



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 35 OF 2019

MARY WAMBUI WARUI.....1ST PLAINTIFF

AGNES AHOMA WARUI (Suing as Legal

Representative of ELIUD WARUI).....2ND PLAINTIFF

LUCY NYAMBURA KARUCHI.....3RD PLAINTIFF

FAITH MUTHONI MUNENE (Suing as Legal

Representative of CYRUS MUNENE MWENJE).....4TH PLAINTIFF

VERSUS

JOHN NJAMA MWANGI.....1ST DEFENDANT

GEOFFREY MAINA KIHARA.....2ND DEFENDANT

RULING

Background

the Applicant who is also the 1st Defendant herein moved this Court vide the Notice of Motion dated 19th June 2020 under *Order 8 CPR* for the following orders:-

- (1) That the Court be pleased to vacate/set aside its ruling and the orders issued on 13th December 2019.*
- (2) That the 1st and 2nd defendant pray for the same ruling to be set aside.*
- (3) That the defendant prays that the court consider a prior judgment issued in Misc. Civil Application No. 22 of 2013 (Judicial Review) at Kerugoya dated 18th July 2014 before Judge B.N. Olao to be maintained.*
- (4) That the 1st and 2nd defendant prays that the Court considers to have the said parcel of land No. MUTITHI/CHUMBIRI/493 remain by their names following the revocation of parcel of land No. MUTITHI/CHUMBIRI/975, 976, 977, 978 which was fraudulently acquired Eliud Warui which the court at Wanguru revoked and hence the Court of Appeal Kerugoya, dated 18/7/2104(Misc. Civil Application No. 22 of 2013(Judicial Review.)*
- (5) The 1stdefendant pray that the Court Review and dismiss the applications from the 4th Respondent, her legal representative whom happens to be the daughter(Wangechi Munene) was the same advocate representing the 1st defendant in the same matter Case No. Misc. Civil Application No. 62 of 2011 at Embu counter-claiming the legality of Eliud Warui ownership of the same parcel of land. Attached is a copy of replying affidavit sworn by the said 1st defendant JOHN NJAMA MWANGI at Wang'uru dated 9th July 2012.*

Grounds in support of the said application are as follows:-

- (1) That the plaintiffs obtained orders that has barred the defendants from cultivating their portion which has adversely affected them during this season of harvesting.

(2) That the plaintiffs pray for status of the orders issued over the land and asks for status quo to be maintained.

(3) Costs of this application be provided for.

Factual Statement by the Applicant.

The Applicant in his supporting affidavit made the following depositions:-

- (1) That I am the applicant herein thus competent to swear this affidavit on my behalf and on the behalf of the 2nd Applicant.
- (2) That I am the absolute registered proprietor of parcel number MUTITHI/CHUMBIRI/493 (annexed hereto and marked JNM 1A, B" respectively are copies of parcel registers.
- (3) That the applicants are total strangers to land No. MUTITHI/CHUMBIRI/393.
- (4) That I therefore pray that the orders of the temporary injunction of the land No. MUTITHI/CHUMBIRI/493 be vacated to allow the applicant to continue utilizing the said parcel of land without further interference.
- (5) That it is true that Francis Mwangi Kania(now deceased) was the registered owner of the land parcel No. MUTITHI/CHUMBIRI/493.
- (6) That it is not true that Francis Mwangi Kania transferred land parcel MUTITHI/CHUMBIRI/493 to Eliud Warui at consideration.
- (7) That what exactly happened is that Eliud Warui fraudulently acquired land parcel No. MUTITHI/CHUMBIRI/49 from Francis Mwangi Kania.
- (8) That he filed a case before Mwea Divisional Land Dispute Tribunal in the year 2004 against Eliud Warui claiming he obtained land parcel MUTITHI/CHUMBIRI/493 fraudulently.
- (9) That the Land Dispute Tribunal at Mwea heard him and made a determination that one Eliud Warui obtained the title deed for land parcel No. MUTITHI/CHUMBIRI/493 fraudulently and the same ought to be revoked.
- (10) That after the land Dispute revoked the title, the award was presented to the Senior Resident Magistrate's Court at Wang'uru to be adopted as an order and/or judgment of the court.
- (11) That the Senior Resident Magistrate Court at Wang'uru in the arbitration Case No. 31 of 2004 adopted the award by the tribunal as the judgment of the court. (Annexed and marked JNM 3 is a copy of the proceedings of the Senior Resident Magistrate's Court at Wang'uru.
- (12) That the Court at Wang'uru in the Arbitration Case No. 31/2004 explained that any party aggrieved by the order of the Court had 30 days to appeal.
- (13) That up to now, no appeal has been preferred against the order/judgment of Court revoking title deed of land parcel MUTITHI/CHUMIRI/493 that was fraudulently acquired by Eliud Warui and the court reverted back to Francis Mwangi Kania.
- (14) That he was able to extract the decree that revoked the title deed belonging to Eliud Warui. (Annexed and marked JNM 4is a copy of decree.)
- (15) That sometimes in the year 2013, the respondent through one Eliud Warui filed an Ex-parte Judicial Review Application seeking to quash the decision of the Mwea Lands Dispute Tribunals.
- (16) That in the meeting, no such issue of cancellation of a cheque was discussed nor any such resolution made therefore the letter annexed is a fraud and another attempt to deceive this Honourable Court.
- (17) That the ELC Court in Misc. Application 22/2013 dismissed the Application No. 22/2013, dismissed the Notice of Motion filed on 28th October 2011 that sought an order for certiorari. (Annexed and marked JNM is a copy of the judgment).
- (18) That the family of the late Francis Mwangi Kania after the land reverted back to him filed a succession cause to inherit him.
- (19) That the succession cause was over and the land MUTITHI/CHUMBIRI/493 was given to him and co-applicant Geoffrey Maina Kihara. Nobody opposed the succession. (Annexed and marked JNM 6 is a Kenya Gazette Extract).
- (20) That MUTITHI/CHUMBIRI/493 belongs to him and his co-applicant. (Annexed and marked JNM 7 is a copy of the title deed).
- (21) That land parcel MUTITHI/CHUMBIRI/975, 976, 977, 978 no longer exist since the title deed that had been fraudulently acquired by Eliud Warui was revoked and so were the subdivisions of the same.

