



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**CASE NO. 211 OF 2010**

**THANDE HOLDINGS LIMITED.....PLAINTIFF/.APPLICANT**

**-VERSUS-**

**STEPHEN KARANJA KUNGU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**CITY COUNCIL OF NAIROBI....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE REGISTRAR OF TITLES....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Plaintiff/Applicant has filed the Notice of Motion Application dated the 19<sup>th</sup> of July 2021 and in respect of which the Plaintiff/Applicant seeks the following reliefs;

- i. ....(Spent)
- ii. The judgment issued in ELC no. 211 of 2010 on the 9<sup>th</sup> of November 2017 be reviewed as per prayers herein below.
- iii. The 3<sup>rd</sup> Defendant/Respondent be ordered to Rectify the Register of Titles and to show the Plaintiff as the Rightful Proprietor of L.R. NO. Nairobi/Block 83/14/376, as per the judgment in ELC No. 211 of 2010, dated 9<sup>th</sup> November 2017.
- iv. The 2<sup>nd</sup> Defendant/Respondent be ordered to Rectify the Lands and Rates Register to show the Plaintiff as the Rightful Proprietor of the suit property, namely, Nairobi/Block 83/14/376 as per the judgment in ELC 211 of 2010 dated the 9<sup>th</sup> of November 2017.
- v. The 3<sup>rd</sup> Defendant herein be ordered to cancel any existing title deed and instead register the Plaintiff as the only rightful proprietor of the suit property namely, Nairobi/Block 83/14/376, as per judgment in ELC No. 211 of 2010, dated 9<sup>th</sup> November 2017.
- vi. The Honorable Court be pleased to issue any order or relief as it may deem fit in the circumstances.
- vii. Cost of this Application be provided for.

2. The Subject Application is based and/or premised on the grounds contained at the foot thereof and same is further supported by the Affidavit of one A.P. Thande, sworn on the 19<sup>th</sup> of July 2021 and to which the Deponent has attached a single annexure.

3. The Suit herein appears to have been heard ex-parte, culminating into the delivery of the judgment rendered on the 9<sup>th</sup> of November 2017. In this regard, the subject Application has also been filed and because the Defendants/Respondents did not participate in the formal hearing, same has not been served.

4. Be that as it may, whether the subject Application has been served or otherwise, it is still incumbent upon the Plaintiff/Applicant to satisfy the grounds enumerated and in line with the provisions of **Order 45 Rule 1 of the Civil Procedure Rules, 2010**, which relate to and/or govern Applications for Review.

## **DEPOSITIONS BY THE PARTIES**

### **The Plaintiff/Applicant's Case**

5. The Supporting Affidavit has been sworn by one A.P Thande, who avers that same is a Director of the Plaintiff/Applicant company. In this regard, the Deponent thus avers that same is seized and/or possessed of the requisite capacity to depone to the subject Affidavit.

6. The Deponent further avers that in the year 2010, the Plaintiff/Applicant filed and/or commenced the subject suit against the Defendants/Respondents, seeking to be Declared as the lawful and legitimate proprietor of L.R. NO. Nairobi/Block 83/14/376, [herein after referred to as the suit property].

7. It is further averred that following the Filing and subsequent hearing of the matter, judgment was ultimately delivered in favor of the Plaintiff/Applicant, whereupon the Honorable Court inter alia declared the Plaintiff to be the lawful and legitimate owner of the suit property and also directed the 3<sup>rd</sup> Defendant to Rectify the Register to reflect the Plaintiff as the proprietor of the suit property.

8. Nevertheless, the Deponent further avers that the 3<sup>rd</sup> Defendant herein has since failed or refused to comply with the orders vide judgment of this Honorable Court rendered on the 9<sup>th</sup> of November 2017.

9. Owing to the failure and/or refusal by the 3<sup>rd</sup> Defendant/Respondent to comply with the terms of the judgment, the Plaintiff/Applicant has thus filed the subject Application and is now seeking the various Reliefs itemized at the foot of the Notice of Motion Application herein.

### **1<sup>st</sup> Defendant's Case**

10. The 1<sup>st</sup> Defendant/Respondent herein did not file any response to the Application. Consequently, the Application stands unopposed on the part of the 1<sup>st</sup> Defendant/Respondent.

### **2<sup>nd</sup> Defendant/Respondent's Case**

11. Similarly, the 2<sup>nd</sup> Defendant/Respondent did not file any response to the subject Application. Consequently, the Application also remains unopposed on the part of the 2<sup>nd</sup> Defendant.

