



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC NO. 114 OF 2013**

**MIRIAM KUBAI.....PLAINTIFF**

**VERSUS**

**MARGARET NEKESA MOSES.....1<sup>ST</sup> DEFENDANT**

**PHILIP WACHILONGA.....2<sup>ND</sup> DEFENDANT**

**CHRISTINE WANJALA WABOMBA.....3<sup>RD</sup> DEFENDANT**

**AND**

**KENNEDY ANDOVE (APPLYING AS THE LEGAL REPRESENTATIVE OF THE**

**ESTATE OF JOHN ANDOVE).....APPLICANT**

**RULING**

1. This is a ruling on two consolidated applications filed on different dates, seeking a review of this court's judgment in this suit. This court has found it proper to consolidate the two applications as they seek similar orders albeit on grounds that bear a slight difference.

2. The background of the two applications is that Miriam Kubai, the plaintiff, sued the three defendants in the suit vide a plaint filed on **10/9/2013** seeking *inter alia* a declaration that she is the owner of a plot of land measuring **0.1** acres being part of **Plot No 260** in Masaba Farm, the latter which was formerly known as **LR NO 4538/2**. This court found in favour of the plaintiff and declared the plot to be hers on **28/2/2019** after a protracted hearing.

3. On **23/4/2021** the 2<sup>nd</sup> and 3<sup>rd</sup> defendants through Arusei Chepchumba & Co advocates sought a review of that judgment vide an application of the same date supported by the affidavit of the 2<sup>nd</sup> defendant. Subsequently a further affidavit of the 2<sup>nd</sup> defendant was filed on **10/5/2021** in support of the application in the wake of the filing of the plaintiff's replying affidavit on **29/4/2021**. Originally, the grounds for the proposed review were said to be that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were wrongly sued and were not heard on their defence; that they never participated in the hearing despite having filed their defence; that the respondent would not suffer any prejudice if the judgment were set aside. The plaintiff's response stated that all along the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had legal representation (by Okile & Co Advocates) during the hearing; that the defendants were accorded an opportunity by the court to conduct their respective defences, but their advocate indicated to court at the hearing on the **17/1/2018** that he did not wish to call witnesses and applied to close their case; that since the defendants opted not to call evidence they cannot now be heard to aver otherwise; that no discovery of any new and important matter or evidence or mistake or error on the face of the record or any other sufficient reason has been disclosed; that the applicants are solely to blame for not offering any evidence; that the delay of **3 years** and **2 months** in bringing the application is inordinate and that the defendants have withheld crucial details as to when they allegedly discovered that they had been locked out of the proceedings.

4. The 2<sup>nd</sup> defendant's further affidavit mentioned responds to the plaintiff's depositions by stating that the defendant's legal representation was inadequate; that on **15/11/2018** only the 1<sup>st</sup> defendant testified and then her case was marked as closed and submissions were ordered to be filed; that it is not true that Mr. Bisonga applied to close the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's case as alleged; that Mr. Okile never informed the defendants that they were required to attend court; that every time the 2<sup>nd</sup> defendant visited Mr. Okile's office he would tell him that everything was "okay" and that he had no reason to worry; that since **2018** up to April **2021** when he was served with a notice to show cause, he had awaited for communication from his advocate Mr. Okile in vain; that upon unsuccessfully seeking Mr. Okile for consultations the defendants sought another advocate; that there is an error on the face of the record and the mistakes of counsel should not be borne by the defendants; that the delay in filing the application was not deliberate but due to misinformation and concealment of facts by the advocate

and that the two defendants have a reasonable defence on the record.

5. As stated earlier, the application of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is not the only threat to the judgment and decree held by the plaintiff in this suit; another application dated 27/5/2021 and filed in court on the same date was brought by the one Kenneth Andove, the Administrator of the estate of John Andove through M/S Ndiwa Serebe & Co Advocates under **Order 45 Rule 1, Order 1 Rule 10(2), Order 36(10)** of the **Civil Procedure Rules, Section 1A, 1B, 3A & 63** of the **Civil Procedure Act** and **Article 50(1)** of the **Constitution of Kenya, 2010**. The applicant/intended defendant seeks the following orders:-

(i) ...spent

(ii) ...spent

(iii) That by way of review, the honourable court be pleased to set aside judgment of this court delivered on 28/2/2019.