- (22) That they have no interest in MUTITHI/CHUMBIRI/975, 976,977 and 978.
- (23) That their interest lies in the land parcel MUTITHI/CHUMBIRI/493 that belongs to them.
- (24) That the plaintiffs lied to the Honourable Court by hiding information that the resultant parcel MUTITHI/CHUMBIRI/975, 976, 977 and 978 were revoked by court.
- (25) That no appeal has ever been filed or any order to revoke the title MUTITHI/CHUMBIRI/493 belonging to them.
- (26) That the Judicial Review filed by the plaintiffs in this Court was dismissed.
- (27) That this matter is res-judicata having been arbitrated and finalized, the plaintiffs are trying to bring it back through the back door.
- (28) That they are the ones on the ground and the temporary orders against them are only making them suffer since they have availed title deed and they have been cultivating their land since way back.
- (29) That the law allows them to seek for review once a new information is discovered that the court never knew when issuing the orders.
- (30) That the plaintiffs never told the Court the whole truth and hence need to seek for review of the court orders.
- (31) That the plaintiffs/respondents claim that in the year 2004, land parcel No. MTITHI/CHUMBIRI/493 was not in existence when the title deed was being closed in 2000 yet they failed to attach anything to proof the same.
- (32) That a close look at the green card, you will notice that MUTITHI/CHUMBIRI/975, 976, 977 and 978 title deeds were issued in 2013 and not 2000 as alleged that it is after the tribunal had revoked the fraudulent transfer by Eliud Warui (Annexed and marked JNM 8 is a copy of a green card of 978.)
- (33) That in fact in the year 2012, the advocate for the plaintiff/respondent Wangechi Munene commissioned for them a replying affidavit where they clearly stipulated any transaction by the title of Eliud Warui had been acquired illegally was revoked and she acknowledged the same as true. She cannot now claim the same was illegal (Annexed and marked JNM 9 is a copy of replying affidavit).
- (34) That it is in the interest of justice that their application to set aside the temporary orders be allowed.

Respondents` Statement of Facts

The Respondent/plaintiffs filed a replying affidavit in opposition to the said application and deponed as follows:-