### **3<sup>rd</sup> Defendant/Respondent's Case**

12. It is also imperative to note that also the 3<sup>rd</sup> Defendant/Respondent did not oppose the subject Application, and on this account, the Application is also unopposed.

## **SUBMISSIONS BY THE PARTIES**

13. When the subject Application came up for hearing on 26<sup>th</sup> of October 2021, Counsel for the Plaintiff sought to canvass this Application by Oral submissions and the request to do so was granted.

14. It was the Counsel's brief submissions that this Honorable Court, differently constituted, had rendered a judgment in favor of the Plaintiff/Applicant which was delivered on 9<sup>th</sup> of November 2017. For clarity, Counsel submitted that the judgment under reference declared the Plaintiff to be the legitimate proprietor of the suit property.

15. It was the Plaintiff/Applicant's Advocates further submission that despite being the beneficiary of the judgment, the 3<sup>rd</sup> Defendant failed to comply with the terms of the judgment and has thereby failed to rectify the register in respect of the suit property so as to reflect the Plaintiff as the legitimate owner of the suit property.

16. On the other hand, Counsel further submitted that during the filing of the Plaint, the Plaintiff/Applicant herein did not plead any Specific order as against the Registrar of Titles and thus it was therefore necessary for the Honorable Court to Review the judgment and grant Specific orders directed to and/or against the 3<sup>rd</sup> Defendant/Respondent.

17. Finally, the Counsel for the Plaintiff/Applicant implored the Court to proceed and allow the Application, on the basis that the subject Application had not been opposed by the Defendants/Respondents.

## **ISSUES FOR DETERMINATION**

18. Having reviewed and examined the subject Application, the Supporting Affidavit thereto and the brief submissions rendered by Counsel for the Plaintiff/Applicant, it is my humble view that the following issues suffice for Determination;

- i. Whether the subject Application has been made without unreasonable delay.
- ii. Whether the subject Application has espoused and/or captured any of the grounds enunciated vide the provisions of Order 45 Rule 1 of the civil Procedure Rules.

iii. Whether the Honorable Court can grant new and/ or Fresh Reliefs which had not been sought and/or pleaded in the Plaint, on the basis of an Application for Review.

## **ANALYSIS AND DETERMINATION**

### **Issue Number One**

#### **Whether the subject Application has been made without unreasonable delay.**

19. Before venturing to address whether the subject Application has been filed without unreasonable delay, it is important to point out, one preliminary Issue and this relates to the Provisions which have been relied upon in agitating the subject Application.

20. I beg to point out that the subject Application has been brought pursuant to the Provisions of **Order 40 Rule 1, 3, 4, 5 of the Civil Procedure Rules,2010**, as well as the provisions of **Section 3A of the Civil Procedure Act, Chapter 21, Laws of Kenya**.

21. Clearly, the provisions which have been invoked or relied on relate to and only apply in situations where an Applicant is seeking of orders of temporary injunction and not Review. In respect of the subject matter, no Relief has been sought for in respect of temporary injunction. Consequently, any order for temporary injunction, would be irrelevant.

22. Suffice it to say, that premised and based on the orders that have been invoked, this Honorable Court would have been disposed to strike out the subject Application. However, because the Application refers to Review in the body thereof, I am enjoined to overlook the provisions that have been invoked and thereby delve into the merits of the Application for Review and to assume that the subject Application is founded or anchored on the correct provisions of the Law, namely, the Provisions of **Order 45 Rule 1 of the Civil Procedure Rules,2010**.

23. In my humble view, the foregoing position resonates with the spirit and the letter of **Article 159(2) of the Constitution, 2010**, which inter alia demands that the Court should not pay undue premium and attention to Procedural technicalities and should endeavor to render substantive justice.

24. Having addressed the foregoing preliminary issue, I am thus called upon to determine whether the subject Application has been made without unreasonable and/or inordinate delay, and if otherwise, whether the delay has been explained or accounted for.

25. To ascertain the length and/or extent of delay, it is worthy to note that the judgment which is the subject of the Application herein was rendered on the 9<sup>th</sup> of November 2017 and yet the subject Application was filed on the 19<sup>th</sup> of July 2021. For clarity, the Application has been filed approximately 3 years and 7 months, from the date of the rendition of the judgment and consequential decree.

