REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 303 OF 2013

(FORMERLY CHIEF MAGISTRATE'S COURT CIVIL CASE No. 621 of 2009)

JOSEPHAT DOE OKIRIA..... PLAINTIFF

VERSUS

LUDOVICIUS ORIAMA OKITOYI.....1ST DEFENDANT

FAUSTINO OPURU OJULOTO.....2ND DEFENDANT

R U L I N G

By a Judgment delivered on 27th May 2020, this Court dismissed the plaintiff's suit and allowed the defendant's Counter – Claim. The relevant part of that Judgment for the purposes of this ruling is finding No 2 (a) in which I stated as follows: -

> ***2(a) "A declaration is issued that the registration of the plaintiff as proprietor of the land parcels NO SOUTH TESO/OSURETTE/2420, 2426, 2427 and 2428 was fraudulent and the same is hereby cancelled and the Land Registrar is directed to restore the land parcel NO SOUTH TESO/OSURETTE/1512 to the previous owners as of 12th November 1990."***

A decree issued according. This was pursuant to the defendant's Counter – Claim in which in paragraph (bb) he sought Judgment in the following terms: -

> ***"A declaration that the land parcels NO SOUTH TESO/ OSURETTE/2420, 2426, 2427 and 2428 respectively and the plaintiff's registration as proprietor thereof is a fraud and the same be cancelled and title NO SOUTH TESO/OSURETTE /1512 be restored."***

When the decree was presented to the Land Registrar Busia for implementation, he explained that he was unable to take action because the title **NO SOUTH TESO OSURETTE/1512** had been closed and partitioned into three new titles viz **SOUTH TESO/OSURETTE/2419**, **2420** and **2421** and it was not therefore possible to restore it to its earlier position by cancelling only one of those partitions and leaving others intact.

The defendant has therefore moved to this Court by his Notice of Motion dated 27th November 2020 and predicated under the provisions of Sections 3 and 3A of the Civil Procedure Act and Order 45 Rule 2 of the Civil Procedure Rules in which he seeks the following orders: -

> ***1. "The Honourable Court be pleased to review it's Judgment/decree issued on 27th May 2020.***
>
> ***2. Costs of this application be provided for"***

The application is premised on the grounds set out therein and is supported by the affidavit of **LUDOVICUS ORIAMA OKITOI** the defendant herein.

The gravamen of the application has already been captured in the preceding paragraph of this ruling. Basically, the defendant's case is that although this Court in it's Judgment delivered on 27th May 2021 allowed his Counter – Claim by declaring that the plaintiff's registration as the proprietor of the land parcels **NO SOUTH TESO/OSURETTE/2420**, **2426**, **2427** ad **2428** was fraudulent and should be cancelled and the land parcel **NO SOUTH TESO/OSURETTE/1512** be restored to it's previous owners as at 12th November 1990, that decree cannot be executed by the Land Registrar because such restoration would also involve the cancellation of land parcels **NO SOUTH TESO/OSURETTE/2419** and **2421** which are not part of the decree herein. The defendant has therefore sought in paragraphs (d) and (e) of his application the following orders: -

(d) "In order to give teeth to the decree and order directed at the Land Registrar, the cancellation order should extend to SOUTH TESO/OSURETTE/2419 and 2421 and any further partitions/subdivisions hereof as they too are products of fraudulent partitions/sub – divisions of SOUTH TESO/OSURETTE 1512."

(e) "For the avoidance of doubt, the Judgment should be reviewed to provide for the cancellation, not only of SOUTH TESO/OSURETTE/2420, 2426, 2427 and 2428 but also of SOUTH TESO/OSURETTE/2419 and 2421 together with any and all sub – divisions or partitions effected on any of these parcels."

It would appear from paragraph 12 of the supporting affidavit that between the years 2015 and 2019 while this suit was pending, the land parcel **NO SOUTH TESO/OSURETTE/2421** was similarly sub – divided to create five other parcels viz **SOUTH TESO/OSURETTE/3146**, **3147**, **3148**, **3149**, **3150**, **3151**, **3152**, **3322**, **3323** and **3324** as per the annexed copies of the Green Cards. Further, and also during the pendency of this suit, the land parcel **NO SOUTH TESO/ OSURETTE/2426** was subdivided to create two new parcels being **SOUTH TESO/OSURETTE/3327** and **3328**. The Green Cards are similarly annexed to the supporting affidavit. All this was done in collusion with the then Land Registrar **MR TOM CHEPKWESI** who testified in this case as the plaintiff's witness on 20th March 2019.

