



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 34 OF 2007 (O.S)

LEONARD W. MAKIO (as the admin

of estate of FRANCIS M. OBALE-dcd)Plaintiff/Applicant

= VERSUS =

DISMAS OMUKUBI ONG'ANGL.....Defendant/Respondent

RULING

1. The notice of motion dated 20/7/2020 commenced on behalf of Francis MakioObale – deceased by Leonard WesongaMakio who substituted him in this case by an order of this court made on 5th October 2020. The application is premised on the provisions of section 3A and 63(e) of the Civil Procedure Act and order 45 Rule 1 – 3 of the Civil Procedure Rules. The applicant prays for grant of orders;

1) Spent.

2) Spent.

3) That the proceedings that were conducted on 23/9/2019 and on 15/10/2019 in respect of the defendant's application on 14/11/2019 be reviewed by being set aside and the said application dated 27/6/2019 be reheard on its merits with the participation of the deceased plaintiff's legal representative.

4) That costs of this application be provided for.

2. The application is supported by the following grounds;

(i) That there is discovery of new and important evidence which was not available to Counsel for the plaintiff and the Court and which evidence was decisive in determining the course of the proceedings to the effect that the plaintiff FRANCIS MAKIO OBALE had died prior to the filing of the defendant's application dated 27/6/2019 that sought to review the judgement that had been delivered on 29/5/2012.

(ii) That there is a sufficient ground to grant review in that substitution of the deceased plaintiff ought to have been undertaken before such substantive proceedings that were conducted on 23/9/2019 and 15/10/2019 and the ruling on the defendant's application could be deliberated on.

(iii) That the defendant/respondent has brought about the present application for the reason that he failed to take out the citation proceedings and substitution but chose to proceed as if the plaintiff was alive when he knew that the plaintiff had passed on in August of the year 2018.

(iv) That there will be no prejudice to the defendant/respondent if the application is allowed for the reason that he will have an opportunity to prosecute his application or file another application after substitution has been allowed.

3. The application was further supported by the affidavit of Leonard Wesonga sworn on 20th July 2020 together with the documents annexed on it. He deposed that the seller had executed transfer documents in regard to the suit land in favour of the deceased plaintiff. That the plaintiff sued the defendant in this claim for adverse possession. That the defendant who is their neighbour knew that the plaintiff had died on 16/8/2018 as shown in the copy of death certificate annexed. That it is necessary that he gets a chance to oppose the application dated 27/6/2019 which proceeded without his knowledge and after the death of his father.

4. The defendant in opposing the application filed a replying affidavit on 16th November 2020. He deposed that the application ought to have

been brought without unreasonable delay. That the applicant has a hidden agenda. Thirdly, the defendant deposed that there is no new evidence to warrant the application for review of the judgment and that litigation should have an end.

5. Parties relied on the pleadings as filed. Order 45(2) of the Civil Procedure Rules provides that; “**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**”.

6. Order 45(2) in my interpretation allows a party to either apply for review or file an appeal against the order but not to pursue the court on both fronts. In this instance, the applicant filed a notice of appeal on 29/11/2019 against the ruling which he now wants reviewed. The notice of appeal is on record and a notice of appeal is sufficient as an appeal to the court of appeal – see order 42 rule 4. The applicant made no mention on the status of his appeal in his current application. Pursuing both the appeal and the orders of review amounts to an abuse of the court process and on this account, this court can strike out the application.

7. On the merits, the court can review its orders where it is shown that there is;

(a) *Discovery of new and important evidence.*

(b) *Error or mistake apparent on the face of record.*

(c) *For any sufficient cause shown.*

8. In this instance, the applicant pleaded that the new and important evidence was that the application was filed after the demise of the original plaintiff (Francis MakioObale). He therefore moved the court to be given him a chance to oppose the application. The applicant was represented by the same counsel who had filed grounds of opposition on 15/10/2019 challenging the defendants’ application of 27th June 2019. The Respondent’s application was argued orally on 15/10/2019 and the applicant’s counsel ably represented the plaintiff he has substituted. The court then rendered herself on the ruling read on 14/11/2019.

9. In the case of *KCB Ltd Vs Specialized Engineering Co. Ltd (1982) 485* it was held that “**a duly instructed advocate has an implied authority of his client to do so**”. Counsel on record for the plaintiff did not indicate to court during the hearing of that application that he no longer had instructions to appear for the plaintiff. Mr. Wanyama had the option of filing an application to cease acting instead of filing grounds of opposition. Therefore, it is defeatist for him to depose now that while pursuing the impugned application dated 27/6/2019 it remained unknown to him that the plaintiff had died on 16/8/2018. He chose to mislead the defendant and the court so that the death of the plaintiff cannot be argued to amount to discovery of new and important evidence.

10. The draft replying affidavit to the impugned application do not raise any new and important evidence which was not within the knowledge of the applicant’s counsel if he acted with due diligence. For instance, the filing of the application before removing Ouma-Okutta & Co. Advocates then acting for the defendant is a matter that was within the knowledge of plaintiff’s counsel. On substitution of the deceased plaintiff, counsel did not inform the court during the hearing of the impugned application that he tried to reach out to the plaintiff and failed to get him. Lastly the import of the motion dated 27/6/2019 on its face was to alter the decree of 25/7/2012 so the same cannot be treated as new evidence.

11. Can the application succeed on the heading of sufficient cause? On account of the fact that the Applicant acquired a title to his land on 4th Dec 2015 as shown in annexure LWM-10 and in view of the fact that the ruling of this court made on 14th November 2019 reversed that gain. **I find that there is sufficient cause to allow the Applicant be heard to explain himself why the consent order conferring him the disputed size of land should not be set aside. For this reason, I allow the application and hereby set aside the orders I made on 14th Nov. 2019. The application dated 27th June 2019 shall be heard afresh.**

12. However, for putting the Defendant to argue his application twice for a mistake that would have been avoided, I award him **costs of the motion dated 20th July 2020 which I hereby assess at Kshs.7,000 to be paid within 30 days from date of delivery of the ruling.** In default of payment of the said sum, execution to issue.

Dated, signed and delivered at BUSIA this 18th Day of February, 2021

A.OMOLLO

JUDGE