26. Having filed and/or mounted the subject Application, after lapse of 3 years 7 months, it was incumbent upon the Plaintiff/Applicant to satisfy the Honorable Court that the duration in question was reasonable and/or otherwise, to account for the delay in the filing of the subject Application.

27. In my humble view, the reasons and/or the explanations for the delay ought to have been discernible or obtainable in the Supporting Affidavit. However, the 7 paragraph Affidavit excluding the introductory part, have not explained or provided any reason for the length of time that was taken before the subject Application was filed.

28. In the absence of any explanation or reason for the delay, it is my finding and holding that the subject Application has been made with unreasonable and inordinate delay and thus the Plaintiff/Applicant is guilty of **Laches**, which thus non-suits the Plaintiff/Applicant.

29. In support of the foregoing position, I take guidance and do echo the sentiments of the Court in the case of **Mohsen Ali & another v Priscillah Boit& another E&L NO. 200 OF 2012[2014] eKLR** where the Honorable Court stated as hereunder;

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret ELC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”

### **Issue Number Two**

#### **Whether the subject Application has espoused and/or captured any of the grounds enunciated vide the provisions of Order 45 Rule 1 of the civil Procedure Rules.**

30. Even though the subject Application has not been brought pursuant to the provisions of **Order 45 Rule 1 of the Civil Procedure Rules,2010**, it is sufficient to note that what the Applicant is essentially seeking from the Court are orders of Review of judgment or Decree which was rendered on the 9<sup>th</sup> of November 2017.

31. Owing to the fact that the said Applicant is seeking Review of the said Decree, it was thus incumbent upon the Plaintiff/Applicant to bring herself within the parameters of **Order 45 Rule 1 of the Civil Procedure Rules,2010** and essentially, to incorporate the Grounds envisaged for Review.

32. However, in respect of the subject matter, the Plaintiff/Applicant has not stipulated any of the Grounds upon which the Review is sought, Suffice it so say, that an order for Review can only issue upon the establishment or satisfaction of any of the following Grounds;

- i. Error and/or mistake apparent on the face of Record
- ii. Discovery of New and Important evidence which the Applicant could not produce at the time of the judgment despite exercise of Due Diligence.
- iii. Existence of Sufficient cause.

33. Before an Applicant can establish or prove any of the foregoing grounds, it is incumbent upon the Applicant to capture the said grounds or any of them in the grounds of the Application or as part of the Supporting Affidavit and it is only then that the Applicant shall be called upon to prove the pleaded ground and not otherwise.

34. Be that as it may, in the instant case, the Applicant has neither adverted to nor pleaded any of the said grounds and neither has same endeavored to prove any.

35. Owing to the foregoing, it is very difficult for this Honorable Court to understand or appreciate the foundation upon which the Review is being sought. Certainly, this Honorable Court cannot be expected to grope in darkness, in a bid to find out under which corner the Plaintiff/Applicant's Application fits and thereafter proceed to consider same in that perspective.

36. In my humble view, Applicants seeking Review must appreciate their cases appropriately and thereafter plead and/or fashion their cases with the requisite specificity and upon such pleading, the Honorable Court will be called upon to grant the specific reliefs, subject to proof thereof.

37. Anything short of that, the Applicant must bear the consequences of the failure and/or neglect to comply with the law.

38. For the avoidance of doubt, an Application that does not capture and/or satisfy any of the grounds stipulated under **Order 45 Rule 1 of the Civil Procedure Rules, 2010** is one for Dismissal.

39. In support of the foregoing position, I adopt and approve of the Decision in the case of **Republic vs Advocates Disciplinary Tribunal Ex-parte Apollo Mboya [2019] eKLR**, where the Honorable Court distilled the relevant principles as hereunder;

“The principles which can be culled out from the above noted authorities are:-

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review

can be sought are enumerated in Order 45 Rule 1.”

### **Issue Number Three**

#### **Whether the Honorable Court can grant new reliefs which had not been sought and/or pleaded in the Plaint, on the basis of an Application for Review.**

40. The Plaintiff/Applicant herein prosecuted the subject suit on the basis of the Amended Plaint dated the 5<sup>th</sup> of July 2011, and in respect of which the Plaintiff/Applicant had sought for the following Reliefs;

- a. An Injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves, their agents, servants and/or representatives from acting on, developing, transferring or dealing with the suit property in any manner whatsoever.
- b. An Injunction restraining the 2<sup>nd</sup> Defendant from in any way alienating, transferring or dealing with the suit property in any manner adversarial to the Plaintiff's rights with regard to the suit property.
- c. A declaration that the Plaintiff is the 1<sup>st</sup> Defendant's title is fraudulent and an order subsequent thereafter directed to the 3<sup>rd</sup> Defendant directing that the register be rectified indicating the Plaintiff as the proprietor thereof.
- d. Costs of this suit together with interest thereon.

