



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELC NO. 21 OF 2018**

**JOSPHAT KURIA GATHIONI.....PLAINTIFF**

**VERSUS**

**JAMES MAINA NJOROGE.....1<sup>ST</sup> DEFENDANT**

**JULIUS TANGUS.....2<sup>ND</sup> DEFENDANT**

**STANLEY K SITIENEI .....3<sup>RD</sup> DEFENDANT**

**EVANSON NJENGA.....4<sup>TH</sup> DEFENDANT**

**AND**

**BETWEL K MARINDANY & OTHERS.....INTENDED INTERESTED PARTIES**

**RULING**

1. The Court on 20<sup>th</sup> March 2019 after hearing of the suit delivered a judgment in favour of the plaintiff. The Court found the defendants to be trespassers and awarded the plaintiff Kshs.250,000/= as general damages for trespass. The Court ordered the defendants to vacate the suit land within 30 days failing which the plaintiff to be at liberty to apply for their eviction. The plaintiff was also awarded the costs of the suit.

2. The defendants vide a Notice of Motion dated 27<sup>th</sup> June, 2019 expressed to be brought under section 3A, 6 and 80 of the Civil Procedure Act, Order 45 (1) (a), 50(1) & Order 10 (10) of the Civil Procedure Rules, Article 50 (1) & 159 (2) (d) of the Constitution and section 152 E, 152G of the Land Act, 2012 inter alia prays for stay of execution of the decree issued on 20<sup>th</sup> March 2019; that the decree and other consequential orders be reviewed and set aside and for the enjoinder as defendants of the persons set out in the addendum to the application for them to defend their interest in the suit property. The defendants further pray that the present suit be stayed pending the hearing of various suits relating to the same issues pending before various Courts. The application was premised on the grounds set out on the body of the application and the affidavit sworn in support by the 2<sup>nd</sup> defendant.

3. The Applicants in support of the application aver that sometime in January 2018 they had instructed their former advocates on record to apply for leave to amend their defence to include the grounds they had set out in support of the instant application which apparently the advocates failed to do. The applicants state that the parties sought to be enjoined as defendants, had lived cultivated and occupied the suit land for more than 15 years and if evicted would suffer irreparable loss and damage.

4. The plaintiff respondent filed grounds of objection on 30<sup>th</sup> September 2019. The plaintiff inter alia contended the application was misconceived and an abuse of the Court process; that there was no discovery of any new material facts and/or any sufficient reason to warrant stay and/or review of the judgment, and that the defendants sought to be enjoined had no interest in the suit land other than through the defendants who had leased portions to them and further that the defendants only want to use the "new parties" to reopen the suit in an attempt to get what they failed to get in the concluded suit.

5. The parties argued the application by way of written submissions. I have carefully reviewed the application, the affidavit in support and the grounds filed in response thereto together with the submissions filed by the parties. I have equally reviewed the record of the proceedings. As per the Court record the suit was heard on 20<sup>th</sup> September 2018 in the presence of the defendants former advocate Mr. Muchafu. At the commencement of the hearing Mr. Muchafu drew the Court's attention to the pendency of petition No.43 of 2016 before Nakuru ELC 2 which he stated related to the entire Eastern Mau Forest where the suit land was located. Munyao J, upon hearing counsel of parties ruled that there was no demonstration that the suit had any relationship with the petition and directed the hearing of the suit to

proceed. It is apparent that even though the applicants stated they had given their former advocate details relating to the other alleged pending matters, these were not brought to the attention of the judge.

6. The Applicants application is basically two prolonged. Firstly, the applicants seek review and/or setting aside of the judgment delivered on 20<sup>th</sup> March 2019, and consequent to such review and/or setting aside, a stay of the suit pending the hearing and determination of the various suits referred to. Secondly, the applicants seek the joinder of the 27 persons set out in the addendum to the application as defendants. The applicants additionally have ominously sought the lifting of a caveat placed by the National Land Commission over the entire **Nakuru/Marioshoni Settlement Scheme** and further the implementation of the finding of Task Force on implementation of the decision of the African Court on Human & People's Right issued against the Government of Kenya in respect of the Rights of the Ogiek Community of Mau.

