REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NYERI

ELCA CASE NO. 5 OF 2017

(Formerly Nyeri HCCA 41 OF 2011)

JOYCE MWIHAKI MAINA .....APPELLANT

VERSUS

MARIA NYOKABI KIBUNJA .....RESPONDENT

RULING

A. INTRODUCTION AND BACKGROUND

1. By a plaint dated 25th September, 2009 the Respondent sued the Appellant herein in *Nyeri CMCC No. 54 of 2009 – Maria Nyokabi Kibunja v Joyce Mwihaki* seeking an order for the Appellant to account to her for all the rental income she had received from certain commercial buildings on the Respondent's parcel of land known as *Nyeri/Naromoru/100 (the suit property);* a permanent injunction restraining her from trespassing upon or dealing with the suit property; and general and exemplary damages for trespass.

2. The basis of the Respondent's claim was that she was the absolute registered proprietor of the suit property but the Appellant had trespassed thereon, appropriated the land for her own use, and rented out some of the buildings thereon without lawful justification

or excuse. The Respondent pleaded that she had no blood or filial relationship with the Appellant and that despite issuance of a demand and notice of intention to sue the Appellant had failed to make amends hence the suit.

3. The record shows that the Appellant filed a defence denying liability for the Respondent's claim. She pleaded that she entered occupation of the suit property with the tacit permission of the Respondent as her daughter in-law since she was married to her late son known as Simon Muriuki Kibunja *(the deceased).* She further pleaded that the buildings from which she was collecting rent were constructed by the deceased.

4. The record further shows that upon a full hearing of the suit the trial court found for the Respondent vide a judgment dated 6th April, 2011. By the said judgment, the trial court granted the permanent injunction sought restraining the Appellant from trespassing upon the suit property and from dealing with it in any way but declined to grant the rest of the prayers.

5. Being aggrieved by the said judgment and decree the Appellant appealed to the Environment and Land court at Nyeri *(the appellate court).* The record of proceedings shows that by a judgement dated 20th June, 2014 the court allowed her appeal. The appellate court found that the Appellant was not a trespasser on the suit property as she had been permitted by the Respondent to settle thereon. The court also found and held that the Respondent was not the absolute proprietor of the suit property but a trustee who held only a life interest in the suit property. Consequently, the appellate court set aside the judgment of the trial court and substituted it with an order **dismissing** the Respondent's suit with no order as to costs.

B. THE APPELLANT'S APPLICATION

6. By a notice of motion dated 24th June, 2020 expressed to be based upon **Order 45 Rules 1** and **2** of the **Civil Procedure Rules 2010** ***(the Rules*)**, and **Sections 1, 1A, 3** and **3A** for the **Civil Procedure Act (Cap. 21)** the Appellant sought the following orders:-

(a) Spent.

(b) That this honourable court may be pleased to revisit and review the judgment pronounced herein on 20th of June, 2014 by cancelling the title deeds to L.R. Numbers Nyeri/Naromoru/4021 – 4046 (inclusive) to revert to L.R. Number Nyeri/Naromoru/100 in the name of the Respondent.

(c) That this honourable court may be pleased to direct the County Surveyor, Nyeri County to visit the land and sub-divide the entire 7.0 hectare (17.29 acre) land lengthwise into nine (9) equal portions, each measuring naught decimal seven eight (0.778) of a hectare, equivalent to one decimal nine two two (1.922) acres and each to abut the tarmac road on the upper side and the dirt access road on the lower side.

(d) That each of the eight (8) Jacob Kibunja Kariuki's sons get 1.922 acres and their nonagenarian mother also get the 9th portion of the same acreage for herself because she is blind and Diabetic and she may be taken advantage of.

(e) That the County Surveyor, Nyeri County to thereafter draw a report and file the same in court.

(f) That fresh mutation forms be prepared for the nine (9) resultant portions.

(g) That the surveyed/subdivided in such manner that each beneficiary of the late Jacob Kibunja Kariuki take respective portions where their houses are, fall or how they occupy the land, and specifically the Applicant's share of 1.922 acre portion should be excised where her deceased spouse was allocated, settled and developed and left her and their children and have been to date.

(h) That the Deputy Registrar of this honourable court may be authorized to execute the necessary documents, be they such mutation and transfer forms in place of the Respondent to facilitate valid, legal and successful transfer of the 1.922 acre portion to the Applicant.

(i) That this honourable court may be pleased to order the County Land Registrar, Nyeri to dispense with the production of the original title deeds to L.R. Numbers Nyeri/Naromoru/4021-4046 (inclusive), to facilitate valid, legal and successful reversal to the original L.R. Number Nyeri/Naromoru/100.

(j) That this honourable court may be pleased to order the Officer Commanding Station (OCS), Naromoru Police Station and/or the Assistant County Commissioner (ACC), Kieni East Sub-county to provide security to the surveyor during the survey and/or sub-division exercise.

(k) That costs of this application be borne by all the Respondents.