- (1) That one Francis Mwangi Kania (now deceased) was the registered owner of land parcel No. MUTITHI/CHUMBIRI/493. (Annexed herewith marked "FMM 2" is a copy of the green card to show this).
- (2) That on or about 2nd February 1998, the Francis Mwangi Kania transferred land parcel No. MUTITHI/CHUMBIRI/493 to Eliud Warui at a consideration.
- (3) That Eliud Warui had land parcel No. MUTITHI/CHUMBIRI/493 sub-divided into land parcel No. MUTITHI/CHUMBIRI/975, 976, 977 and 978. On 20th January 2000, he transferred land parcel No. MUTITHI/CHUMBIRI/976 and 978 to the 3rd and 4th plaintiffs/applicants respectively.
- (4) That Eliud Warui sold land parcel No.MUTITHI/CHUMBIRI/976 and 977 to Cyrus Munene Mwenje and the titles thereof were on 15th March 2013. (Attached herewith marked "FMM 3 &4" are copies of the green cards to show this).
- (5) That 1st and 2nd plaintiffs/applicants also sold land parcel No.MUTITHI/CHUMBIRI/975 and 978 to Cyrus Munene Mwenje and the respective titles were issued to him. (Attached herewith and marked "FMM 5&6" are copies of the green card to show this.)
- (6) That on or about 2nd December 2004, the 1st defendant/respondent sued Eliud Warui in Mwea Land Disputes Tribunal allegedly that he had fraudulently obtained the original land title to parcel No. MUTITHI/CHUMBIRI/493 from his father, Mwangi Kania.
- (7) That the Land Disputes Tribunal held that Eliud Warui had defrauded the land. The 1st and 2nd plaintiffs/applicants aver that the Land Disputes Tribunal did not have jurisdiction to adjudicate on matters of ownership of land. That she is advised by her advocate on record which advice she verily believes to be true that the Land Disputes Tribunal Award thereto is null and void having contravened the now repealed Land Disputes Tribunal Act (Attached herewith is and marked "FMM 7" and a copy of the Tribunal award).
- (8) That by the time the said Tribunal Award was filed and award given on 2nd December 2004, land parcel No.

MUTITHI/CHUMBIRIR/493 was not in existence the title having been closed on subdivision on 20th January 2000 as such the same could not be executed. The suit had no subject matter and was null and void abinitio.

(9) That this Honourable Court rightfully gave injunction orders against the applicants/defendants restraining them from interfering with her possession, use and enjoyment of land parcels Nos. MUTITHI/CHUMBIRI/975,976,977 and 978 and selling their alleged land parcel No. MUTITHI/CHUMBIRI/493 pending the hearing of the suit.

(10) That if the applicants/defendants were aggrieved by the said orders, the best recourse was to appeal against the same not to ask for setting aside of the same.

(11) That in this case, no reason has been demonstrated to warrant the Court to vacate its orders of 13th December 2019 as her late husband is the legal owner of land parcel No. MUTITHI/CHUMBIRI/975, 976,977 and 978. In any case, if the applicants were aggrieved by the orders of this Court, the best recourse was to appeal against the same.

Applicants written Submissions

The Applicant did not file their submissions within the timelines given by the court.

Respondents written Submissions

The Respondents through the firm of Wangechi Munene on behalf of the respondents submitted on each of the prayers as follows:-

Prayer No. 1

On this prayer, the respondents submitted that the application has been brought under *Order 8 CPR* which is basically for amendment of pleadings and therefore the same is misconceived and bad in law. They also submitted that a party can only seek to find to set aside and/or vacate in order if the same were obtained ex-parte. They submitted that the orders under review were issued on 13th December 2019 after this Honourable Court heard both parties and that if the applicants were aggrieved by the orders issued, their recourse was to appeal but not setting aside as this Court cannot sit on its own appeal. The Respondent further submitted that even assuming applicants are seeking to review the orders of this Honourable Court under *Order 45 of the Civil Procedure Rules*, they have to satisfy the Court on the principles set out hereunder, that is to wit:-

(a) They discovered new and important matter on evidence which after the exercise of due diligence, was not within their knowledge or could not be produced by him at the time when the decree was passed on the order made, or

(b) There is a mistake or error apparent on face of the record or for any other sufficient reason.

They submitted that none of these grounds have been demonstrated.

Prayer No. 2

The respondents reiterated submissions made on , above.

Prayer No. 3

On the second prayer, the respondent submitted that such a prayer cannot be granted in an application. They submitted that it is trite knowledge that an application for Judicial Review is the nature of Court process in which a Judge is asked to review the lawfulness of a decision or action made by a public body in the course of its Administrative duties. They are proceedings in which an aggrieved party challenges the process in which a decision has been made rather than the merits of the decision. They referred to Page 8 of the Judgment by Justice Olao dated 18th July 2014 where the learned Judge dismissed an ex-parte Applicant's application which was brought way after six (6) months had lapsed from the time the decision was made. They argued that in the present suit, the plaintiffs are challenging the jurisdiction of tribunal in making of an award in Mwea Land Disputes Tribunal No. D/269 Vol. 4.252. the respondents further submitted that the applicants in the current suit are challenging the tribunal award which has to go to full hearing where evidence will be called to determine whether the tribunal had jurisdiction to make that award or not. They therefore submitted that the applicants cannot therefore pray for this court to adopt a judgment issued in a interlocutory application.

