



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO.243 OF 2017

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GATHAITE FARMERS CO-OPERATIVE

SOCIETY LIMITED.....PLAINTIFF

VS

NICHOLAS KIGO NDUNGU.....1<sup>ST</sup> DEFENDANT

FRANCISCA NJERI GAKUMO.....2<sup>ND</sup> DEFENDANT

GIDEON KAMAU KARANJA.....3<sup>RD</sup> DEFENDANT

DAVID NJENGA KARANJA.....4<sup>TH</sup> DEFENDANT

MARGARET NJERI NJENGA.....5<sup>TH</sup> DEFENDANT

FELISTER WANJIRU NJENGA.....6<sup>TH</sup> DEFENDANT

ROSARIA WANJIKU NDERI.....7<sup>TH</sup> DEFENDANT

FELISTA WANJIRU NDUNGU.....8<sup>TH</sup> DEFENDANT

MONICA WANGUI NJOROGE.....9<sup>TH</sup> DEFENDANT

MICHAEL NJOROGE GICHARU.....10<sup>TH</sup> DEFENDANT

HANNAH NYAMBURA NGUGI.....11<sup>TH</sup> DEFENDANT

JAMES MAINA MWANGI.....12<sup>TH</sup> DEFENDANT

AGNES WAITHERA NJUKI.....13<sup>TH</sup> DEFENDANT

JOEL KIRUKU NJENGA.....14<sup>TH</sup> DEFENDANT

MARY WAMBUI NDUNGU..... 15<sup>TH</sup> DEFENDANT

SALOME WANGARI KARIUKI.....16<sup>TH</sup> DEFENDANT

DICKSON MAINA RUKU.....17<sup>TH</sup> DEFENDANT

LUCY MUGURE KAMAU.....18<sup>TH</sup> DEFENDANT

RULING

1. The Applicant moved the Court vide an application dated 25/11/2020 expressed under Sections 1A, 1B and 63(e) of the Civil Procedure Act, Order 45 Rule 1, Order 8 Rule 3 and Order 51 of the Civil Procedure Rules and Article 159 of the Constitution seeking orders that; -

a) THAT this Honorable Court be pleased to review and set aside the Judgement and order given on the 11/12/2019, 2019 dismissing the suit.

b) That, costs of this application be provided for.

2. The application is based on grounds interalia that there is discovery of new and important matter and or the presence of sufficient reasons to warrant a review of the Court's judgment delivered on 11/12/2019.

3. The Application is supported by the Affidavit of Arcadius Njora Chege. He stated that he is the current Chairman of the Plaintiff Company. He deponed that the Applicant has discovered new and important evidence that was not within its knowledge and could not be adduced during the trial hearing leading to the dismissal of their suit. That the new discovery is that the Applicant still holds the mother Title for land parcel MAKUYU/MAKUYU BLOCK 11/1086 (*hereinafter the suit land*), a certified copy annexed as 'ANC1'.

4. The Applicant averred that by a letter dated 16/3/2000 annexure 'ANC2', the then District Officer Makuyu Division indicated that Two title deeds in respect of the same parcel were illegal and unconstitutional. Further that the Kenya Gazette Notices No. 2150 annexure 'ANC3', showing ROBERT KIMUNYE, GIATU NDUNGU, NJIRAINI NJARAMBA, JOHN NJENGA and KARANI GAITHO as the registered proprietors of the suit land were false because they have never been registered as such. That their bundle of documents is clear on the current society's officials and status of the suit properties and therefore there was no property the respondents would have rightfully obtained by whatever means. That Gazette Notice No. 15469 cannot cancel an existing and valid Title. That their titles were issued through a corrupt scheme at the behest of the Respondents.

5. The application is vehemently opposed.

6. The Respondents filed their Replying Affidavit sworn on 4/2/2021 by Nicholas Kigo Ndungu. He deponed that he is the current chairperson of Gathaite Farmers' Cooperative Society and faulted the Applicant for lacking locus standi to act on behalf of the society in this matter. That the cooperative officer - Gatundu North has nothing to do with the Plaintiff Society which operates in Murang'a county. That a photocopy of the title deed is not an authoritative position of a parcel of land as compared to an official search. He termed the documents emanating from the cooperative officer Gatundu North as misleading and suspicious and do not amount to new evidence as prayed.

7. On 18/3/2021, directions were taken to canvass the application by way of written submissions. The Applicant filed theirs dated 26/4/2021 whereas the Respondent did not file any.

