REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT EMBU

E.L.C. CASE NO. 201 OF 2015

(FORMERLY KEROGOYA ELC 29 OF 2014)

KENNETH KARIUKI IRERI...PLAINTIFF

VERSUS

TITUS KITHINJI NDICHI..DEFENDANT

(BY ORIGINAL SUIT)

TITUS KITHINJI NDICHI.............................PLAINTIFF/RESPONDENT

VERSUS

KENNETH KARIUK IRERI...1ST DEFENDANT

NTHIGA MWARIRIE...2ND DEFENDANT

ALFRED NGIRI MARANGI.....................3RD DEFENDANT/APPLICANT

NYAGA TITIMA...4TH DEFENDANT

R U L I N G

1. By a Notice of Motion dated 28.8.2020 and filed on 23.9.2020 the applicant ALFRED NGIRI MARANGI- would wish the court to review, vary, and/or set aside its judgment and decree in this matter made on 28.3.2019. That is the first prayer (prayer 1). His second prayer (prayer 2) requires that the court makes provision for cost of the application.

2. The application is expressed to be brought under order 45 Rule (1) and order 51 Rule 1 of the Civil Procedure Rule 2010 and Sections 3A and 3B (1) (a) of the Civil Procedure Act (Cap 21). **(There is actually nothing like Section 3B (1) (a) in the Civil Procedure Act, Cap 21).** It is anchored on the grounds, inter alia, that the court delivered its judgment on 28.3.2019 and declared that the respondent – TITUS KITHINJI – is the lawful proprietor of title No. NTHAWA/ RIANDU/1298; that the applicant was authorized by Irimba Clan members as their chairman to represent them and ensure that all members got their rightful parcels of land guided by the available list; that the land was fairly distributed as per the list, with land parcel No. NTHAWA/RIANDU/1298 allocated to Nthiga Mwarire, the 2nd defendant, while parcel No. NTHAWA/RIANDU/1294 was allocated to TITUS KITHINJI NDICHU; that there is an error and/or mistake on the face of the record and it is only fair and just to set aside because TITUS KITHINJI NDICHI had already been allocated parcel No. 1294 by the clan; that the said Kithinji cannot own parcel No. 1298 and 1294 together unless the whole process of allocation is re-done or he agrees to release one parcel to the rightful owner; and that the applicant will suffer prejudice if the orders are not granted.

3. The supporting affidavit that came with the application is actually an explication and elaboration of the grounds advanced in the application. It also provides some history and antecedents. It came to light, for instance, that another case – ***HCC No.1615/1975, NAIROBI***- generally touching on the larger clan land was settled by consent and the subdivision and distribution of the land among clan members went on well. The exercise resulted in Nthiga Mwarire being allocated parcel NO. 1298 while Titus Kithinji Ndichi was allocated parcel No. 1294.

4. Titus Kithinji Ndichi, who was the only defendant in the suit herein as originally filed, made a response in reply to the application on 9.12.2020. According to him the applicant herein is abusing the court process as the judgment in the matter was delivered on 28.3.2019 while the application under consideration is coming about one and a half years later. To him, there was in ordinate delay.

5. It was further deposed, inter alia, that no new evidence or mater which was not within the applicant's knowledge has come up since the decree was passed. It was averred too that there is no error or mistake apparent on the face of the record as alleged. Titus deposed that he is the rightful owner of parcel No. 1298 and has no interest in parcel NO. 1294. He also faulted the applicant for not stating clearly what he wants to be done after the review, variation, or settling aside is done.

6. The application was said to fall short of attaining the requisite threshold for granting an order of review.

7. The applicant filed a supplementary affidavit after receiving the response filed by Kithinji. He reiterated that his application has merit and that it was brought without undue delay. According to him, he only got to know of the matter when he was served with a bill of cost. He deposed that he was never served with pleadings.

