



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MURANG'A

E.L.C NO. 47 OF 2018

ROLEX MICHAEL GITAU WAMBUGU.....1ST PLAINTIFF/RESPONDENT

EPHANTUS MBUGUA NJUGUNA.....2ND PLAINTIFF/RESPONDENT

SAMUEL KAMAU KIBUKA.....3RD PLAINTIFF/RESPONDENT

(suing as Chairman, Secretary & Treasurer of KIRUWAGAGI UPENDO SOCIETY)

VERSUS

KANGORIAKI FARMERS COOPERATIVESOCIETY LIMITED.....DEFENDANT/APPLICANT

MURANGA COUNTY GOVERNMENT.....THIRD PARTY/RESPONDENT

RULING

1. *The ruling refers to the application dated the 26/2/2021 by the Applicant/Defendant for orders as follows;*

- a. *Spent*
- b. *That the execution of the judgment and orders be stayed pending the hearing and determination of the application.*
- c. *That status quo be maintained allowing farmers to continue processing their coffee at the factory premises*
- d. *That judgement issued on the 29/10/2020 be reviewed.*
- e. *Costs of the application.*

2. *The application is supported by the grounds annexed thereto and the affidavit of Joseph Kangethe Mburu and James Ruitha Gathua who deponed that; the Plaintiffs have through non disclosure of material facts acquired public utility land; that the land was contributed to by members of Kiunyu Coffee Growers Cooperative Society, a sub society of the Applicant society;*

3. *The application is opposed by the Plaintiffs/Respondents. They contend that the application is a delaying tactic to deny the Plaintiffs the opportunity to enjoy the fruits of their judgment; that the application is incompetent on account that the person acting in person is not disclosed;*

4. *On the question of review, the Respondents contend that the Applicants have not demonstrated the existence of any new and important discovery, any error on the face of the record to warrant the review of the judgement.*

5. *On the question of concealment of material facts, the Respondents denied any concealment. That the application is an appeal but camouflaged as a review. Further that the application has been brought after 4 months which is inordinate delay in the circumstances.*

6. *In conclusion the Respondents averred that the Applicant has voluntarily handed over quiet possession of the suit land and the only issue pending is the payment of damages awarded by the Court as well as costs.*

7. *Parties elected to file written submissions. The Respondent filed while the Applicant failed to do so.*

8. The Respondents submitted that the application does meet the criteria set down in Order 45 Rule 1 of the Civil Procedure Rules as it does not raise any new issue nor does it demonstrate any apparent error on the face of the record. They submitted that the Applicant had the opportunity to examine the Respondent on the evidence adduced but failed to do so and the action of bringing the instant application is thus an afterthought. It was their submission that a delay for four months from the date of judgment amounted to inordinate delay. The Respondent faulted the application for review submitting that the Applicants ought to have instead appealed against the ruling.

9. The Respondent in submitting that the application did not meet the criteria for grant of review and relied on the case of **Francis Njoroge vs Stephen Maina Kamore and Southern Engineering Co Limited vs Heady Berge Limited & Another** and asked the Court to be guided thereof and prayed for cost.

10. On whether the Notice to Act in person is properly on record, the Applicant at the filing of the application filed a notice to act in person dated 26/2/2021. The Respondent took an issue with the said notice and stated that the notice was invalid as it did not indicate the persons acting in person. There was no rebuttal from the Applicant and neither did the Respondent submit on this issue. A litigant by application of Order 9 Rule 8 of the Civil Procedure Rules can opt to act in person where he or she had previously instructed Counsel. However, Order 9 Rule 9 of the Civil Procedure Rules provides:

When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the Court—

(a) Upon an application with notice to all the parties; or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

Order 9 Rule 10 of the Civil Procedure Rules provides for procedure on the above and provides:

“An application under Rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

11. In the instant case, the Applicant was at the time of judgment represented by the firm of Mwihi & Mutai Co. Advocates at the time of instituting the application they sought to act in person. The rules of procedure required the Applicant to seek leave and file the relevant consent to that effect. The Applicant has failed to comply with the above rules.

12. *The above finding is sufficient to dispose of the application. However, I shall look at the issue of whether the application for review is merited.*

13. **Order 45 Rule 1 of the Civil Procedure Rules** provides that; -

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

14. In summary for a review to succeed, one must demonstrate that;

a. No appeal has preferred

b. There is discovery of new and important evidence

c. There is a mistake or an error apparent

d. There is sufficient cause to warrant the grant of the orders.

