REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 110 OF 2019

(FORMERY MOMBASA HCCC NO. 453 OF 2000)

RASTO GWIYO MIKAYA.....PLAINTIFF

VERSUS

1. CHARO RUWA MWAGONA

2. AMINA MBARAK

3. IBRAHIM MBARAK

4. JUMA MBARAK

5. SALIM MASHA MBARAK

6. SULEIMAN MBARAK.....DEFENDANTS

RULING

1. This suit was initially filed some 21 years ago at Mombasa being ***Mombasa HCCC No. 453 of 2000*** and a Judgment was delivered thereon on 11th November 2005. It was transferred to Malindi following an Order made by the High Court on 29th October 2019 when the same came up for consideration of the present application.

2. By their application dated 11th July 2019, the six (6) Defendants pray for Orders: -

1. That the Judgment and Decree made on 11th November 2005 be reviewed and be set aside;

2. That the Defence Case be re-opened and it be re-heard in order to adduce new evidence; and

3. That the costs of the application be in the cause.

3. The application which is supported by an affidavit sworn by the 2nd Defendant- Amina Mbarak is premised on the grounds inter alia: -

i) That Judgment was delivered on the said 11th November 2005 but new and important evidence relating to the suit property- Kilifi/Mtondia/77 which was not within the knowledge of the Defendants has since been discovered;

ii) That it has emerged that the suit property as described in the pleadings at the time of hearing and delivery of Judgment did not exist as the same had been sub-divided by the Plaintiff and new Title had been created before the suit was filed;

iii) That as at the time of the institution of the suit, the hearing and delivery of Judgment, the Plaintiff did not own the suit property described as Title No. Kilifi/Mtondia/77 as pleaded in his Plaint;

iv) That as at the time of the hearing of the suit and delivered of Judgment the new titles sub-divided from the suit property had already been sold to a third part by the Plaintiff but the Plaintiff did not disclose that information to the Court;

v) That had that disclosure been made before delivery of Judgment the Court would not have arrived at the Judgment delivered on 11th November 2005;

vi) That the said evidence was not within the knowledge of the Defendants at the time of hearing and Judgment and it is only just that the Judgment be reviewed and set aside to enable the new evidence to be placed before the Court;

vii) That there is also an error apparent on the face of the record in that although the Court found that the Plaintiff did not legally purchase the suit property from the 1st Defendant and had even dismissed the Plaintiff's case, the Court omitted to order for the return of the suit property and title deed to the 1st Defendant; and

viii) That as a result of this omission the Plaintiff has continued to cling to a parcel of land which a Court of law has found not to have been lawfully acquired by him.

4. The application is opposed. In a Replying Affidavit sworn by the Plaintiff/Respondent –Rasto Gwiyo Mikaya and filed herein on 28th October 2019, he avers that the Judgment herein was delivered on 11th November 2005 and that there is absolutely no reason why the application has been made 14 years after. The Plaintiff thus asserts that the application is inordinately late and without any reasonable cause.

5. The Plaintiff contends that there is no reason why the defence case should be re-opened and re-heard as there is no new evidence. The Plaintiff further asserts that the sub-division of Kilifi/Mtondia/77 was done and that separate titles were issued in 1999 and if the Applicants had been diligent they would have done a search and confirmed the position.

6. The Plaintiff further avers that the Applicants had earlier on filed ***Malindi ELC No. 54 of 2015*** raising similar issues but the same was truck out in a Ruling delivered on 15th November 2018. The Applicants have also not appealed against the dismissal of their Counterclaim in the said case.

7. The Plaintiff further asserts that there is no error apparent on the face of the record and if there is then the Applicants are inordinately late in coming to Court for correction thereof.

8. I have given full consideration to the application and the response thereto. I have similarly considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.

9. The six (6) Defendants urge this Court to review the Judgment and decree made herein on 11th November 2005 and to re-open the defence case so that the Defendants can adduce new evidence. The circumstances under which a Court can grant a review of proceedings are outlined under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.

10. In this respect, Section 80 of the Civil Procedure Act provides as follows: -

"80. Any person who considers himself aggrieved: -

(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is allowed by this Act,

May apply for a review of the Judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."

11. On the other hand, Order 45 Rule 1 of the Civil Procedure Rules provides thus: -

"(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 the Judgment to the Court which passed the decree or made the order without unreasonable delay."

12. Thus while Section 80 gives the power of review to a Court, Order 45 on the other hand sets out the rules. Those rules lay down the jurisdiction and scope of review limiting it to an application made without unreasonable delay on the following grounds: -

a) The 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 produced by him at the time when the decree was passed or the order made; or

b) On account of some mistake or error apparent on the face of the record; or

c) For any other sufficient reason.

13. The Defendants/Applicants before me have grounded this application which was filed 14 years after Judgment was delivered herein on the discovery of a new and important matter which was not in their knowledge at the time of the proceedings and further, on the basis of an apparent error on the face of the record.

14. It was the Defendant's case that as at the time of the institution of the suit in the year 2000, the suit property described in both the Plaint and the Defence as Title No. Kilifi/Mtondia/77 had been sub-divided way back in 1999 and that new titles had been created. According to the Defendants, what this situation meant was that the entire subject matter of the suit as described in the pleadings did not exist. The Defendants submit that these facts were peculiarly within the knowledge of the Plaintiff and that he chose not to disclose the same.

