



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT CASE NO. 82 OF 2015

MODE OF TRACK.....FAST TRACK

WILSON KAIGA GIDION GUDAHI

(Suing as the Legal Representative of the

Estate of the late GIDEON GUDAHI KAHIGA).....PLAINTIFF/RESPONDENT

VERSUS

DANIEL LIVOI GIDEON.....DEFENDANT

AND

RUTH NASIMIYU WAFULA.....1ST INTERESTED PARTY/APPLICANT

PHINIKE MIGARUSHA AMUDAVA.....2ND INTERESTED PARTY/APPLICANT

SAMUEL MAVALE AYIENZA.....3RD INTERESTED PARTY/APPLICANT

THOMAS NYONGESA FERNANDES.....4TH INTERESTED PARTY/APPLICANT

MOSES MAKHOKA MUKWENYI.....5TH INTERESTED PARTY/APPLICANT

WYCLIFF MAKHOKA.....6TH INTERESTED PARTY/APPLICANT

PAMELA AREYO.....7TH INTERESTED PARTY/APPLICANT

MARGRET WANGWE.....8TH INTERESTED PARTY/APPLICANT

MILDRED KUYAYA.....9TH INTERESTED PARTY/APPLICANT

GLADYS AWINJA.....10TH INTERESTED PARTY/APPLICANT

HARRISON MAINA.....11TH INTERESTED PARTY/APPLICANT

JANEPHER SHIDOGO ANGATIA.....12TH INTERESTED PARTY/APPLICANT

REUBEN OROD.....13TH INTERESTED PARTY/APPLICANT

FRIDAH ABUKOSE.....14TH INTERESTED PARTY/APPLICANT

MOSES IMO.....15TH INTERESTED PARTY/APPLICANT

DICKSON KIVONDO.....16TH INTERESTED PARTY/APPLICANT

RULING

Having heard the dispute herein in the absence of the defendant, this Court made the following orders in disposition of the matter: -

- 1. The Land Registrar to forthwith cancel the titles to land parcels NO BUNGOMA/KAMAKOIWA/2045, 2046 and 2047 and the same to revert to BUNGOMA/KAMAKOIWA/577.**
- 2. The defendant holds land parcel NO BUNGOMA/KAMAKOIWA/577 in trust for himself, the plaintiff and other beneficiaries.**
- 3. The trust is determined in the following terms: -**
 - a. The plaintiff to be registered as proprietor of 7 acres out of land parcel NO BUNGOMA/KAMAKOIWA/577.**
 - b. The defendant to be registered as proprietor of 7 acres out of land parcel NO BUNGOMA/KAMAKOIWA/577.**
 - c. The remaining portion to be registered in the names of the plaintiff TO HOLD IN TRUST for ROIDA (JOY) JENDEKA MUDULIA and BENNAH GWAMBEZA to be shared equally.**
 - d. As the parties are family, each to meet their own costs.**

Those orders followed the plaintiff's claim that the land parcel **NO BUNGOMA KAMAKOIWA/577** was family land registered in the names of his brother the defendant to hold in trust on behalf of the family but the defendant had abused that trust and sub – divided the said land into parcels **NO BUNGOMA/ KAMAKOIWA/2045, 2046 and 20147** with the intention of disposing the same rather than sharing it with the plaintiff and other beneficiaries.

The Court's Judgment was delivered on 23rd May 2019. By another ruling delivered on 21st November 2019, the Court authorized the Land Surveyor and Land Registrar Bungoma to visit the land parcel **NO BUNGOMA /KAMAKOIWA/577** for purposes of demarcating it as per the disposal orders herein and also authorizing the Deputy Registrar of this Court to sign all the relevant documents on behalf of the defendant.