(iv) That upon prayer (iii) being granted, the honourable court be pleased to grant leave *do novo* upon the applicant filing his defence.

(v) Cost of this application be provided for.

6. The application is supported by the affidavit of the applicant sworn on 27/5/2021. The grounds upon which the application is made are that the applicant is the administrator of the estate of **John Andove** and, he being aggrieved by the judgment desires to have it reviewed; that the suit property, **0.1 acres** in the large plot **No. 260** within Masaba are, undisputedly belonged to the estate of **John Andove**; that the estate never participated in the proceedings before judgment was rendered; that the effect of the judgment is that the estate is being deprived of its property and the beneficiaries are being disinherited. He avers that the estate has been condemned unheard and its property taken away for no justifiable cause. The applicant avers that John Andove passed on 5/11/2009 before the suit was filed; that the family allowed whoever had financial muscle to develop the suit property and the 2<sup>nd</sup> respondent developed the same; that the applicant works far away in Nairobi and was not aware of the events concerning the suit land happening on the ground; that recently while seeking to obtain letters of administration for his late father's estate they discovered that judgment in this suit had been delivered; that upon the advice of his advocate he believes that the estate ought to have participated in the proceedings in this suit; that the 2<sup>nd</sup> respondent had no letters of administration and was not sued as administrator but in her personal capacity and that the plaintiff avoided suing the estate for fear of a robust defence to the suit; that the plaintiff was not truthful to court by stating that she purchased the suit land.

7. The plaintiff filed a replying affidavit sworn on 8/6/2021. She depones that the suit took **6 years** to be finalised and the applicant has not explained his whereabouts in that period or why he never sought to be enjoined as a party; that the applicant and the deceased's wife were witnesses in the agreement and the deceased John Andove not only sold the land but also gave the plaintiff vacant possession which she has held to date; that after the burial of the deceased there was a family or clan meeting headed by the father to the deceased at which the applicant and his mother attended and it was agreed that the balance of the purchase price be paid and it was paid to the applicant; that the plaintiff was also recognized in the succession proceedings as having bought the suit land in the confirmation of grant in the estate of the original owner one *Rosemary Naswa Wafula* and there was no objection raised; that even the deceased's widow *Agnes Khasiala Sisiko* has refrained from claiming the suit land as she was aware of the sale to the plaintiff; that the other widow *Margaret Nekesa Moses* against whom judgment was given in the instant suit has not appealed the judgment; that widows have priority above any other person in succession yet the applicant omitted the named widows from the succession proceedings yet there is no renunciation of right by them filed in this court; that the application does not meet the threshold for review envisaged by **Order 45 Rule 1** of the **CPR** and is a fishing expedition.

8. After these depositions the affidavit of Agnes Khasiala Sisiko was filed on 8/6/2021. In the affidavit it is deponed that she is the widow to John Andove that she testified in favour of the plaintiff in the suit; that her late husband sold the land to the plaintiff and that she was not involved in the succession cause giving rise to the *ad litem* grant the applicant has used to file the application at hand.

9. The applicant filed further affidavit sworn on 15/6/2021. In that further affidavit of the applicant avers that no person could have transacted over the property of the deceased without a grant of letters of administration after he died; that the contract can only be deemed to have been perfected after the payment of the purchase price and transfer of proprietary interest yet the alleged payment to a person without a grant is not competent; that the widows testified in the case on their own behalf and not on the behalf of the estate; that there was no clan meeting as alleged and that since the institution of suits is not gazetted he could not be deemed to know of the existence of the suit.

#### **SUBMISSIONS**

10. The plaintiffs filed her written submissions to the first application on 3/5/2021 and to the second application on 9/6/2021. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents appear to have filed no submissions as none were on the record at the time of the preparation of this ruling. The applicant in the second application filed his submissions on 15/6/2021.

