRA

7. GLADYS RIZIKI NYAMAWI

8. MBODZE JILANI (suing for & on behalf of 401).....PLAINTIFFS

VERSUS

1. DARIUS MBELA

2. PHILEMON MWAISAKA

3. JULIUS KARIUKI

4. MIKE MAINA

5. SIGNON FREIGHT

6. FAIRPLAY ENTERPRISES

7. BAJABA INVESTMENTS

8. KENLIFE ENTERPRISES

9. NJEWA INVESTMENTS

10. PRINCIPAL REGISTRAR OT TITLES

11. COMMISSIONER FOR LANDS

12. ATTORNEY GENERAL..... DEFENDANTS

RULING

Pursuant to the provisions of order XLIV rule 1 of the Civil Procedure rules, the plaintiffs herein prayed

for an order of review with a view of setting aside the ruling and or order made by this court on 3rd November 2006. The motion is supported by the affidavit of Gladys Riziki Nyamawi sworn on 15th November 2006. The 2nd defendant resisted the application by replying on the replying affidavit of William Wameyo sworn on 25th January 2007.

It is the submission of Mr. Okanga, learned advocate for the plaintiffs that the parcel of land known as MN/III/515 does not exist hence the copy annexed to the affidavit of Philemon Mwaisaka sworn on 21. 8. 2006 is nothing but a dummy. It is the submission of Mr. Okanga that the plaintiffs have discovered that the two plots known as MN/III/324 and MN/III/334 are in existence as government land and that they were never amalgamated nor subdivided. The plaintiffs aver that they reside on these pieces of land and not on plot no. MN/III/515 which does not exist.

Mr. Wameyo, learned advocate for the 2nd defendant urged this court to dismiss the motion because there is nothing to review. The learned advocate was of the view that the only available remedy to the plaintiffs is an appeal against the decision of this court. It is submitted that there are no new facts raised. Mr. Wameyo further urged this court to strike out the motion for being incompetent in that the applicants have failed to annex to the supporting affidavit a copy of the order sought to be reviewed.

I have considered the rival submissions and the material placed before this court. The background of this motion can easily be traced. By a summons dated 11th August 2006, in which Philemon Mwaisaka, the 2nd defendant herein sought for a mandatory injunction to be issued against the plaintiffs to vacate the parcel of land known as MN/III/515. The plaintiffs opposed the said application by filing the replying affidavit of Bardale Tapata. When the summons came up for hearing the plaintiffs' advocate did not turn up hence the application proceeded for hearing exparte. In the end, the 2nd defendant was

granted the order for mandatory injunction. That is the order the plaintiffs are now seeking to be reviewed. It is trite law that an application for review can only succeed if the applicant proves that there was an error or mistake apparent on the face of the record, discovery of new evidence or for any other sufficient reason. It is the submissions of the plaintiffs that they have discovered that plot numbers MN/III/334 and MN/III/324 exist as government land. Two certificates of postal searches were annexed to the affidavit of Gladys Riziki Nyamawi. The aforesaid searches indicate that the two parcels of land measure 161 acres. It is said in that land there are homesteads owned by the plaintiffs. It is clear from my ruling of 3. 11. 2006 that I considered as required by law the replying affidavit of Bardale Tapata. In that affidavit, the deponent had stated that the title held by Mr. Philemon Mwaisaka was nothing but a fake title. That ruling also shows that I came to the conclusion that title no MN/III/515 exists. In arriving at that conclusion I took into account the copy of title and the postal search annexed to the affidavit of philemon Mwaisaka. In the end I see nothing new to enable me review my decision. I am convinced by the submissions of Mr. Wameyo, that the plaintiffs if well advised should have appealed against my decision instead of filing this application.

It is also clear that the applicants have not annexed the order or ruling they seek to be reviewed to the affidavit in support of the application. This in itself renders the entire motion fatally defective.

In the end I order the motion to be struck out and dismissed with costs to the 2nd defendant.

Dated and delivered this 18th day of February 2008.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Kenga h/b Okanga for plaintiff.

N/A Mogaka for 6th – 8th Defendants

N/A Attorney General for 10 – 11th Defendant

N/A Muniyitha 2nd defendant