I now have before me for my determination three (3) Notices of Motions filed by eighteen (18) Interested Parties. By those Notices of Motion, the said Interested Parties basically seek similar remedies which are that they be enjoined in these proceedings and that this Court's Judgment delivered on 23rd May 2019 and the subsequent ruling of 21st November 2019 be reviewed and/or set aside. The gist of their application is that they are innocent purchasers of portions of the original land parcel **NO BUNGOMA/KAMAKOIWA/577** and the resultant sub – divisions which they have occupied yet the plaintiff did not inform the Court that there are other parties in possession of those parcels. That if this Judgment is executed, they will have been condemned un – heard.

APPLICATION BY RUTH NASIMIYU WAFULA (1ST APPLICANT).

The first application is dated 3rd February 2020 and is filed by **RUTH NASIMIYU WAFULA** (the 1st Applicant). It is predicated under **Sections 3, 3A and 63(e)** of the **Civil Procedure Act** and **Order 22 Rule 22, Order 45 Rule 3 and Order 51 Rule 1** of the **Civil Procedure Rules**. It seeks the following orders: -

- a. Spent**
- b. Spent**
- c. That the 1st Applicant RUTH NASIMIYU WAFULA be enjoined in this suit as an interested party.**
- d. That this Honourable Court's decree issued on 23rd May 2019 and the ruling of 21st November 2019 be set aside as against the Interested Party/Applicant.**
- e. That the 1st Interested Party/Applicant be declared the legal owner and proprietor of land parcel NO BUNGOMA/KAMAKOIWA/4712 measuring approximately 1.36 Ha.**
- f. That costs of this application be provided for.**

The application is premised on the grounds set out therein and is also supported by the affidavit of **RUTH NASIMIYU WAFULA** (the 1st Applicant herein).

The gist of this application is that the 1st Applicant is the registered proprietor of the land parcel **NO BUNGOMA/KAMAKOIWA/4712** which is a resultant sub – division of the land parcel **NO BUNGOMA/KAMAKOIWA/2045** and which she purchased from **DANIEL LIVOI GEDION** (the defendant herein) in the year 1997 at a cost of Kshs. 335,000/= yet she was not invited into the suit by the plaintiff. That she has been living on the said land parcel for the last 23 years which information the plaintiff failed to disclose. That it was only on 27th January 2020 that the Chief informed her that the Land Surveyor would be sub – dividing the land parcel **NO**

BUNGOMA/KAMAKOIWA/577 pursuant to the Judgment of this Court whose orders are adverse to her interests. Annexed to the application is a copy of the title deed to the land parcel **NO BUNGOMA/ KAMAKOIWA/4712** issued in her names on 29th August 2016, a copy of a land sale agreement between the 1st Applicant and the defendant dated 22nd January 1999 in respect to three (3) acres of land out of the parcel **NO BUNGOMA/ KAMAKOIWA/2045** at a consideration of Kshs. 335,000/=, Certificates of Search in respect to the land parcels **NO BUNGOMA/KAMAKOIWA/4712** and **2045** as well as other documents.

APPLICATION BY PHINIKE MIGARUSHA AMUDAVA (2ND APPLICANT)

The application by **PHINIKE MIGARUSHA AMUDAVA** (the 2nd Applicant herein) is dated 10th February 2020 and is predicated under the provisions of **Sections 3, 3A, 63(e) and 80** of the **Civil Procedure Act, Order 1 Rule 10(2), Order 22 Rule 22, Order 45 Rule 1 and 2, Order 51 Rule 1, 3 and 15** of the **Civil Procedure Rules** and **Sections 26 and 80** of the **Land Registration Act 2012**. It seeks the following orders: -

1. Spent
2. That this Honourable Court be pleased to enjoin the 2nd Applicant in these proceedings as an Interested Party.
3. Spent
4. That this Honourable Court be pleased to review, vary, set aside and/or discharge the decree issued in the matter herein and all consequential orders resulting therefrom.
5. That upon such review, the Interested Party/2nd Applicant be allowed to enter appearance and be heard in the matter herein before any orders are made against her.
6. That costs of this application be provided for.

The application is founded on the grounds set out therein and is also supported by the 2nd Applicant's affidavit dated 10th February 2020.