8. The application was canvassed by way of written submissions. The applicant's submissions were filed on 22.2.2021. He gave an overview of the whole matter and also delved into some history. He then focused on the application under consideration and stated that when he was enjoined in the suit as 3rd defendant, he was not informed about it. He was not served, he submitted, and therefore never got a chance to defend himself. He got to know of the suit much later and that is when he discovered that the respondent had concealed that he has two parcels of land – parcel No. 1298 and parcel No. 1294. According to the applicant, parcel No. 1298 was allocated to NTHIGA MWARIRE, who was sued as 2nd defendant in counter-claim.

9. The applicant says he was aggrieved by the judgment and has sufficient reason to have it reviewed. There is evidence he would like the court to consider. He faulted the respondent for saying that the application is an abuse of the court process.

10. The applicant then pointed out the applicable statutory law as contained in Section 80 of the Civil Procedure Act (Cap 21) and order 45 of the Civil Procedure Rules, 2010. Recourse was also had to the case of ***MAKHECA & COMPANY ADVOCATES VS CENTRAL BANK OF KENYA*** Miscellaneous Application, No. 296 of 2021, NAIROBI in order to justify that *"sufficient reason"* is a ground for allowing review.

11. According to the applicant the court should consider whether injustice would be occasioned if the decree as drawn is adhered to. In his view, there would be injustice occasioned to him.

12. The rest of the submissions are in essence a summation of the grounds advanced on the face of the application.

13. The respondent's submissions were filed on 20.4.2021. The respondent reiterated that the application lacks merit and is an abuse of the court process. The applicant was said to have had an early chance to file the application but he squandered the chance and ended up filing the application about one year after delivery of the judgment.

14. Further, the respondent submitted that there is no error or mistake apparent on the face of the record as alleged by the applicant. According to him, *"There are no grounds in the Application to warrant the judgment being reviewed"*.

15. The respondent then made reference to the law as contained in the applicable statutes and aslo in some Judicial Pronouncements. In this regard, he referred to section 80 of the Civil Procedure Act (Cap 21) and Order 45 of the Civil Procedure Rules, 2010. Then the cases of ***NASIBWA WAKENYA MOSES VS UNIVERSITY OF NAIROBI [2019] eKLR, AJIT KUMAR RATH VS STATE OF ORISA & Others: Supreme Court of India case at page 608, SADAR MOHAMED VS CHARAN SIGNH & Another [1963] EA 557, TUKESI MAMBI & others VS SIMION LITSANGA [2004] eKLR, NYAMOGO & NYAMOGO VS KAGO [2001] EA 170 and ATTORNEY GENERAL & OTHERS VS BONIFACE BYANYIMA (HC MA NO. 1789 of 2000)*** were all cited and quoted to explain what constitutes an error on the face of record or sufficient reason as grounds for review. And the position that emerged is that an error or mistake on the face of the record should be rather obvious, easily noticeable, and/or straight forward while sufficient reason should be analogous, or close if you will, to an error apparent on the face of the record.

16. Ultimately, the respondent submitted that the application was brought late and that there is no new evidence available that was not within the applicant's knowledge.

17. I have considered the application, the response made, the substance of the applicants supplimentary affidavit, rival submissions from both sides, and the record of the entire suit generally. It is clear to me that the suit as filed originally was between KENNETH KARIUKI IRERI as plaintiff and TITUS KITHINJI as defendant. Titus Kithinji is the respondent in this application. In the suit, Kenneth wanted Kithinji to be evicted from parcel No. 1298. Apparently, Kenneth is the current registered owner.

18. When Kithinji was served, he not only filed a defence but also a counter-claim. He denied Kenneth's claim and in the counter-claim, he sued Kenneth (as 1st defendant) and three others – NTHIGA MWARIRE (as 2nd defendant), ALFRED NGIRI MARANGI (the applicant herein as 3rd defendant) and NYAGA TITIMA (as 4th defendant). In the counter-claim, Kithinji sought a declaratory order (prayer (a)) that he is the lawful owner of parcel No. 1298, that the plaintiff in the main suit (who appears as 1st defendant in the counter- claim) be deleted as owner from the land register and that Kithinji himself be registered as the new owner (prayer (b)). Kithinji also wanted to be awarded costs of the entire suit (prayer (c)).