15. According to the Applicant, there was material non-disclosure on the part of the Respondent as to the true ownership of the suit property. The principles of material non-disclosure were settled in **Brinks – Mat Ltd – Versus - Elcombe [1988], 3 ALL ER 188** when it was stated that the Court will have to determine whether indeed there was material non-disclosure and the relevance to the application. On the ownership of the property, the Applicant deponed that the suit property did belong to their members a fact the Respondent did not disclose, he raises issues of conspiracy and also that the land belonged to a cooperative society.

16. To determine the foregoing will require a perusal of the proceedings and pleadings. Notably, the facts before the trial Court were for determination of ownership of the suit the issue on members of the Cooperative Society was not an issue at the trial. The Applicants are

leaders of the society and if they had an issue as to their contribution towards purchase of the suit property they should have introduced at the hearing. The Applicant deponds that the Respondent failed to disclose that the land belonged to 642 Kiunyu farmers. This Court in paragraph 39 of its' judgment noted that there was uncontroverted evidence that the land was contributed by 65 members. It was also noted that the land was registered in the name of Kiunyu Coffee Growers Limited and later Murang'a County. Also the Applicant in paragraph 10 of the Replying Affidavit dated 6th July, 2017 sworn by JAMES RUTHA GATHUA confirmed that the suit property was donated by 65 members of the Respondent. The Applicant did not challenge this assertion at the hearing; he cannot now depart from his pleadings then.

17. The Court in its pronouncement took account of how ownership was acquired and concluded as thus "the finding of the Court is that the Plaintiffs are the valid owners of the suit land. The Court did not find any iota of irregularity in the manner that it acquired and was registered as the owner of the title" The Applicant in paragraph 7 of their amended Defence and counterclaim particularized inter alia allegation of conspiracy against the Respondent and Muranga County Government but failed to lead evidence as to the conspiracy. Having failed to lead evidence they cannot now base their review on an unproven issue. Section 107 to 109 of the Evidence Act placed the onus of proving allegation of fraud and conspiracy on the Appellant.

18. Similarly, annexure JR3 indicates that registration of the Land in the name of Kiunyu Coffee Growers Cooperative society was made as a first registration. These facts were elaborated by the Respondent in their testimony and the Court did take the same into consideration and made a pronouncement on the same.

19. The Applicant alleges that the Respondent failed to disclose that they did register a social group. As to whether the disclosure is material the answer is in the negative. The Respondent lead evidence as to the registration of the society and produced incorporation documents as part of their evidence. This has little significance in changing the decision/final outcome of the Court.

20. The Respondent in submitting that the application does not meet the threshold of granting a review urged this Court to be guided by the reasoning in **Francis Njoroge vs Stephen Maina Kamore {2018}eKLR** and **Southern Engineering Co. Limited vs Heady Berge Limited & Another {2019}eKLR**. In both cases, the Courts concluded there were no new or important evidence or an error apparent respectively and declined to grant a review. The instant application as couched grounds the application on material non-disclosure.

21. All the facts raised by the Applicant in support of the application were raised in the pleadings as well as at the hearing of the suit. In finding that there was no material non-disclosure the Court fully associates itself with the finding in the Court of Appeal Nyeri Civil Appeal 275 of 2014 **Mary Wairimu Gikunju v Republic & 3 others [2014] eKLR** when seeking to set aside ruling that found there was material non-disclosure.

22. Having found that there was no material non-disclosure the prayer for review cannot issue. The other aspects of review being new and important matter, error on the face of the record and for any sufficient cause have been successfully urged.

23. On the prayer for status quo, the Respondent gave uncontroverted averments that the Applicant has already given vacant possession of the suit property as per the judgment of Court what is now pending is payment for the general damages. On the other hand, has not given any evidence on how it stands to be prejudiced by the execution of the judgement which is alleged to have been carried out voluntarily.

24. On delay, it is the finding of the Court that this application has been brought four months after judgment. The Applicant did not lead any evidence to the satisfaction of the Court as to the reasons for delay in filing the application to warrant the Court to exercise its discretion in its favour.

25. In the end the application is unmerited and it is for dismissal. It is dismissed with costs to the Plaintiffs/Respondents.

26. *It is so ordered.*

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

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

1st – 4th Plaintiffs/Respondent: Absent

Defendant/Applicant: Absent

Ms Macharia HB for Kimwere for the Third Party

Court Assistant: Alex