It is the 2nd Applicant's case that she and her daughter **LINDA AFANDI MISE** are the registered proprietors of the land parcel **NO BUNGOMA/ KAMAKOIWA/6215** which is a sub – division of the land parcel **NO BUNGOMA/KAMAKOIWA/2045** and which her late husband **JEREMIA MISE MAMBO** purchased from the defendant. That she and her late husband put up a home on the land parcel **NO BUNGOMA/KAMAKOIWA/6215** where her late husband was buried in 2017 without any objection from any person and on which she has continued to live. That she was therefore surprised when on 7th February 2021, she was summoned to the Chief's office where she was informed that the County Surveyor would be visiting the said land on 12th February 2020 for purposes of implementing this Court's order. It was then that she visited the Land Registry and confirmed that her title **NO BUNGOMA/KAMAKOIWA/6215** was still intact yet according to this Court's Judgment, her title is cancelled. That her right to property has been adversely affected yet she was never heard at all hence the need to review the Judgment herein.

Annexed to her application is a copy of the sale agreement between **JEREMIA MAMBO** as purchaser and **DANIEL LIVOI GIDEON** as seller dated 31st January 2009 for a portion measuring 2.15 acres out of the land parcel **NO BUNGOMA/KAMAKOIWA/2045** at a consideration of Kshs. 645,000/=, photographs of a home, confirmed Grant issued to the 2nd Applicant in respect to the Estate of **JEREMIAH MAMBO** and copy of the title deed to the land parcel **NO BUNGOMA/KAMAKOIWA/6215** issued on 22nd August 2018 in the names of the 2nd Applicant and **LINDA AFANDI MISE** among others.

APPLICATION BY SAMUEL MAVALE AYIENZA AND THIRTEEN (13) OTHERS (3RD TO 16TH APPLICANTS).

The application by **SAMUEL MAVALE AYIENZA** and 13 others is dated 12th October 2020 and is premised under **Sections 1A, 1B, 3, 3A and 80** of the **Civil Procedure Act** and **Orders 45 Rule 1 and 2, Order 1 Rule 10 (2) and Order 51 Rules 1, 2, and 15** of the **Civil Procedure Rules**.

The 3rd to 16th Applicants seek the following orders: -

1. That this Honourable Court be pleased to review, vary, set aside and/or discharge the decree issued herein and all the consequential orders resulting therefrom.
2. That this Honourable Court be pleased to give a consequential order that the decree herein does not impact on those parcels of land that the 3rd to 16th Applicants purchased from the defendant and which parcels of land they are in occupation of and using.
3. In the alternative and without prejudice to the foregoing, this Honourable Court be pleased to enjoin the Applicants to these proceedings in a capacity that it shall deem fit for any expeditious and just determination of this matter.
4. That consequent to limb 3 above, this Honourable Court be pleased to give consequential orders as regards the Applicants' participation in these proceedings.

5. Costs be provided for.

The application is anchored on the grounds set out therein and is supported by the affidavit of **THOMAS NYONGESA FERNANDES** who is among the Applicants herein and who has the authority to depone to the matters herein on their behalf.

It is their case that they are the registered proprietors of sub – divisions of portions of the land parcel **NO BUNGOMA/KAMAKIYWA/2045** which they purchased from the defendant at various times. Those with titles are: -

1. Title **NO BUNGOMA/KAMAKOIWA/4710** in the names of **THOMAS NYONGESA FERNANDES** issued on 11th November 2016.
2. Title **NO BUNGOMA/KAMAKOIWA/4721** in the names of **SAMUEL MAVALE AYIENZA** issued on 20th September 2016.
3. Title **NO BUNGOMA/KAMAKOIWA/4705** in the names of **MOSES MAKOKHA MUKWENZI** issued on 2nd May 2017.