19. Kithinji won the counter-claim and the main suit instituted against him was dismissed, meaning that he actually won the entire suit.

20. The application herein is essentially a contestation of Kithinji's win. But the real looser in the case – KENNETH KARIUKI IRERI-has not contested and neither has NTHIGA MWARIRE (2nd defendant in the counter claim) who sold or transferred the land to KENNETH. As the registered owner of the land, Kenneth is the person really affected by the first two orders in the decree extracted from the judgment. These two orders have the effect of changing the title from his name to the Kithinji's name. Yet Kenneth has not complained. The

application herein is not expressed to be brought on his behalf. It is also not brought on behalf of the 2nd defendant – NTHIGA MWARIRE – from whom the land changed hands to Kenneth. And as the land is now individually owned, it can no longer be said to be clan land.

21. The judgment clearly shows that the applicant was only condemned to pay costs. But the application herein filed is not even about costs. It is essentially about the impending ownership of the land by Kithinji if the judgment is executed. Although the Law allows any party considering himself aggrieved to file an application for review, it appears obvious to me that where it is not readily noticeable that such a person is aggrieved, sound reasons have to be shown concerning how such a person is affected. It is not clear to me how the applicant is personally aggrieved by the change in ownership that the judgment may bring. And this is so because he is not the registered owner. The registered owner is Kenneth and he has not complained. Besides, Kithinji himself has said that he has no interest in parcel No. 1294. I would understand the applicant if he was pursuing the issue of costs. But the issue of ownership is not his to pursue.

22. It is crucial also to appreciate that those others sued with the applicants are apparently not part of the application. If the application for review is allowed, the net effect is to drag them back to court for a possible fresh hearing. This appears to me undesirable considering that none of them is challenging the judgment.

23. It is necessary too to consider and appreciate what the applicant is calling an error or mistake on record and/or sufficient reason. A reading through the application and the submissions that followed seem to show that the error, mistake, and/or sufficient reason comprise of untendered evidence in the applicant's possession which he did not make available in the suit allegedly because he was not served. But is this really the position? A reading of the court record shows an affidavit of service filed on 14.11.2018 showing, inter alia, that the applicant was served with summons to enter appearance and a defence and counter claim on 14.1.2010. This happened in his home in Riandiu Location, Mbeere North District. The process server was one WILFRED NJERU KIGORO and was accompanied by Titus Kithinji. A copy of summons to enter appearance was filed together with the affidavit of service and it is signed by the applicant.

24. It may be important to clarify here for proper understanding that although this matter is shown as ELC No. 201/2015, it is much older than that and was originally filed as HCC No. 167/2009. It should not therefore be surprising when the court observes that the applicant is shown to have been served on 14.1.2010.

25. When the applicant therefore says he was not served, one would have expected that he would endeavor to show that the service shown herein is a lie. As things stand, the applicant only makes an unsubstantiated allegation that he was not served. Given the record I have referred to, the allegation by him sounds hollow and/or untrue. It then appears to me that the evidence the applicant would wish to make available is not something he was denied opportunity to give. Rather, it is something he failed to seize the opportunity and give.

26. Both sides articulated the law generally well. But before the law applies, facts have to be established. As I have already shown, the applicant is not a person who was denied an opportunity to be heard; he is a person who failed to utilize the opportunity to be heard. He is now coming late in the day and making an unconvincing allegation that he was not served.

27. Given what I have said so far, it is clear that the application herein lacks in merit. It is therefore an application for dismissal and I hereby dismiss it with cost.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 3RD DAY OF JUNE 2021.

In the presence of:

Court Clerk – Leadys

3rd defendant/applicant – absent

Defendant/respondent – absent

Interpretation – English/Kiswahili

Other parties absent

Mugendi for M/S. Njuguna for 3rd defendant/applicant

Ms. Mutua for Okwaro for defendant/respondent.

COURT – Ruling on Notice of Motion dated 28.8.2020 and filed on 23.9.2020 read and delivered in open court.

Right of Appeal 30 days.

A.K. KANIARU

JUDGE.

3.6.2021