



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC 312 OF 2017 (FORMERLY OS 91 OF 2001-NYERI)**

**RAPHAEL MURIGI KARIUKI.....PLAINTIFF/ APPLICANT**

**VS**

**JOSEPH MWANGI NDIRANGU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MWANGI KARIEBU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ELISHIPHA WANGARI NDIRANGU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**EVANSON WAWERU GICHOYA.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. There are two applications for determination in this file. The 1<sup>st</sup> one is dated the 16/7/2020 filed by the applicant. This motion inter alia seeks eviction of the respondents from the land. The 2<sup>nd</sup> one is dated the 18/9/2020 filed by the respondents. The latter seeks a review of the judgment issued by this court on the 26/2/2009 and stay of the Notice of Motion dated the 16/7/2020.

2. Considering the prayers in the two applications, I shall determine the application for review and stay first and if it fails then I shall consider the one seeking eviction of the Defendants. In the event that the 1<sup>st</sup> one succeeds then the 2<sup>nd</sup> one will be stayed.

The Notice of Motion dated the 18/9/2020

3. This motion is brought by the Defendants seeking stay of the Plaintiffs application dated the 16/7/2020; review, vary and or set aside the orders issued on the 26/2/2009 and the case be heard afresh; order a site visit and costs.

4. In their supporting affidavit, the Defendants state that the orders of the court issued on the 26/2/2009 have not been appealed.

That there is new and important evidence that was not in the eyes of the court at the time of the determination of the suit on account of some mistake and or error apparent on the face of the record; they have been in occupation of the suit land and have never vacated; the Plaintiff only occupies ¼ of the land and not the whole; that the Plaintiff obtained the orders in 2009 irregularly.

5. The Plaintiff opposed the motion vide his replying affidavit dated the 29/9/2020. He contended that the 1<sup>st</sup> Defendant has never denied that he had been in possession of the suit lands; there is no new and important evidence by the defendants; it is not true that he occupies ¼ of an acre; 1<sup>st</sup> Defendant took possession of the suit premises in 1981 and the rest moved in during the pendency of the suit;

6. The Defendants submitted that the judgement rendered by the court in 2009 is one sided since the Defendants were not given the opportunity to be heard. That the new evidence is that the Plaintiff occupies only a ¼ of the land and not the whole. That parcel 748 is not a subdivision of the original parcel 346. That the Plaintiff has never been in occupation of parcel 748 at all. That the effect of this information is to negate the claim of adverse possession. That the 3<sup>rd</sup> Defendant was in physical occupation of the suit land and therefore the Plaintiff has never been in uninterrupted possession.

7. The Plaintiff submitted that the evidence of the Plaintiff was not challenged in the judgement. That the 2<sup>nd</sup> and 4<sup>th</sup> Defendants died and have not been substituted. That the Defendants came into possession of the suit lands during the pendency of the suit. That the Defendants have not shown any new and important matter.

8. Having read and considered the application the key issue is whether the review is merited; whether the application dated the 16/7/2020 should be stayed and whether the court should visit the locus quo.

9. The applicable law for grant of review is Section 80 of the Civil Procedure Act which provides *inter alia*:-

**“Any person who considers himself aggrieved—**

**a. by a decree or order from which an Appeal is allowed by this Act, but from which no Appeal has been preferred; or b. by a decree or order from which no Appeal is allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”**

10. Order 45 Rule 1 of the Civil Procedure Rules is couched in the following terms: **“(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**

**(c.) on account of some mistake or error apparent on the face of the record,**

**or**

**(d) 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.”**

11. In the main the application seeks for the review of a judgment delivered in 2009.

12. There is no reason adduced by the Defendants as to why the application is being brought after a period of 11 years. Is the delay in filing the review inordinate? The question as to whether the delay is inordinate depends on the circumstances of each case but the general principle is whether the applicant has explained the delay to the satisfaction of the court.

13. In dealing with laches, Halsbury’s Laws of England, 4th ed. Vol. 16(2) at §910 has this to say;

“A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation, equity aids the vigilant, not the indolent’ or ‘delay defeats equities’. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (‘laches’).

14. Lord Selbourne L.C. delivering the opinion of the Privy Council in *The Lindsay Petroleum Co v Hurd* (1874) L.R. 5 P.C. 221 said at page 240:

“Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy”

15. As stated above the review has been brought after a period of 11 years. The Defendants have all along been aware of the judgement of the court. In the interim period the Plaintiff has caused the suit properties to be registered in his name pursuant to the orders of the court, which court orders have not been appealed against. I am satisfied that the remedy of review being an equitable remedy does not lie in the circumstances of this case on account of laches. Further the Defendants have not offered any explanation for the delay. The court finds that the delay is inordinate.