#### **DETERMINATION**

11. I have considered the two applications, the responses and the submissions. The common issue that arises in both applications is whether the judgment of this court in the matter should be reviewed and/or set aside.

12. I have confirmed that the court record reads as follows:

17/1/2018.

C/A: Picoty /Collins

**Mr Onyancha, for the plaintiff**

**Mr Bisonga, holding brief for Mr. Okile for the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant;**

**Ms Mufutu, holding brief for Mr Murgor for the 1<sup>st</sup> defendant;**

**Mr Onyancha: Today is defence hearing.**

**Mr Bisonga: Mr Okile is not calling any witness. He applies to close the case of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.**

**Court: The case of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who have opted to call no witnesses is hereby deemed closed.**

**(Signed)**

**Mrs Mufutu: I seek for a date for hearing of the 1<sup>st</sup> defendant's case; Mr Murgor is attending a colleague's burial.**

**Mr Onyancha: No objection.**

**Court: This matter is hereby adjourned for the reason that Mmr Murgor is attending a colleague's burial. Hearing opf the 1<sup>st</sup> defendant's defence will be on the 10/4/2018 by consent.**

**(Signed).**

13. The above record, which speaks for itself and summarily puts paid to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's attempts to have the court's judgment in this matter reviewed on the basis that they were not accorded a hearing. They were represented in court and their counsel communicated to court that they did not wish to call any evidence in the matter and the court took that to be the true situation. Their subsequent ground that their advocate never provided them with adequate representation during the proceedings can not be the concern of this court or deemed a proper ground for review under **Order 45 Rule 1** by any stretch of the imagination and it must be rejected, and so must their application dated 23/4/2021.

14. The second application by the administrator of the estate of John Andove has as its main basis that the estate was not involved at the hearing of the main suit while the property subject matter remained the estate's.

15. The applicant skirts around the issue that the widow to the deceased, who is also the applicant's mother, has executed a replying affidavit supporting the respondent's position that the deceased had sold the property to the plaintiff; he also avoids the issue that the widows of the deceased have not been involved in the obtainance of a grant of letters of administration *ad litem* yet they rank higher in priority to him.

16. The other issue the applicant has not addressed properly is the delay in lodging his application. The application was filed three long years after the judgment was delivered. It is not sufficient for the applicant to state that he works far away. He must have been in contact with his mother at around the time she was giving evidence in the case otherwise he would be painting himself in poor light who can not travel from Nairobi to Kitale to see his mother even once during a duration of three years. I do not find it plausible that he did not know of the judgment for that long. Besides, he has not disclosed exactly when he became aware of the judgment.

17. The third issue that arises is that the family was not apparently involved in the confirmation of grant in the **CMC Succession Cause No. 152 of 2019** on 11/7/2019 when the plaintiff was confirmed to be the beneficiary of the suit land by way of purchase.

18. Though the applicant appears to state that such confirmation does not matter for the purposes of the instant application as it was authorized by a court judgment, the question that arises is why there was no objection thereto. That demonstrates that the delay of the applicant in acting before the said confirmation has led to the grant of other orders in another competent court bases on the judgment, which amounts to partial execution of the judgment. Such a scenario is an example of what the provision in **Order 45 Rule 1** of the **CPR** seeks to avert when it provides that an application for review ought to be filed without unreasonable delay.

19. The application by the administrator of the estate of *John Andove* must therefore fail for reason of inordinate and unexplained delay if nothing else. The inordinate delay is fatal to the application. It also suffices for this court to state that that the application dated 27/5/2021 does not demonstrate any proper ground for review under **Order 45 Rule 1** in that no discovery of new evidence or matter or mistake on the face of the record has been demonstrated by the applicant.

20. The upshot of the foregoing is that the applications dated 23/4/2021 and 27/5/2021 respectively are lacking in merit and both of them are hereby dismissed with costs to the plaintiff in the suit.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 29<sup>th</sup> day of June, 2021.**

**MWANGI NJORGE**

**JUDGE, ELC, KITALE.**