Prayer No. 4

On prayer No.4, the respondents submitted that there is no Court that has ever revoked titles to land parcel No. MUTITHI/CHUMBIRI/915, 976, 977, and 978. They submitted that what the District tribunal held in Arbitration Case No. D26D/Vol. 4.232 John Njama Mwangi Vs Eliud Warui is that after perusal of the documents adduced by both the plaintiff and defendants, it resolved that the documents adduced by the defendants were not genuinely obtained. They stated that the tribunal ordered the Land Registrar to revoke Eliud Warui's title deed. That award was adopted as a Court's judgment in Arbitration Case No. 31 of 2004 between John Njama Mwangi Versus Eliud Warui on 3rd February 2015. The learned Judge Hon. Justice Olao in Misc. Civil Application no.22 of 2013 (J.R) did not tackle the merits of the Tribunal decision but dismissed the J.R Application as it had been filed out of time. The Judge did not uphold the tribunal's award. Her argued that the plaintiffs in this suit are challenging the tribunal's jurisdiction to revoke title or determine matters of fraud and that the case should go for full hearing for the court to arrive at a just decision. The Respondents further submitted that by the time the tribunal case was filed on 2nd December 2004 to the time its decision was reached, land parcel No. MUTITHI/CHUMBIRI/493 was not in existence. They submitted that it

is clear from their replying affidavit that on or about 2nd February 1998, Francis Mwangi Kania transferred land parcel No. MUTITHI/CHUMBIRI/493 to Eliud Warui at a consideration. On 20th January 2000, he had the land sub-divided into land parcels No. MUTITHI/CHUMBIRI /975, 976, 977, and 978 and thereafter transferred MUTITHI/CHUMBIRI/975 and 978 to the 3rd and 4th plaintiffs. After some time, Eliud Warui sold land parcel No. MUTITHI/CHUMBIRI/976 and 977 to Cyrus Munene Mwenje (5th plaintiff) in 2013. The 3rd and 4th plaintiffs also sold their parcels No. MUTITHI/CHUMBIRI/975 and 978 to Cyrus Munene Mwenje (5th plaintiff) in the same year 2013. They submitted that by the time the tribunal made its award on 2nd December 2014 and the award adopted on 3rd February 2005, the land was not in existence as the same had been closed on sub-division on 20th January 2000.

Prayer No. 5

The respondents submitted that the firm of Wangechi Munene & Co. Advocates has never acted for the 1st defendant in Misc. Civil Application No. 62 of 2011 and that from the replying affidavit, the 1st defendant deposed that his advocate was one S.G. Wachira & Co. Advocates. They stated that the Judicial Review Application was transferred from Embu High Court to Kerugoya and re-registered as Misc. Application No. 22 of 2013. By that time, the firm of Wangechi Munene & Co. Advocates were representing Cyrus Munene Mwenje, the interested party. In conclusion, the respondents submitted that this Honourable Court rightfully issued injunction orders after satisfying itself that a prima facie case had been established.

Legal Analysis

I have considered the affidavit evidence and the submissions by the respondent alone. I have also considered the applicable law. The applicants in this application are seeking a myriad of orders and have invoked the provisions of **Order 8 CPR** which basically deals with amendment of pleadings. None of the prayers sought by the applicant is related to amendment of their defence. None of the orders sought by the applicants also relate to amendment of the defence herein. To the contrary, the applicant seeks to set aside the orders issued by this Honourable Court on 13th December 2019. That order/ Ruling was issued after inter-parties hearing of a Notice of Motion dated 28th August 2019 brought under **Order 40 Rule 1 CPR**. A ruling/ order issued after interparties hearing cannot be set aside and/ or reviewed unless the applicant has properly invoked the Court under **Order 45 CPR** and also demonstrated the discovery of new and important matter of evidence which after the exercise of due diligence was not within their knowledge or could not be availed by him at the time when the decree was passed or the order made or that there is a mistake or error apparent on the face of the record or for any other sufficient reasons. The applicant has not satisfied this Court of any of the two principles to warrant the grant of the orders sought. The orders issued by this Honourable Court on 13th December 2019 are equitable reliefs which were issued after hearing all the parties. This court cannot set aside its orders on the basis of a judgment issued in a different case heard and determined by a separate judge being a Misc. Application No. 22 of 2012 (J.R). If the applicant was aggrieved by the order/ Ruling of this Court issued on 13th December 2019, his remedy lies in Appeal and not by way of setting aside and/ or review as sought in the present application. The fourth prayer seeking to have the suit land parcel No. MUTITHI/CHUMBIRI/493 remain in the names of the 1st and 2nd defendants are substantive orders which cannot be issued before hearing the merits of the case. This applies to prayer No. 5 of the application. The upshot of my findings is that the Notice of Motion dated 19th June 2020 lacks merit and the same is hereby dismissed with costs to the plaintiffs. It is so ordered.

RULING READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 11TH DAY OF JUNE, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Ndorongo holding brief for Mrs Makazi for the Applicant
2. Mr. Wanyinge holding brief for Wangechi for Respondent
3. Kabuta – Court clerk.