Others such as **WYCLIFFE SIKHILA, REUBEN OROD IRARU, PAMELA AREYO, HARRISON MAINA** and **FRIDA ABUKUSE** have sale agreements (annexture TNE 7) showing that at various times, they purchased from the defendant various portions of land sub – divided from the land parcel **NO BUNGOMA/KAMAKOIWA/2045** and on which they are now in occupation. They were therefore surprised when on 7th February 2020, the Chief notified them that the County Surveyor would visit the land on 12th February 2020 with a view to giving effect to a Court order. That upon seeking advice from their Counsel, they learnt that the Judgment herein has the effect of violating their ownership of the parcels of land which they purchased from the defendant yet the plaintiff did not bring to the attention of the Court that they were parties in occupation of the land. And since they were not parties to the suit, their rights as enshrined in **Articles 40, 47 and 50** of the **Constitution** have been violated. Justice therefore demands that the orders sought be granted.

Annexed to the application are copies of titles **NO BUNGOMA/ KAMAKOIWA/4710, 4721** and **4705** registered in the names of **THOMAS NYONGESA FERNANDES, SAMUEL MAVALE AYENZA** and **MOSES MAKOKHA MUKWENZI** respectively, and which show that those parcels are sub – divisions of the land parcel **NO BUNGOMA/KAMAKOIWA/2045** and various sale agreements.

The plaintiff filed both a replying affidavit and grounds of opposition dated 24th February 2020 in response to the application dated 10th February 2020 and a replying affidavit dated 2nd February 2021 in response to the application dated 12th October 2020.

In the replying affidavit dated 24th February 2020, the plaintiff deponed, inter alia, that he was not privy to the transaction between the 2nd Applicant and the defendant and that he has already paid the County Surveyor and the Officer Commanding Police Station (**OCS**) Bungoma Kshs. 83,000/= to facilitate the execution of the decree herein. That the Court has already pronounced itself on this dispute and the only recourse available to the 2nd Applicant is to claim what she bought from the defendant's share. That the defendant had no capacity to dispose of any portion of the land parcel **NO BUNGOMA/KAMAKOIWA/577** without the consent of the other beneficiaries since he was holding it in trust. That this Court cannot be called upon to legalize an irregularity and that the 2nd Applicant should allow the execution process to proceed and seek for the enforcement of her entitlement, if any, from the defendant once the decree her been executed.

In his grounds of opposition, he states that the defendant has his share from the land parcel **NO BUNGOMA/KAMAKOIWA/577** which he can apportion to the 2nd Applicant once the decree herein is executed since she has no privity of contract with the plaintiff. That this Court's Judgment is explicit and this application only seeks to derail the execution of the decree herein.

In his replying affidavit dated 2nd February 2021, the plaintiff avers, inter alia, that the application dated 12th October 2020 is bad in law, frivolous and an abuse of the process of this Court which, in any event, lacks the jurisdiction to grant the orders sought. That this application is an appeal through the back door. That the transactions between the Applicants and the defendant were null and void and therefore the titles held by the Applicants are not recognized in law. That the Applicants can claim their land from the portion awarded to defendant and this application is causing him harm since he is old and sickly and it is the Applicants and the defendant who are frustrating his efforts to comply with this Court's Judgment. That there are no new facts or error on the face of the record to warrant the orders sought and this application should therefore be dismissed with costs and timelines set within which the decree herein should be complied with.

The application was canvassed by way of written submissions which have been filed by **MR J. B. OTSIULA** instructed by the firm of **J. B. OTSIULA & ASSOCIATES ADVOCATES** for the 1st Applicant, **MR J. O. MAKALI** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the 2nd Applicant, **MR OCHARO** instructed by the firm of **OCHARO KEBIRA & COMPANY ADVOCATES** for the 3rd to 16th Applicants and **MR D.C. CHITWAH** instructed by the firm of **D. C. CHITWAH & COMPANY ADVOCATES** for the plaintiff. It is noted however that on 27th October 2020, the plaintiff filed a Notice to Act in person.

I have considered the three (3) Notices of Motions by all the Applicants herein, the rival affidavits and annextures thereto as well as the submissions by Counsel.

In paragraph 2(b) of his replying affidavit, the plaintiff questions this Court's jurisdiction to grant the orders sought herein. However, he has not stated in what way this Court lacks the jurisdiction to determine the application herein. I can only dismiss that averment as not having been made with any conviction.