7. It is obvious all the other prayers, the defendants seek in the application are dependent on the prayer for review and/or setting aside of the judgment of 20<sup>th</sup> March 2019 being granted. If review and/or setting aside is denied, it follows all the other prayers would fail. It is thus imperative that I consider whether any basis exists to warrant a review or setting aside of the judgment of 20<sup>th</sup> March 2019. Order 45 Rule 1 of the Civil Procedure Rules provides for the conditions that an applicant for review needs to satisfy in order to succeed in an application for review. It provides 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.*

8. Thus in order for an applicant to succeed in an application for review, the applicant must satisfy the court that: -

(i) There has been discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be available at the time the decree was made; or

(ii) there was a mistake and/or error apparent on the face of the record; or

(iii) there was some other sufficient cause/ or reasons; and

(iv) the application has been made without unreason delay.

9. In the present suit the plaintiff claimed ownership of land parcel **Nakuru /Kapsita/1096** in respect of which he held a title deed issued on 16<sup>th</sup> July 1997. The plaintiff alleged that the defendants had in 2006 unlawfully trespassed onto the land. He sought a declaration that the land belonged to him and an order of eviction. In their joint defence filed on 6<sup>th</sup> September 2007 the defendants averred that they had been allotted the land in 1994 and that they had occupied the land since then. Both the plaintiff and the defendants participated in the trial and the Court in its evaluation of the evidence found and held that the defendants had failed to demonstrate that they had been allocated the land for their use and/or that the plaintiff had acquired title to the land fraudulently. The Court upheld the plaintiff's title to the suit property and held that the defendants had no right to be on the property and were trespassers. The Plaintiff's suit herein related to a specific parcel of land which he had been allocated and held title to and in regard whereof he claimed the defendants had trespassed into. The defendants did not show in what respect the various other pending suits they have referred to in the application for review as having been pending, affected the suit property. The suit *Milimani ELC No. 821 of 2012(OS) (2014) eKLR* as at the time the present suit was heard, had been decided judgment having been rendered in 17<sup>th</sup> March, 2014. In the suit the Ogiek as a community were claiming entitlement to reside and live generally in the East Mau Forest. They were not claiming a specific, land parcel that had been alienated. The Court upheld their claim and directed the National Land Commission to identify land for the settlement of the Ogiek members which land was to be excised within the Marioshoni location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru. The area to be delineated could not include any private land that had already been allocated and alienated.

10. The applicant's are not basing their applications for review on the discovery of any new matter or evidence not available at the time of the decision but rather *on any other sufficient cause or reason*. I have considered the application and I am not able to identify such other sufficient cause or reason that can warrant a review of the judgment/decreed. The applicants apparent "sufficient cause" is that around January 2018 they had instructed their advocate then on record to seek leave to amend the defence and in particular seek a stay of the matter as issues of ownership of properties within the wider geographical area of Nakuru/Marioshoini area where the suit property was situate was pending determination both in Courts of law and administratively. The advocates did not carry out that instruction and as the record shows proceeded to have the suit prosecuted and the applicants participated in the prosecution and gave evidence. As I have observed there was no demonstration as to how the pending cases affected the instant suit and in my view it was not enough to allege that there were cases pending which had a direct bearing to the instant suit. The suit related to a specific parcel of land whereas the suits referred to related to a wide geographic area which cannot be said to include any specific parcels of that may have been alienated to individuals like the plaintiff/respondent. The applicants nonetheless never made the application for amendment and/or stay of proceedings before the suit was heard and determined on merits on the basis of the pleadings that were before the Court. The applicants had the opportunity to make the application for amendment and/or stay which they did not make. I do not consider such an application can be made after judgment. One

cannot amend pleadings where a suit has been heard and determined on merit and neither can such a suit be stayed since the same has been heard and concluded.

11. Having regard to the conditions under Order 45 (1) of the Civil Procedure Rules under which a review may be granted I am satisfied that the applicants have failed to satisfy any of the conditions and the application for review, is declined. As the applicants have failed in their application for review, of necessity the application for joinder of the 27 persons whose names are set out in the addendum to the application fails. It is unclear why it is the defendants/applicants who are seeking their joinder and they themselves did not make the application to be enjoined as such when the suit was ongoing. The suit having been concluded and judgment rendered, the new parties cannot be properly enjoined to the suit. In case they have a separate and distinct cause of action against the plaintiff they can nonetheless file a fresh suit against the plaintiff. However if their claim would be through the defendants/applicants, they would be bound by the judgment as servants and/or agents of the defendants.

12. The net result is that I find no merit in the defendants Notice of Motion dated 27<sup>th</sup> June 2019 and I accordingly order the same dismissed with costs to the plaintiff /respondent.

13. Orders accordingly

**Ruling dated signed and delivered electronically at Nakuru this 7<sup>th</sup> Day May 2020.**

**J M MUTUNGI**

**JUDGE**