In opposing the application, **JOSEPHAT DOE OKIRIA** the plaintiff herein has filed a replying affidavit dated 23rd February 2021 in which he has deponed, inter alia, that following this Court's Judgment dated 27th May 2020, he filed a Notice of Appeal and an application dated 15th October 2020 seeking a stay of execution of the Judgment pending the hearing of the intended appeal. That his application dated 15th October 2020 is yet to be heard. That the prayers sought in the defendants' application cannot be granted since the land parcel numbers sought to be cancelled are registered in the names of parties who were not privy to this suit and to do so would amount to depriving them of their properties contrary to the provisions of **Article 40** of the **Constitution**. In any case, there is no error apparent on the face of the record to warrant a review of the Judgment since the land parcels listed were not the basis of the defendant's Counter – Claim and neither did the defendant touch on them in his evidence. He therefore sought the dismissal of this application.

I notice from the record that although the plaintiff's Notice of Motion dated 15th October 2020 was filed earlier under Certificate of Urgency and I made directions thereon, the parties appear to have abandoned it following the filing of the defendant's Notice of Motion dated 27th November 2020. I shall be giving further directions at the end of this ruling.

Submissions have been filed both by **MR IKAPEL** instructed by the firm of **IKAPEL AND COMPANY ADVCOATES** for the defendant and by **MR OTSIULA** instructed by the firm of **J. B. OTSIULA AND COMPANY ADVOCATES** for the plaintiff.

I have considered the application, the rival affidavits and annextures thereto as well as the submissions by Counsel.

Order 45 Rule 1(1) and **(2) of the Civil Procedure Rules** on which this application is predicated provides that: -

1(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." Emphasis added.

It is clear from the above that for a party to succeed in an application for review of a review, he must satisfy the Court on any of the following: -

1. There is discovery of new and important matter or evidence which, even after the exercise of due diligence was not within the Applicant's knowledge or could not be produced when the decree or order was made, or

2. On account of some mistake or error apparent by the face of the record; or,

3. Any other sufficient reason.

4. The application must be filed without unreasonable delay.

Therefore, the powers donated to the Court to review it's decree are not open ended. They are circumscribed by the provisions of **Order 45 Rule 1** of the **Civil Procedure Rules**.

In **FRANCIS ORIGO & ANOTHER .V. JACOB KIMALI MUNGALA C.A CIVIL APPEAL No 149 of 2001**, the Court stated as follows: -

"In an application for review, an Applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly, the Applicant must make the application for review without unreasonable delay."

A plain reading of the Notice of Motion dated 27th May 2020 does not disclose the ground upon which it is premised. My understanding of the provisions of **Order 45 Rule 1(1)** and **(2)** of the **Civil Procedure Rules** is that an Applicant seeking orders of review must be specific on the ground upon which that remedy is being made. At the commencement of this ruling, I captured the remedy which the defendant seeks in his application. It is clear that it does not state upon which ground the review of Judgment/decree is sought. Neither on the face of the application nor in his supporting affidavit has the defendant made reference to any of the grounds stipulated in **Order 45 Rule 1(1)** and **(2)** of the **Civil Procedure Rules**. That notwithstanding, I will proceed to consider the application on it's own merits.

I must first determine whether the defendant approached the Court without unreasonable delay. The Judgment sought to be reviewed was delivered on 27th May 2020 and this application was filed on 1st December 2020 some six months later. Although it is not indicated in the application itself or in the supporting affidavit on which date the defendant discovered that the Land Registrar Busia could not register the decree without also cancelling the registration of land parcels **NO SOUTH TESO/OSURETTE/2419** and **2421**, Counsel for the defendant has stated on page two of his submissions that the decree was presented to the Land Registrar Busia in August 2020 but it was not until October 2020 that the defendant was informed of the fact that it could not be registered. I must remind Counsel that submissions are not evidence. Any mitigating circumstances as to why the defendant waited until December 2020 to file this application ought to have been explained in the supporting affidavit and not in the submissions. And whereas whether or not a delay is unreasonable will be determined by the circumstances of each case, any delay must be explained. The decree herein was extracted on 1st July 2020. It is not clear why it took the defendant upto August 2020 to serve it on the Land Registrar Busia. What is clear however is that it was not until October 2020 that the defendant discovered that the Land Registrar Busia was not going to execute the said decree. Obviously the defendant could not move to this Court until the Land Registrar Busia had expressed his inability to act on the decree. But there is no explanation why it took the defendant until December 2020 to file this application. However, given the circumstances of this case, I am prepared to hold that the delay is not unreasonable.