7. The application was based upon the various grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Appellant on 24th June, 2020 and the annextures thereto. The gist of the Appellant's application was that the judgment of the appellate court was incapable of execution in its current form and that it was necessary to review it for clarity and implementation. The Appellant contended that she had patiently waited for over 6 years for implementation of the judgment and decree of the trial court but that the Respondent had failed to take steps towards its implementation hence the application.

C. THE RESPONDENT'S RESPONSE

8. There is no indication on record of the Respondent having filed any response to the application.

D. DIRECTIONS ON SUBMISSIONS

9. When the application was listed for directions on 22nd July, 2020 it was directed that the same shall be canvassed through written submissions. The parties were given timelines within which to file their respective submissions. The record shows that the Appellant filed her submissions on 16th January, 2021 whereas the Respondent's submissions were not on record by the time of preparation of the ruling.

E. THE ISSUES FOR DETERMINATION

10. The court has considered the Appellant's notice of motion dated 24th June, 2020, her written submissions filed on 16th January, 2021 as well as the material on record. The court is of the opinion that the following issues arise for determination herein:

(a) Whether the appellant has made out a case for review of the decree dated 20th June, 2014.

(b) Who shall bear costs of the application.

F. ANALYSIS AND DETERMINATION

(a) Whether the Appellant has made out a case for review of the decree dated 20th June, 2014

11. The Appellant's application for review is essentially grounded upon **Order 45 Rule 1(1) of the Rules** which stipulates 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."***

12. The court has fully considered the application together with the supporting affidavit and annextures thereto as well as the written submissions. The court is unable to find any demonstration of the grounds for review set out in **Order 45 Rule 1** of the **Rules**. There is no demonstration that the Appellant has discovered any new and important matter or evidence since the decree was passed. There is no demonstration of any error apparent on the face of the record either. There is also no demonstration of any other sufficient reason to warrant a review or variation of the decree dated 20th June, 2014. See **Origo** and **Another v Mungala [2005] 2 KLR 307.**

13. The court has noted that the Appellant is seeking substantive orders which were neither canvassed before the trial court or the appellate court. As indicated before, the Respondent's claim before the trial court was seeking vindication of her property rights. There was no cross-claim or counterclaim by the Appellant. The issue of whether or not the 8 sons of the Respondent were entitled to equal shares of 1.922 acres each was never canvassed in either of the two courts. The issue of termination of the Respondent's life interest in the suit property was never canvassed before the two courts either. There was no counterclaim in that regard.

14. The court is of the opinion that application for review of the decree is not an opportunity to reopen a concluded case for the purpose of canvassing new matters which were never the subject of litigation. It is not an opportunity to litigate mattes which ought to have been initiated through a plaint or counterclaim and canvassed in the normal manner. The court is of the view that the question of sub-division of the suit property in which the Respondent has a life interest goes beyond the scope of litigation both before the trial court and the appellate court.

15. It is apparent from the material on record that the instant application cannot possibly serve the purpose of 'clarifying' the decree dated 20th June, 2014. The said Judgment and decree was made in an appeal challenging the decree of the trial court dated 6th April, 2011. The judgment of the appellate court could only have affirmed or set aside the judgment and decree of the trial court. It is evident from the record that in the instant case, the appellate court set aside the decree of the trial court in favour of the Respondent and instead proceeded to make an order dismissing the Respondent's suit before the trial court. Clearly, the order allowing the appeal court not have contemplated the orders sought in the instant application especially in the absence of a counterclaim. The appellate court simply allowed the appeal and dismissed the Respondent's suit before the trial court. Consequently, a dismissal order is incapable of giving rise to the substantive orders sought by the Appellant.

16. The court has further noted that the suit property has since been sub-divided into several parcels some of which have been transferred to third parties who were not made parties to the appeal. It would be against cardinal rules of natural justice for the court to make any orders which may adversely affect the property rights of such properties without according them an opportunity of being heard.

17. Finally, the court has noted that the instant application for review was filed about 6 years after the decree sought to be reviewed was passed. The Appellant has not rendered any reasonable explanation for such lengthy delay in seeking review. The court is thus of the opinion that the Appellant is disentitled to the remedy of review on account of such unreasonable delay. See **Michael Muriuki Ngibuini v East Africa Building Society Ltd [2015] eKLR.**

(b) Who shall bear costs of the application

18. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the even in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap. 21).** The court has noted that the Respondent did not contest or participate in the application for review. Accordingly, the court is of the opinion that the appropriate order to make is that there shall be no order as to costs.

G. CONCLUSION AND DISPOSAL

19. The upshot of the foregoing is that the court finds no merit in the Appellant's notice of motion dated 24th June, 2020 hence the same is hereby dismissed in its entirety with no order as to costs.

It is so ordered.

RULING DATED and **SIGNED in Chambers at Nyeri** and **DELIVERED** via Microsoft Teams platform this **21st** day of **April, 2021.**

In the presence of:

Mr. Peter Muthoni for the Appellant

No appearance for the Respondent

HON. Y. M. ANGIMA

JUDGE

21.04.2021