16. The case-law on the subject of review jurisdiction shows that two principles seem to be in competition. There is the “principle on finality” of litigation on the one hand which does not support review and there is “the justice principle” on the other hand which favours limited review predicated on the basis that the object of litigation is to do justice. The finality principle is urged on the basis of public interest as a public policy issue and is premised on the need for stability and consistency in law while the justice principle is urged on the basis of justice to the parties. In examining these principles, English case law on the point is of persuasive authority by dint of section 3 of the Judicature Act. The arguments in favour of the finality principle have featured in many English cases which were reviewed in the judgment of Lord Woolf, CJ, in *Taylor and Another v. Lawrence and Another* [2002] 2 All ER 353. In *Ladd v. Marshall* [1954] 3 All ER 745 the common law principle that the outcome of litigation should be final was emphasized. In that case, the Court of Appeal declined an application for a new trial which was sought with a view to adduction of further evidence. The Court did not totally reject the notion of review. It set a threshold in which it held that “in order to justify the reception of fresh evidence, or a new trial, three conditions must be fulfilled. First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that if given, it would probably have an important influence on the result of the case although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible although it need not be

incontrovertible.” In his judgment in the case, Hodson, L. J referred to **Brown V. Dean [1910] AC 373** where the House of Lords affirmed a decision of the Court of Appeal and gave guidance on the topic. He quoted the passage of Lord Loreburn, L.C. where he stated at page 374:

“when a litigant has obtained a judgment in a court of justice, whether it be a county court, or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive.”

17. The Defendants have averred that there is new and important evidence that has been discovered. That is that the 1st and 3rd Defendants have resided on the suit lands their entire lives; that the Plaintiff occupies ¼ of the suit lands and cannot be said to have been in uninterrupted occupation. I have found that the court in arriving at its considered judgement found as a fact that the 1st Defendant subdivided the land during the pendency of the suit and transferred to the other Defendants. The court observed that none of the Defendants with the exception of the 1st Defendant swore an affidavit to show when they took over possession. They were happy to rely on the affidavit of the 1st Defendant. The defendants were therefore heard by the Court and their case was ventilated through the 1<sup>st</sup> Defendant. It therefore cannot be a new and important matter of discovery 11 years later. The court has no difficulty in dismissing this limb.

18. As to whether there is an error apparent on the record the Defendants did not attempt to explain to the court the nature of the error. An error on the face of the record means an error that is self-evident without having to go into arguments and counterarguments to decipher the same. I see none was disclosed. This limb is dismissed too.

19. Balancing the principle of justifiability and finality to cases, the circumstances of this case calls for the finality principle to be upheld. The reason being that the Plaintiff has had judgement for the last 11 years which he has not been able to enjoy the fruits while the Defendants have done nothing to disturb it. Allowing the review in the manner suggested by the Defendants leads to the reopening of the case in the face of a valid court judgement. The judgment has been partially executed except for the delivery of vacant possession.

20. In the end I am satisfied that the Defendants/Applicants has not met the threshold for review and the application dated the 18/9/2020 is dismissed with costs to the Plaintiff/Respondent

21. Having dismissed the application for review I see no need to consider the prayer for stay of the Plaintiffs application dated the 16/7/2020. There is also no necessity of considering the prayer for a site visit. Both prayers become moot.

#### **The application dated the 16/7/2020 by the Plaintiff/applicant**

22. The Plaintiff sought the following orders;

- a. The Defendants/Respondents their agents and/or servants give vacant possession of L.R. LOC.2/GACHARAGE/ 1471, 1472, 1473 and 748.
- b. Defendants/Respondents and/or their servants agents be evicted from LOC.2/GACHARAGE 1471, 1472, 1473 and 748 forthwith.
- c. The Defendants/Respondents be estopped from entering, interfering or otherwise trespassing from LOC.2/GACHARAGE 1471, 1472, 1473 and 748 forthwith.
- d. That the O.C.S Ngonda Police Station to provide security to facilitate eviction.
- e. Costs of this application

23. The application is supported by the grounds and the affidavit of the applicant who deposes that the Plaintiff was granted judgement in this suit on 26/2/2009 and no appeal has been preferred. He has become the registered proprietor of the suit lands in pursuance to the said orders. That the defendants have continued to occupy the land in disobedience of a court order and their continued trespass has prevented him from enjoying the fruits of the judgement and quiet possession as a registered owner.

24. The Defendants opposed the application and reiterated the very grounds in support of the motion dated the 18/9/2020. That the plaintiff has not disclosed when his right under adverse possession accrued and when he lost possession of the suit land so as to seek the remedy of eviction of the Defendants from the land.

25. I have read and considered the submissions of the parties.

26. Section 26 of the Land Registration Act provides that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

27. In this case the Plaintiff has judgment in his favour. The defendants have refused to vacate the suit land in disobedience of the court orders. The defendants have not shown any compelling reason as to why the judgement of the court cannot be executed against them.

28. Court orders cannot be made in vain. The application is granted as prayed in the following terms;

- a. The Defendants/Respondents their agents and/or servants be and hereby ordered to deliver vacant possession to the Plaintiff with

respect to L.R. LOC.2/GACHARAGE/ 1471, 1472, 1473 and 748 within the period of 60 days from the date of this ruling.

b. In default the said Defendants/Respondents and/or their servant's agents shall be evicted from LOC.2/GACHARAGE 1471, 1472, 1473 and 748.

c. The Defendants/Respondents be estopped from entering, interfering or otherwise trespassing from LOC.2/GACHARAGE 1471, 1472, 1473 and 748 forthwith.

d. The O.C.S Ngonda Police Station to provide security to facilitate eviction and maintain law and order, if needed.

e. Costs of this application are in favour of the Plaintiff/Applicant.

28. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANGA THIS 14<sup>TH</sup> DAY OF JANUARY 2021**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

**Plaintiff: Absent**

**Gitari for the 1<sup>st</sup> defendant**

**2<sup>nd</sup> defendant absent**

**Gitari for the 3<sup>rd</sup> defendant**

**Ben Mwangi for the 4<sup>th</sup> defendant**

**Kuiyaki: Court assistant**