Having said so, I do not see any new and important matter or evidence which, after due diligence was not within the knowledge of the defendant or could not be produced by him to warrant a review of the Judgment or decree herein. In paragraph nine of his supporting affidavit, the defendant has stated that in his Counter – Claim, he focused on the land parcels No ***"SOUTH TESO/OSURETTE /2420, 2426, 2427 and 2428 which were directly in issue in dispute between the plaintiff and 1."*** He adds that the land parcels **NO SOUTH TESO/OSURETTE /2419** and **2421** which he now wants cancelled were created during the pendency of this suit. That cannot possibly be true because the Green Card for the land parcel **NO SOUTH TESO/OSURETT/1512** shows that it was closed on 4th April 2009 to create the two land parcels **NO SOUTH TESO/OSURETTE/2419** and **2421**. This suit was first filed on 6th August 2009. The defendant first filed his defence on 24th August 2009 before it was subsequently amended first on 17th April 2010 and later on 7th June 2016. The existence of the land parcels **NO SOUTH TESO/OSURETTE/2419** and **2421** was therefore a matter which, with due diligence, was within the knowledge of the defendant even as he filed his Counter – Claim that gave rise to the Judgment and decree sought to be reviewed. Clearly, the defendant did not deem it necessary to include those two parcels among the prayers that he sought in his Counter – Claim. Indeed, at page three of his submissions, his Counsel states as follows: -

"The defendant did not specifically plead for the cancellation of parcels SOUTH TESO/OSURETTE/2419 and 2421 because these parcels were not directly in issue between him and the plaintiff. Indeed, none of the parties herein had any claim over the two titles."

Clearly, the defendant chose the party whom he wanted to litigate with and the remedy which he wanted the Court to grant him. He must therefore live with that Judgment and subsequent decree. He knew about the land parcels **NO TESO/ OSURETTE/2419** and **2421**, by his own admission, and even if he had not known about their existence, a simple search at the Lands Registry would have confirmed the same. There is therefore no discovery of any new and important matter or evidence to warrant the review of the Judgment and decree herein.

I have also considered if there is any mistake or error apparent on the face of the record to warrant the remedy of review. In **NATIONAL BANK OF KENYA LTD .V. NDUNGU NJAU 1997 eKLR**, the Court of Appeal had the following to say about this ground: -

"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter."

Clearly therefore, to warrant a review, the error must be so obvious that to allow it to remain on the record would result in an injustice. It must be such an error or mistake that is easily discerned from the record. The defendant, and rightly so in my view, has not referred to any mistake or error apparent on the face of the record herein in his application. And in my own assessment, no such mistake or error exists to warrant a review of the Judgment or decree.

Finally, a review may be granted for any other sufficient reason. As to what constitutes sufficient cause, the Court of Appeal of Tanzania in the case of **THE REGISTERED TRUSTEES OF THE ARCHDIOCESE OF DAR–ES-SALAAM .V. BANJU VILLAGE GOVERNMENT & OTHERS CIVIL APPEAL No 47 of 2006** stated that: -

"It is difficult to attempt to define the meaning of the words "sufficient cause." It is generally accepted however that the words should receive a liberal construction in order to advance substantial justice, when no negligence or inaction or want of bona fides is imputed to the Applicant."

My understanding of this ground is that the Court has a wide discretion in determining what is sufficient reason in the circumstances of each case. Such discretion, as always, must be exercised judiciously and on sound basis the main objective being to do justice to the parties. Therefore, such discretion will not be invoked if an injustice will be caused to another party. I think that is what Counsel for the defendant had in mind when he made the following submission: -

> ***"The defendant no doubt meant to reach out to those inherent powers of the Court should the need arise by adding to his Counter – Claim a prayer for "Any other or further relief this honourable Court may deem fit to grant." The review order sought herein is not strenuous to the order of cancellation given in the Judgment."***

No doubt this Court retains inherent discretionary powers which it can invoke whenever it is necessary to do so in the interests of justice and fairness. Indeed, **Section 3A** of the **Civil Procedure Act** behooves the Court, in the exercise of such inherent powers, ***"to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court***.

In trying to persuade this Court to order for the cancellation of titles **NO SOUTH TESO/OSURETTE/2419** and **2421** although they were not the subject in the defendant's Counter – Claim, Counsel for the defendant has submitted as follows: -

> ***"Even if those two titles belong to other persons; it is our submission that they should not be allowed to benefit from the proceeds of fraud."***

That sounds like a very attractive argument. However, it would be a dangerous route to take for the following reasons. Firstly, it is clear from the Green Card that the land parcel **NO SOUTH TESO/OSURETTE/2419** has since 4th February 2009 been registered in the names of **CHRISTOPHER ADEKE** and **RAPHAEL OKWARE** both of whom are not parties to this suit. It would be a violation of their right to property protected by **Article 40** of the **Constitution** to cancel those titles without allowing the registered proprietors thereof an opportunity to testify.