41. It is imperative to note, that having made the foregoing pleadings, paragraph [C] of which does not look to be elegantly pleaded, the Plaintiff prosecuted same culminating into judgment whereby the Honorable Court entered judgment in terms of prayers a, b and c of the Amended Plaint. Besides, the Honorable Court also awarded costs in favor of the Plaintiff/Applicant. For clarity, the Honourable Court granted all the Reliefs that were sought for by the Plaintiff/ Applicant.

42. Fast forward, the Plaintiff/Applicant herein has now approached this Court with an Application for Review and in respect of which the Applicant now seeks new and/ or Fresh Reliefs, which were not pleaded or captured in the Amended Plaint.

43. In the Plaintiff/Applicant's own words, same had failed to seek Specific orders against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and thus the Application for Review herein, is meant to facilitate the pleading and seeking for the specific Reliefs.

44. I am afraid that the Plaintiff/Applicant herein is misusing an Application for Review and seeking to rely on the subject Application to sneak in new and Fresh Reliefs which had hitherto not been pleaded, and which in any event, were not proven before the Court in the conventional way.

45. On the other hand, it is evident that the Plaintiff/Applicant herein is seeking to revert back to the Honorable Court to have a second bite at the cherry and thereby upset the well reasoned judgment that was rendered by a Court of coordinate jurisdiction, based on the pleaded and proven facts. In my humble view, the subject Application is misguided and legally untenable.

46. In support of the foregoing submission, I adopt the words of the Supreme Court in the case of **Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR** whereby the Honorable Court stated as hereunder;

“We further add that the review window so envisaged is not meant to grant an applicant a second bite at the cherry. It is not an opportunity for an applicant to re-litigate his/her case. Sight should never be lost of the shore that in an application for review, like the one before the Court, at the core of the application is the Court's exercise of discretion. It is the Court/Judge's decision that is impugned and not the substantive application being re-argued. Hence an applicant is under a legal burden to lay a basis, to the satisfaction of this Court, that in exercise of its discretion, the limited Bench acted whimsically or misdirected itself in reaching the decision it made.”

47. On my part, I am not disposed to afford the Plaintiff/Applicant herein another window to re-litigate the subject matter afresh and thereby attract further reliefs, which were not captured in the Amended Plaint, which constitutes the operative pleading in respect of the subject matter, is grounded and/ or anchored.

48. I must also hasten to state that to allow the subject Application for Review and grant the Fresh reliefs which are being sought at the foot thereof, shall amount to doing violence to the *Doctrine of Departure*.

49. Finally, my short answer to the Plaintiff/Applicant's Application for Review is found in the provisions of **Order 2 Rule 6 of the Civil Procedure Rules, 2010** which provides as hereunder;

**“[Order 2, rule 6.] Departure.**

**6. (1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.**

**(2) Sub-rule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to**

**plead the allegations or claims in the alternative.”**

**FINAL DISPOSITION**

50. Other than prayer [C] of the Amended Plaint, which was inelegantly worded, and thus culminating into an equivocal order by the Court, which I am prepared to remedy and which I do remedy as hereunder;

**i. A declaration be and is hereby made that the 1<sup>st</sup> Defendant’s title over and in respect of L.R. NO. Nairobi/Block 83/14/376 is fraudulent and same be cancelled and in its place the register be rectified so as to reflect the name of the Plaintiff as the rightful owner: I am not persuaded that the Application is worthy of being allowed.**

51. Subject for the limited correction which I have alluded to herein before, the Notice of Motion Application dated the 19<sup>th</sup> of July 2021, is Devoid of merits and same is hereby Dismissed.

52. I make no orders at cost because the Defendants/Respondents neither entered appearance nor filed any pleadings. Consequently, it would be unjust or inappropriate to reward same with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2021**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**ENVIROMENT AND LAND COURT.**

**MILIMANI.**

In the Presence of;

**June Nafula Court Assistant**

Ms Waceke for the Plaintiff/ Applicant