8. The Applicant submitted that the right to review is well anchored in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. That it timeously filed the instant application upon learning that the Applicant still holds the original mother title of the suit land hence a sufficient ground for this Court to review its judgment. It reiterated that no piece of land should have more than one title thus it is doubtful how the Respondents obtained Title to the suit land and caused it to be published in the Kenya Gazette as lost and process a fresh title. Reliance was placed on the case of **Khalif Sheikh Adan v Attorney General [2019] eKLR** that allowed an application for review on account of new and important evidence.

9. According to it, the new important evidence includes the original mother title for the suit land, letter dated 16/3/2000, Gazette notices no. 2150 & 15469, Cooperative officer's bundle of documents, Mutations and sketch maps and the official searches. That all the foregoing amount to new and important evidence that even after due diligence could not be produced as evidence during trial to warrant review of the impugned Judgment. The Applicant also cited the Court of Appeal decision in the case of **The official receiver and Liquidator V Freight Forwarders Kenya Limited (UR)** that quashed the trial Court ruling refusing to review its own judgment and found that the Court had ignored one of the very foundational tenets of review which was apparent in that case. It implored the Court to exercise its jurisdiction in its favour and allow the orders sought in the application.

10. Having read and considered the application, the grounds upon which it was anchored, the rival affidavits, the written submissions and the totality of the record, the key issue for determination is whether a review of Judgment dated 11/12/2019 can be granted?

11. The provisions governing review of judgments are stipulated in Section 80 Civil Procedure Act (CPA) and Order 45 Civil Procedure Rules (CPR) Section 80. Order 45 of the CPR is very explicit that a Court can only review its orders if the following grounds exist: -

(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the Applicant at the time the decree was passed or the order was made; or

(b) There was a mistake or error apparent on the face of the record; or

(c) There were other sufficient reasons; and

(d) The application must have been made without undue delay. The pertinent issue for determination herein, therefore, is whether the Applicant has established any of the above grounds to warrant an order of review.

12. On the first limb, the Applicant has alluded to discovery of new and important evidence that in its view qualifies as a ground for review. The said evidence includes the original title of the suit land, letter dated 16/3/2000, mutation forms and copies of numerous official searches. Paragraph 8 of the impugned Judgement is clear that when the Applicant testified in Court, he produced the original title of the suit

land and a copy of the green card. The Applicant has now attached a copy of the same and termed it new and important matter of evidence. In my view that title does not meet the test for new evidence to entitle the Applicant to orders of review as prayed.

13. Secondly, the Court has to be satisfied that discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the Applicant at the time the decree was passed. Again at Paragraph 23 of the impugned Judgement, this Court noted that indeed mutation forms were not adduced in Court and the Applicant has now attached them in the instant application. It has however not been explained how the same have been procured now but could not be availed during trial after due diligence.

14. Thirdly, the application was filed almost one year since delivery of Judgment. It has not been disclosed when the new evidence found its way into the hands of the Applicant. This is because the mutation forms attached are dated 21/9/2011 and contain names of the society's officials including the Respondent as the secretary. This is contrary to the alluded list of the current society's management committee in the undated list attached to the Applicants supporting affidavit. Reference was also made to a letter dated 16/3/2000 calling for resolution of conflict between two factions of the society leadership. I am not persuaded that all these combined documents and letter amount to new and important evidence that could not be availed with due diligence during the hearing.

15. Recently, when confronted by an application to review its decision, the Supreme Court in the case of **Hussein Khalid and 16 others v Attorney General & 2 others [2020] eKLR** echoed that the power of review is exercised sparingly because a trial has several implications once a judgment is delivered; litigation must come to an end; there is need for finality in Court decisions; the Court is functus officio after delivery of decision sought to be reviewed; and that review should not substantially alter the decision sought to be reviewed. The review window is to be exercised sparingly and only deserving cases have to be allowed.

16. In the same way, the Court of Appeal in **Kamau James Gitutho & 3 others v Multiple Icd (K) Limited & another [2019] eKLR** in dismissing an application for review based on apparent error on the face of the record, the Court cited with approval the observation in the case of **Daniel Lago Okomo vs Safari Park Hotel Ltd & Another [2018] eKLR** that; -

“We do not review judgments just because a losing litigant is unhappy and despondent. We have no jurisdiction to do so.”

17. In light of the foregoing, the Applicant has not established a case for grant of review and setting aside of the Judgment delivered on 11/12/2019.

18. The application is unmerited and it fails.

19. The applicant to bear the cost of the application.

**20. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 30<sup>TH</sup> DAY OF JUNE 2021**

**J. G. KEMEI**

**JUDGE**

**Delivered in the presence of;**

Macharia HB for Bwonwonga for the Applicant

Wangari HB for Ms Waithira Mwangi for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents

Court Assistant: Alex