Secondly, the land parcel **NO SOUTH TESO/OSURETTE/2421** which, as per paragraphs 11 and 12 of the defendant's own supporting affidavit, was also registered in the names of **CHRISTOPHER ADEKE** and **DISMAS OKABURU ADEKE**, no longer exists and has been sub – divided to give rise to land parcels **NO SOUTH TESO/OSURETTE/3146**, **3147**, **3148**, **3149**, **3150**, **3151**, **3152**, **3322**, **3323** and **3324**. Those parcels of land, as per the annexed Green Cards, are registered in the names of **CHRISTOPHER ADEKE**, **RAPHAEL OKWARE**, **DISMUS OKABURU ADEKE**, **DISMUS OLUMAS**, **NICODEMUS ONYANGO OTIENO**, **BEATRICE JANET AMAI** and **AMOH OKODOI LILLIAN** all of whom were not parties in this case. Even if the land parcels **NO SOUTH TESO/OSURETTE/2419** and **2421** were created illegally, the rules of natural justice require that the proprietors thereof must be afforded an opportunity to be heard before those titles are cancelled. It was the duty of the defendant to enjoin the proprietors of those parcels in these proceedings, Counsel for the defendant has also made what on the face of it appears to be a very attractive submission in the final paragraph as follows: -

> ***"Your Lordship, we submit that there is a good case here for review of Judgment. If SOUTH TESO/OSURETTE/2420 was a fraud, then SOUTH TESO/OSURETTE/2419 and 2421 were equally a fraud. In order to give teeth to the decree and order directed to the Land Registrar, it is prayed that the cancellation order should affect not only SOUTH TESO/OSURETTE/2420, 2426, 2427 and 2428 but also SOUTH TESO/OSURETTE /2419 and 2421 together with any and all sub – divisions or partitions effected on any of these parcels. That will ensure that the ends of justice are served and the defendant will enjoy the fruits of his Judgment."***

It is of course true that at page 20 – 21 of the Judgment sought to be reviewed, this Court while referring to the mutation form in respect to the land parcel **NO SOUTH TESO/OSURETTE/1512** which had been sub – divided to give rise to the land parcels **NO SOUTH TESO/OSURETTE/2419**, **2420** and **2421** stated as follows: -

> ***"That form, in so far as it states therein that the registered proprietors of land parcel NO SOUTH TESO/OSURETTE/ 1512 had approved it's sub – division to create parcels NO SOUTH TESO/OSURETTE/2419, 2420 and 2421 was clearly a fraudulent document."***

It must however be remembered that what was placed before the Court for it's determination was the cancellation of titles to the land parcels **NO SOUTH TESO/OSURETTE/2420**, **2426**, **2427** and **2428** and no more. No evidence was led before this Court seeking the cancellation of titles to the land parcels **NO SOUTH TESO/OSURETTE/2419** and **2421**. Indeed, the defendant in paragraph 9 of his supporting affidavit, already referred to above, concedes that he did not see the need to seek for the cancellation of those two titles. He has averred as follows:-

> ***9 "That in my defence and Counter – Claim, I focused on SOUTH TESO/OSURETTE/2420, 2426, 2427 and 2428 which were directly in issue and in dispute between the plaintiff and 1."***

The reference to the land parcels **NO SOUTH TESO/OSURETTE/2419** and **2420** in the above extract of the Judgment was really obiter and the rule in **ODD JOBS .V. MUBIA 1970 E.A 476** could not therefore have come into play. I do not think that the power donated by **Order 45 Rule 1(1)** and **(2)** of the **Civil Procedure Rules** empowers this Court to re – write its Judgment in a manner that would cause an injustice to other parties in breach of the rules of Natural Justice. As was held in **ONYANGO .V. ATTORNEY GENERAL 1986 – 1989 E.A 456** at page 460: -

> ***"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."***

Similarly, in **MBAKI & OTHERS .V. MACHARIA & ANOTHER 2005 2 E.A 206**, the Court of Appeal held that: -

> ***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or effected without the party being afforded an opportunity to be heard."***

In my view, therefore, to review the Judgment and cancel the registration of the land parcels **NO SOUTH TESO/OSURETTE/2419** and **2421** in order, as submitted by the defendant's Counsel, ***"to give teeth to the decree"*** will not ***"ensure that the ends of justice are served."*** If anything, such an order will be a travesty of justice with respect to the rights of the proprietors of the land parcels **NO SOUTH TESO/OSURETTE/2419** and **2421**. That, as I have already stated, is not within the scope of the Court's mandate while exercising it's powers of review under **Order 45 Rule 1(1)** and **(2)** of the **Civil Procedure Rules**. This application is therefore for dismissal.

Ultimately therefore and having considered the application herein, this Court makes the following orders: -

1. The defendant's Notice of Motion dated 27th November 2020 is dismissed with costs.

2. This case be mentioned on 2nd June 2021 for purposes of giving further directions in respect to the plaintiff's Notice of Motion dated 15th October 2020 which is still pending.

BOAZ N. OLAO.

J U D G E

26TH MAY 2021.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF MAY 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

BOAZ N. OLAO.

J U D G E

26TH MAY 2021.