15. From the material placed before me, it is apparent that the Plaintiff instituted this suit in the year 2000 claiming vacant possession from the six (6) Defendants who were members of the same family. The 1st and 2nd Defendants were a husband and his wife while the 3rd to 6th Defendants are their sons. The Plaintiff pleaded that on 12th November 1998, he had entered into a sale agreement with the 1st Defendant in regard to the purchase of all that parcel of land known as Plot No 77 Mtondia Settlement Scheme.

16. It was the Plaintiff's case that despite paying the purchase price of Kshs 12,175/- and having the parcel of land surveyed and transferred to his name, the Defendants who lived on the land had refused to hand over vacant possession of the land. Accordingly, the Plaintiff came to Court urging the Court to grant an order of specific performance or in the alternative an order of eviction of the Defendants from the suitland.

17. The 1st Defendant it would appear passed away sometimes in the year 2004. By a Further Amended Statement of Defence and Counterclaim dated 22nd September 2004, the Defendants denied the sale agreement of 12th November 1998 and/or that the subject land was lawfully surveyed and registered in the name of the Plaintiff. They termed the Plaintiff's registration a nullity and a fraud claiming he had forced the 1st Defendant who was said to be old, weak and feeble- minded to execute documents which the 1st Defendant did not fully comprehend.

18. Having heard the case and in a Judgment delivered on 11th November 2005, Mwera J., (as he then was) dismissed both the suit and the Counterclaim stating in the penultimate paragraph of his Judgment as follows: -

> ***"In sum this suit is dismissed with costs. As to the Counterclaim, it too is dismissed again with costs. It was not proved that the Plaintiff was in illegal occupation of the subject property. It was also not proved here that (the) 1st Defendant's mental capacity was affected by age, drunkenness or bodily distress when he entered the "agreement" to sell the land. The Court would have gone ahead to 'grant the prayers on the suit if it had been proved that the Settlement Fund Trustees finally sanctioned the sale between Rasto and Charo (now deceased)."***

19. Arising from the foregoing, it was evident to me that the parties were both aware of the subject matter of the dispute. The 1st Defendant had been allocated the land as Plot No. 77 Mtondia Settlement Scheme by the Settlement Fund Trustees (SFT) but he apparently sought to sell the same to the Plaintiff before fulfilling the conditions set by the Settlement Fund Trustees. As at the time the suit was instituted in the year 2000, the Defendants were aware that the property in which they lived had since been registered in the name of the Plaintiff.

20. In my mind Order 45 Rule 1 of the Civil Procedure Rules does not excuse every error or mistakes, even if inadvertent. It excuses those mistakes and allows a party to introduce documents which it could not lay its hands on even after the exercise of due diligence. In this respect, this Court notes that the Defendants' Supplementary Affidavit filed herein on 30th January 2020 does not respond to the Plaintiff's claim of lack of diligence on their part. I did not find any evidence that the Defendants made any effort to establish any change in the description of the parcel of land even after they established they were nolonger the registered owners thereof.

21. The discretion of the law to grant an order of review cannot be used to help a party who has shown lack of diligence. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier.

22. The Defendants further stated that there was an apparent error on the face of the record in that although the Court found that the Plaintiff did not legally purchase the suit property from the 1st Defendant and even dismissed the Plaintiff's case., the Court omitted to order a return of the suit property and the Title Deed to the 1st Defendant.

23. Evidently there was no basis for this claim. A perusal of the penultimate paragraph of the Court's Judgment cited above reveals clearly that the Court fell short of evicting the Defendants from the suitland not on the basis that the 1st Defendant did not sell the land but on account of the fact that necessary authorization had not been received for the sale transaction from the Settlement Fund Trustees.

24. The term "mistake or error apparent" by its very connotation signifies an error which is evident *per se* from the record of the case and one that does not require detailed examination, scrutiny or elucidation either of the facts or the legal position. As it were, an order, decision or Judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the Court on a point of fact or law. In the instant case therefore, I was not persuaded that there is an error on the face of the record.

25. It was further clear to me that an application for review under Order 45 Rule 1 of the Civil Procedure Rules ought to be made without unreasonable delay. According to the Defendants, they were unaware of the new and important evidence until sometime on 15th October 2015 when they conducted a search on the suit property. There was however no explanation why the search was being done some ten years after the Judgment was rendered and/or why it took the Defendants another four years after the discovery to bring this application.

26. Besides, it was quite evident that this application was filed in utter abuse of the Court process. On 9th April 2015, the Defendants filed ***Malindi ELC Case No. 54 of 2015; Amina Mbarak & 4 Others –vs- Rastor Gwiyo Mikaya and Another*** in which they sought inter alia an order to cancel the registration of the Plaintiff herein and one Penina Kimeru as the owners of the titles sub-divided from Title No. Kilifi/Mtondia/77. They also sought an order of vacant possession and demolition of the Plaintiff's structures on the Suitland.

27. In a Ruling delivered by myself on 15th November 2017, I did determine that the said suit was res judicata as the issues being raised therein had already been adjudicated upon and were effectively and finally determined in this suit as per the decision of Mwera J cited hereinabove. This application is nothing but another attempt by the Defendants to circumvent the decision rendered in the said ***Malindi ELC Case No. 54 of 2015*** in which their suit was struck out.

28. In the premises I am equally persuaded that this application is res judicata. It is frivolous and misconceived. I dismiss the same with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF JUNE, 2021.

J.O. OLOLA

JUDGE