The three (3) application herein, though filed by different parties, basically seek the same remedies. I shall therefore consider them together.

I have identified the following issues for my determination in this matter: -

- a. Enjoining the Applicants in this suit.
- b. Review and/or setting aside of the Judgment and Decree.
- c. Consequential orders
- d. Costs.

a. ENJOINMENT OF THE APPLICANTS AS INTERESTED PARTIES.

Order 10 Rule (2) of the Civil Procedure Rules provides as follows: -

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.” Emphasis added.

This suit has been heard, finalized and a decree issued. In **TANG GAS DISTRUBUTORS LTD .V. SAID & OTHERS 2014 E.A 448** the Court took the view that a party can be joined before or during the trial even after Judgment where damages are yet to be assessed. The Court added that a party may be added even at the appellate stage and that it is only where the suit has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable. In **MERCY BEACH LTD .V. THE ATTORNEY GENERAL & OTHERS 2018 eKLR** which has been cited by Counsel for the 2nd Applicant, the Court of Appeal stated that: -

“However, there are exceptional circumstances that could justify a Court to enjoin a party even after Judgment has been passed. Once such exception is where a matter has been determined and adverse orders have been issued against a party who was neither given notice of the suit nor heard on the issue in dispute. In joining such a party, a Court would also have to set aside the Judgment entered to give him/her an opportunity to be heard.”

In **KENYA AIRPORTS AUTHORITY .V. MITU – BELL WELFARE SOCIETY & OTHERS 2016 eKLR**, the Court of Appeal took the view that once a Court has delivered a Judgment, it becomes functus officio and transfers jurisdiction to an appellate Court. The same Court however had the following to say in the case of **ROSE WAKANYI KARANJA & 2 OTHERS .V. GEOFFREY CHEGE KIRUNDI & ANOTHER (EVERTON COAL ENTERPRISE LTD – proposed Interested Party) C. A CIVIL APPEAL No 172 of 2010 [2020 eKLR]**: -

“However, there are exceptional circumstances that could justify a Court to enjoin a party even after Judgment has been delivered. One such exception is where a matter has been determined and adverse orders issued against a party who was neither given notice of the suit nor heard on the issue in dispute as was the case in this appeal.” Emphasis added.

The above decision was delivered on 5th June 2020 and guided by it, there is no doubt in my mind that the Applicants are clearly parties who are interested in this matter. In the Judgment delivered herein on 23rd May 2019, one of the orders made was that the Land Registrar cancels the titles to land parcels **NO BUNGOMA/KAMAKOIWA/2045, 2046 and 2047** and that the same reverts to the original title **NO BUNGOMA/KAMAKOIWA/577**. That order was made in the absence of the Applicants who were not enjoined in these proceedings by the plaintiff. The plaintiff did not inform the Court that there were other persons in occupation of portions of the land in dispute. It has now transpired that the Applicants herein had previously purchased from the defendant various parcels of land which were hived from the land parcel **NO BUNGOMA/KAMAKOIWA /2045** whose title I ordered to be cancelled. If that order is executed, as the plaintiff is desirous of doing, the Applicants’ right to their portions of land which they purchased from the defendant will have been violated without them having been afforded an opportunity to be heard. That will be a violation of both **Articles 40 and 50 of the Constitution**. Clearly therefore, the Applicants have a stake in these proceedings to enable them protect their rights to their parcels of land which they purchased from the defendant out of the land parcel **NO BUNGOMA/ KAMAKOIWA/2045**. They are therefore entitled to be enjoined in these proceedings as Interested Parties because orders which adversely affect them have been made by this Court in its Judgment delivered on 23rd May 2019 and the subsequent decree. The prayer to enjoin the Applicants in these proceedings as Interested Parties is well merited. I allow it.

REVIEW AND/OR SETTING ASIDE OF THE JUDGMENT AND DECREE.

