



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Case 122 of 1995

TERESIA KAGONDU ELASTO.....PLAINTIFF/APPLICANT

Versus

MWOBE GATHUTE.....1ST DEFENDANT/RESPONDENT

LAND REGISTRAR - KIRINYAGA.....2ND DEFENDANT/ RESPONDENT

RULING

The Notice of Motion dated 29th August 2005 is brought by the 1st Defendant. That application is brought under *Order XLIV Rules (1) and (2)* of the Civil Procedure Rules. By that application the 1st Defendant seeks that the judgment delivered on 17th March 1999 be reviewed and set aside. That the court do order a retrial of this matter. The Plaintiff sued the 1st Defendant together with the Land Registrar as the 2nd Defendant in her capacity as the administrator of the estate of her late husband by the name of Erasto Kamotho Ruriga. In her plaint the Plaintiff stated that during his lifetime her husband was the owner of property **NGARIMA/NGIRIAMBU/719** which she alleged was fraudulently sub-divided into parcels Numbers. **NGARIMA/NGIRIAMA/852** and **853**. She further alleged that the 2nd Defendant had without the Land Board consent and without any basis, drawn mutation forms and opened new registers for the parcel numbers 852 and 853. The 2nd Defendant, it is alleged in the plaint, issued a title of the said sub- divisions to the 1st Defendant. In her plaint the Plaintiff prayed for an order that the titles of parcels numbers 852 and 853 be closed and consolidated into the original title No. 719. The 1st Defendant in his defence admitted the description of the parties in the plaint. By that admission the 1st Defendant admitted that the Plaintiff had brought the action as the administrator of her late husband. The 1st Defendant in his defence however denied the allegation of fraud and stated that he had occupied those parcels of land since 1968 pursuant to a sale agreement between him and the Plaintiff's late husband. He further termed the Plaintiff's claim as misconceived, vexatious and abuse of the court process.

When the case came up for hearing the Defendant who had been served did not attend Court and by its reserved judgment of 17th March 1999 the court granted judgment in favour of the Plaintiff as prayed in the plaint. The 1st Defendant by the present application for review stated that the review should be allowed on the basis that the Plaintiff did not have locus to sue in this case since she did not at the hearing produce letters of administration. But as stated hereinbefore the 1st Defendant by his defence admitted the description of the parties which included the Plaintiff's plea that she was the administrator of the estate of her late husband. The 1st Defendant's application is also based on the ground that the suit was time barred when the Plaintiff filed it because the 1st Defendant had been registered as the owner of the parcels of land since 1968. The 1st Defendant annexed the title to his supporting affidavit. It was argued by the 1st Defendant's advocate that this present suit having been filed in 1995, it was out of the limitation

period which was contrary to **Section 7** of the Limitation Act. That section provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

The Plaintiff it was argued needed to get leave of the court to file this suit out of the limitation period. The Court responds to that argument by stating that it is clear from the plaint that the Plaintiff’s action is based on allegation of fraud. It is clear from the Limitation of Actions Act that there is no limitation of the time frame within which a suit can be filed which is based on allegations of fraud. See **Section 20(1)** of the same Act.

The 1st Defendant raised another ground in favour of his application by arguing that the Plaintiff had obtained judgment by false representation that she was a party in HCC NO. 71 of 1983. The Court would respond to that argument by saying that that ground is not supported by the judgment delivered on 17th March 1999. In that judgment the judge said in relation to that suit i.e. HCC. NO. 71 of 1983, as follows:

“In support of her contention that the land control board consent was not obtained she relied on an affidavit sworn by one of the parties in HCC. NO. 71 of 1983 which was dismissed for non attendance.”

That is all that is stated in that judgment relating to that suit. That clearly does not show that the Plaintiff misrepresented herself as being a party in that suit. The last ground relied on by the 1st Defendant was that the judgment of the court was contrary to **Order XX Rule 5A** of the Civil Procedure Rules. That rule provides as follows:

“Where there is a prayer for a judgment the grant of which would result in some alteration to the title of land registered under any written law concerning the registration of title to land, a certified copy of the title shall be produced to the court before any such judgment is delivered.”

As I consider that last ground raised by the 1st Defendant, it is an opportune moment to consider the rule upon which the 1st Defendant’s application is grounded. The 1st Defendant’s application is grounded on **Order XLIV R 1 and 2**. That rule provides as follows:

“(1) Any person considering himself aggrieved:-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the 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 by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

By the case of **CHINA ROAD BRIDGE CORPORATION (Kenya) -V- DMK Construction Ltd. [2004] 2 E.A.** the Court of Appeal in respect of **subrule (1)** had the following to say:-

“In an application of review, an applicant has to show that there has been discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within knowledge and could not be produced at the time the decree was passed or on account of some mistake or error apparent on the face of the record or any other sufficient reason.”

Having in mind what the Court of Appeal said hereinabove, one is left to ask; what is the discovery of new and important matter of evidence which this last ground provides? If indeed it is correct that the judge in delivering his judgment failed to comply with the provisions of **Order XX Rule 5A**; is that a discovery of a new matter? I dare say no. The 1st Defendant should have raised such an issue in an appeal. In my view it is not an issue for consideration in an application for review. It should also be noted that the judgment which the 1st Defendant seeks to review was delivered on 17th March 1999. There was no explanation given in the affidavit in support of the application why the application for review was brought to court so late in the day i.e. August 2005. That delay on its own can defeat the 1st Defendant’s application. The end of the matter is that the 1st Defendant’s application dated 29th August 2005 is hereby dismissed.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 9th day of October 2007.

M. S. A. MAKHANDIA

JUDGE