REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL CASE NO. 12 OF 2002

OBUNYO.....PLAINTIFF/ APPLICANT

VERSUS

WERE & 5 OTHERS .....RESPONDENT/DEFENDANT

RULING

The applicant took out a notice of motion dated 28th April 1998 pursuant to the provisions of order XLIV rule 1 (1) of the Civil Procedure Rules. The applicant has also cited the provisions of sections 3A and 80 of the Civil procedure Act. The motion contains the grounds it is based. The same is also supported by the affidavit of Boaz Otanga Otieno sworn on 28th April 1998.

The applicant prays for the order made on 26.9.1996 awarding the plaintiff/ applicant a portion of land measuring one (1) acre out of LR No Samia/ Butobona/560 being his homestead to be reviewed and set aside.

The main ground put forward by the applicant is that there is a new matter which was not within the knowledge of the parties at the time of the trial. It is stated that this Court found that the applicant had acquired by adverse possession the land occupied by the homestead estimated to measure (1) one acre to be excised from LR No Samia/Butabona/560. It is the submission of the applicant that when the survey work was carried out to establish the area occupied by the applicant's homestead it was discovered that the area covers an equivalent of 3.3 acres. The area occupied by the homestead had not been ascertained at the time of the trial. It is the submission of the applicant that this is a new ground which entitles this Court to make an order for review with a view of increasing the acreage from 1 acre to 3.3 acres.

The respondent opposed this application by filing grounds of opposition dated 16th February 2000. The respondent was of the view that there was no new ground sufficient to enable this Court to review the judgment which was clear and unambiguous. It is further claimed that the relevant decree has not been extracted as required before the filing of this motion.

The respondent is accused of delaying to file the motion. It is submitted that that the delay to file the motion by 1 year 4 months is inordinate which should disentitle the applicants the orders sought.

The provisions of order XLIV of the Civil Procedure Rules gives this Court jurisdiction to make an order for review upon the following conditions:

(i) There must be a discovery of a new and important matter or

(ii) There must be a mistake or error apparent on record

or

(iii) For any other sufficient reason.

The applicant in this case took out this motion on the basis that he has discovered a new and important matter. The applicant says that the issue of the amount of acreage was a new matter which was not with the knowledge of the parties.

The applicant did not extract the decree as required under order XX rule 6 of the Civil Procedure Rules. The law requires that a party must extract the decree before filing an application under order XLIV of the Civil Procedure Rules. Hence the motion is fatally defective.

Assuming that the motion is properly before this Court, can it be said that there was a discovery of a new matter which was not within the knowledge of the parties or the Court? The answer to this question can be found by examining the judgment delivered by the Honourable Mr Justice B K Tanui on 26 .9.96. At the last page of his judgment the honourable judge said:

"PW 3 in his evidence stated that the plaintiff was now occupying 1/2 acre since 1983. That appears to me to mean that the only portion of land which the plaintiff acquired by adverse possession between June 1973 when the title was opened and the date of filing this case is the homestead area. The plaintiff's occupation of the area be estimated to be 25 acres after the registration of the land was only for a period of 10 years before he was effectively stopped by the defendants. In his evidence the defendant stated that the plaintiff was occupying one acre of their land but PW 3 said it was 1/2 an acre. That would appear to me to be the only portion of the defendant's land the plaintiff had by adverse possession acquired for the requisite 12 years before this suit.

In the result I would grant the plaintiff the prayers (a),

(b) and (c) stated above for an area measuring one acre being his homestead. There will be no order as to costs."

It is clear from the above passage that the honorable judge considered the issue touching on the amount of acreage claimed. Consequently I find that there is nothing new that was discovered. The judgment is clear and unambiguous. The upshot therefore is that this motion is dismissed with costs to the respondent .

Dated and Delivered at Busia this 7th day of May 2004.

J.K.SERGON

JUDGE