Order 45 Rule 1(1) of the Civil Procedure Rules provides that: -

“Any person considering himself aggrieved –

- a. ***by a decree or order from which an appeal is allowed but from which no appeal is 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"
Emphasis added.

Section 80 of the Civil Procedure Act on the other hand provides as follows: -

"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 Judgment to the Court which passed the decree or made the order, and the Court may make such orders thereon as it thinks fit."

Therefore, Section 80 of the Civil Procedure Act donates power for review while Order 45 Rule 1 of the Civil Procedure Rules sets out the procedure.

It is clear from the above that a party must establish the following requirements in order to benefit from the Court's power to review its Judgment: -

1. Show the discovery of new and important matter or evidence which, even after due diligence was not within his knowledge nor could it be produced when the decree was made; or
2. Establish some mistake or error apparent on the face of the record; or
3. Provide any other sufficient reason; and
4. Approach the Court without unreasonable delay.

I have already enjoined the Applicants in these proceedings and therefore their locus standi cannot be questioned in seeking the remedy of review. Even if they had not been enjoined herein, they would still have the necessary locus standi because both Section 80 of the Civil Procedure Act and Order 45 Rule 1 (1) of the Civil Procedure Rules refer to "Any person." This was settled in the case of ACCREDO Ag & OTHERS .V. STEFFANO UCCELLI & ANOTHER C.A CIVIL APPEAL No 36 of 2015 [2017 eKLR] where the Court held as follows: -

"Our understanding of Order 45 is that it has two distinct parts and accords locus standi in review applications to two distinct persons. Under sub rule (1) thereof, the review application may be brought by "any person considering himself aggrieved" and under sub rule (2), by "a party who is not appealing from the decree or order." Consequently, Order 45 recognizes that review may be sought either by a non-party or by a party to the proceedings."

The 1st Applicant did not cite on what grounds the review of the decree herein is being sought. The 2nd and 3rd to 16th Applicants anchored their prayer for review on all the grounds set out in Order 45 Rule 1(1) of the Civil Procedure Rules. I do not think the ground for new and important matter or evidence is available to the Applicants for the reason that not having been parties to the proceedings when the decree was issued, it could not have been possible for them, even with due diligence, to produce any "new and important matter or evidence." In my view, that ground would only apply in a situation where one who was a party to the proceedings has, subsequent to the Judgment, discovered "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." As the Applicants herein were not parties to the proceedings when the Judgment herein was delivered on 23rd May 2019, no amount of due diligence would have enabled them to avail any "new and important matter or evidence."

On the ground of "mistake or error apparent on the face of the record," it must be one that "stares one in the face" and not one "which as to be established by a long drawn process of reasoning on points where there may conceivably be two opinions" – NYAMOGO & NYAMOGO .V. KOGO 2001 E.A 170. Therefore, his ground only applies where, on the basis of the material which was presented at the time of the order sought to be reviewed was made, a mistake or error can clearly be discerned and is self-evident. The happening of a subsequent event cannot be the basis upon which a party can seek for the review of an order on the ground of error or mistake apparent on the record. In this case, when the Court delivered its Judgment on 23rd May 2019, no material was placed before it to show that the Applicants had purchased portions of the sub – division of the land parcel NO BUNGOMA/KAMAKOIWA/2045. This fact has only been brought up following the filing of the three (3) applications. It cannot be correct therefore to premise the applications on the ground of "mistake or error apparent on the face of the record."

In my view, Applicants are entitled to review of the Judgment and decree herein on the basis of "any other sufficient reason" whereby this Court is enjoined to exercise its discretion in the interest of justice. In WANGECHI KIMATA & ANOTHER .V. CHARAN SINGH C.A CIVIL APPEAL No 80 of 1995, the Court of Appeal stated thus: -

"any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."

As already found above, the Applicants have sufficiently demonstrated that at the time this Court was delivering its Judgment in this suit, they were already owners and in occupation of various parcels of land purchased from the defendant and carved out of the land parcel **NO BUNGOMA/KAMAKOIWA/2045** which was itself a resultant sub – division of the original land parcel **NO BUNGOMA/KAMAKOIWA/577**. Indeed, as is now evident, the land parcel **NO BUNGOMA /KAMAKOIWA/2045** no longer exists the title having been closed to give rise to the land parcels **NO BUNGOMA/KAMAKOIWA/4710, 4721, 4705 and 4712** which are currently registered in the names of **THOMAS NYONGESA FERNANDES, SAMUEL MAVALE AYIENZA, MOSES MAKOKHA MUKWENYI and RUTH NASIMIYU WAFULA** who are among the Applicants herein. Those titles were issued between 2016 and 2017 long before this Judgment was delivered on 23rd May 2019. That fact was deliberately or otherwise not disclosed to this Court. It will be a travesty of justice to allow this Court's order which will essentially result in depriving the Applicants of their respective parcels of land to remain on the record. The prayer for review of the decree of this Court is therefore well taken.

The Applicants were of course also required to move to Court without unreasonable delay. It is clear from the Applicants' supporting affidavits that it was not until 27th January 2020 (in the case of the 1st Applicant) and 7th February 2020 (in the case of the 2nd and 3rd to 16th Applicants) that they were informed by their Chief that the surveyor would be visiting the land on 12th February 2020 for purposes of implementing this Court's Judgment. It was not until 3rd February 2020 and 10th February 2020 that the 1st and 2nd Applicants respectively filed their applications. They therefore moved to Court without unreasonable delay. The 3rd to 18th Applicants moved to Court on 12th October 2020 a delay of eight (8) months. In paragraph 19 of his supporting affidavit, **THOMAS NYONGESA FERNANDES** who swore the supporting affidavit on their behalf alludes to the fact that they were looking for Counsel. He has not stated when then eventually found and instructed Counsel. What is unreasonable delay is to be determined by the circumstances of each case. Any delay must be explained. The delay by the 3rd to 16th Applicants herein has not, in my view, been satisfactorily explained. It is also, no doubt unreasonable. However, the orders that this Court will make in respect to the application by the 1st and 2nd Applicants will no doubt affect the 3rd to 16th Applicants herein because they are all pursuing the same cause of action against the same party over the same property. Ordinarily, I would have dismissed the application by the 3rd to 16th Applicants primarily on the basis of the un – explained and unreasonable delay of eight (8) months. However, in the circumstances of this case, it would be an affront to common sense or the dictates of justice to allow the application by the 1st and 2nd Applicants and dismiss that by the 3rd to 16th Applicants solely on the ground of the delay. Where parties are pursuing the same cause, the cause of interest demands that they be treated equally unless there is clear evidence of malafides. On that basis, I will allow, albeit reluctantly, the 3rd to 16th Applicants to **ride** on the back of the 1st and 2nd Applicants. The prayer for review is therefore allowed.

CONSEQUENTIAL ORDERS: -

The 1st Applicant has urged this Court to declare her the legal owner of the land parcel **NO BUNGOMA/KAMAKOIWA/4712** after reviewing and/or setting aside the Judgment herein.

The 2nd Applicant has urged me to allow her to enter appearance and be heard in this matter before any orders are made against her.

The 3rd to 16th Applicants have urged me to make the order that the decree herein does not impact on the various parcels of land which they purchased from the defendant or in the alternative, that the said Applicants be allowed to participate in the proceedings.

I have agonized over what consequential orders I should grant. All the orders sought by the Applicants are valid in my view. Indeed, for the Applicants such as **RUTH NASIMIYU WAFULA, PHINIKE MIGARUSHA AMUDAVA, SAMUEL MAVALE AYIENZA, THOMAS NYONGESA FERNANDES and MOSES MAKOKHA MUKWENYI** who already hold title deeds for their respective parcels of land, the review of the Judgment and decree of this Court's Judgment simply means that they now revert back to the position in which they were prior to 23rd May 2019. Their titles remain intact. As for the other Applicants who have sale agreements executed between them and the defendant for their various portions of land which they also occupy, the same situation should apply.

Should the Court therefore direct that the Applicants be heard in this case so that they can establish their respective cases as suggested by the 2nd Applicant? Ordinarily, that would be the next order to make. However, I have thought long and hard and come to the conclusion that to direct the Applicants to file their pleadings and have this case heard afresh will not be the most efficacious order in the circumstances. And neither will it be a prudent utilization of judicial resources nor cost effective to the parties. I take note of the fact that under **Section 1A (1)** of the **Civil Procedure Act**, it is provided that: -

1A (1) “The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by this Act.” Emphasis added.

And for purposes of furthering that objective, the Court is required under **Section 1B (d)** of the same Act to ensure: -

1B (d) “the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties” Emphasis added.

Finally, under **Article 159 (2) (b)** of the **Constitution**, it is expected that: -

159 (2) (b): “Justice shall not be delayed.”

Guided by the above principles, I take note of the fact that the defendant who sold the various parcels of land claimed by the defendants herein did not file any defence in this case. Most significantly, the plaintiff has in fact conceded that indeed the Applicants have a claim to resultant sub – divisions of the original land parcel **NO BUNGOMA/KAMAKOIWA/577**. In paragraph 9 of his replying affidavit dated 2nd February 2021, he has deponed as follows: -

9 “That my efforts to comply with the Judgment of this Honourable Court by calling surveyors to the site has been frustrated by the defendant and the interested parties. The survey sketching does not affect the interested parties of their respective portions they are occupying as the same shall be hived out of the defendant portion awarded to him by this Court.” Emphasis added.

In view of the fact that the plaintiff has acknowledged that the Applicants are in occupation of various parcels of land hived from the original land parcel **NO BUNGOMA/KAMAKOIWA/577** which they purchased from the defendant who did not participate in these proceedings, and taking into account the fact that the plaintiff admits that those portions can be hived from the defendant’s share, it would be a waste of the scarce judicial resources to direct that the Applicants prove their entitlements through evidence. Their interest in the resultant subdivisions of the original land parcel **NO BUNGOMA/ KAMAKOIWA/577** have been admitted by the plaintiff and need no further proof. This Court shall therefore make appropriate orders accordingly.

Ultimately therefore and having considered the applications herein, I make the following orders: -

1. The Applicants are enjoined in these proceedings as Interested Parties.

2. The Judgment delivered by this Court on 23rd May 2019 and the subsequent decree are reviewed in the following terms: -

a. The order cancelling the titles NO BUNGOMA/KAMAKOIWA/ 2045, 2046 and 2047 is vacated.

b. Titles already registered in the names of the Applicants herein shall remain intact.

c. The other Applicants who do not as yet have titles to their various portions which they purchased from the defendant but have sale agreements are also entitled to be registered as owners of their respective portions. Those portions shall be hived from the defendant’s share of the land.

3. The plaintiff was the author of this unfortunate state of affairs by keeping the Applicants out of this litigation yet he knew that they had interests in various portions entitling them to be registered as owners thereof. Those portions shall be hived from the defendant’s share of the land.

4. Costs follow the event and are at the discretion of the Court. The plaintiff has pleaded in paragraph 7 of his replying affidavit that he is at the advanced age of 86 years, sickly and that the Applicants have subjected him to costly litigation. However, whereas this Court might have looked at his condition with compassion, he was the author of this unfortunate state of affairs by keeping the Applicants out of this litigation yet he knew of their interests in the various portions of the suit land. He shall therefore meet the Applicants’ costs.

It is so ordered.

Boaz N. Olao.

J U D G E

3rd June 2021.

Ruling dated, delivered and signed in Open Court this 3rd day of July 2021 at BUNGOMA since the plaintiff has no e – mail address.

Mr Murunga for 2nd Interested Party/Applicant present and also holding brief for Mr Otsiula for the 3rd Interested Party/Applicant

Mr Ocharo for the 3rd to 16th Interested Parties/Applicants – present

Plaintiff present in person.

Boaz N. Olao.

J U D G E

3rd June 2021.