REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 893 OF 2015

DAVID MUHANG'I KUNG'U.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

PRINCIPAL SECRETARY, MINISTRY OF LANDS AND SETTLEMENT.....2ND DEFENDANT

RULING

Following a full hearing of this suit, this court entered judgement in favour of the Plaintiff on 16/4/2018 and directed the Defendants to issue a title to the Plaintiff for the land he currently occupies and pay him compensation for the portion of the land which had been occupied by squatters or the township. During the hearing the Defendants called one witness to testify on their behalf.

The Defendant being aggrieved by that decision filed a notice of appeal in the Court of A but later filed a notice of withdrawal of the notice of appeal on 23/10/2019. This was done presumably so that they could pursue review of this courts' judgement.

The Defendant filed the application dated 8/4/2019 on 15/5/2019 seeking stay of execution of this court's judgement, review, variation and setting aside of the judgement and orders made by this court on 16/4/2018 and substitution with appropriate orders.

The application was made on the grounds it was brought without delay and that subsequent to the delivery of the judgement new and crucial evidence had been discovered after reviewing all the relevant files concerning the case. Further, that the Defendants had learnt that vide a letter dated 23/11/1967, the Plaintiff only applied for a business house from the South Kinangop Scheme and that he was allowed to rent the Ex MacEarchern Manager's House and was required to pay rent but that he defaulted. The Defendants relied on various letters dated 16/9/1969, 24/9/1971, 23/7/1971, 13/6/1999, 15/6/1999 and 22/6/2004 touching on the land in question. They also relied on a map attached to a letter dated 22/6/2004 and contended that the Plaintiff only occupied plot number 01.

The Defendants urged that in the interest justice and based on the discovery of the new material facts, the court ought to set aside the judgement it delivered on 16/4/2018 in favour of the Plaintiff. The Defendants contended that no prejudice would be occasioned to the Plaintiff because he would still be entitled to what he was genuinely allocated while urging that if the judgement was not reviewed then the Plaintiff would be entitled to the entire Karati Settlement Scheme which the government had lawfully allocated.

The application was supported by affidavit of Peter K. Waithaka, who is the acting Deputy Director of Land Adjudication and Settlement. He deponed that in the course of implementing this court's judgement, they sought advice from the office of the Attorney General (AG) and availed the original files from the Ministry of Lands and Physical Planning relating to the Suit Property to the counsel having conduct of this matter. That upon review of the files, they were informed by the counsel having conduct of the matter that it was important for the court to be moved to review the judgement in view of the fact that the files disclose material particulars which show that the Plantiff was not entitled to the whole land which he is claiming but only a small portion of it. He added that it was necessary to have the judgment reviewed so that the court can review the new evidence and precisely set out the portion the Plaintiff is entitled to for a survey to be done so that a title can be issued to the Plaintiff. He averred that no part of the Plaintiff's land was allocated to squatters but that the suit land comprising the entire Karati Settlement Scheme was commenced way back in 1963 and that the Plaintiff was not entitled to any compensation as the court ordered. He added that had the material evidence contained in the original file been in the counsel's possession and had those documents been availed to the court the outcome would probably have been different. Further, that it was erroneous for the Plaintiff to claim that he was paying for 49.9 acres when he was only granted a PI – measuring about 1.6 hectares. He averred that the Plaintiff only applied for a business house which he was offered for Kshs. 14,000/=. That the Plaintiff later applied to purchase the PI – which he had been using on a rental basis. He referred to correspondence vide which he claimed the Plaintiff was advised that he was being offered the house for purchase and not the land. He attached letters and maps in support of the application.

The Plaintiff filed a notice of preliminary objection on 8/7/2019 contending that the application was defective and that it contravened Section

1A (1) of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Further, that the application was a gross and blatant abuse of the court process because the court was *functus officio*. The Plaintiff also filed a replying affidavit in which he deponed that there was inordinate delay in filing the application. He added that despite serving a copy of the decree and judgment on the Defendants and the letter dated 20/9/2018 requiring them to comply with the judgment, they did not comply with it nor did they appeal against judgement. He averred that no new evidence and information had been discovered by the Defendant to warrant review of the judgment of this court. He added that the Defendants had admitted that all along they had all the information during the trial of the matter but failed to provide it and they were now seeking to introduce new evidence too late in the day after the court had delivered its judgement.

The Plaintiff averred that he stood to suffer prejudice because an interrogation of the documents shows that the Defendants were the makers and custodians of those documents which raises doubt as to the authenticity and originality of the new documents which the Defendants seek to introduce. Further, that it was suspect why the Defendants failed to disclose when that evidence was discovered bearing in mind that this suit has been in court for over two decades. He maintained that the Defendants had not met the standards set by law to warrant the review sought. He added that the Defendants had not challenged the claim that he paid consideration of Kshs. 80,000/= plus interest when he applied for the permanent improvement dubbed as PI which would therefore entitle him to compensation. He maintained that the Defendants should have availed the documents they now wish to use at the time of pre-trial.

The Plaintiff contended that the Defendants should not be allowed to benefit from their misdeeds and failure to produce evidence which was in their possession. He placed reliance on the letter dated 29/9/1998 which he claimed confirmed the total acreage of the Suit Property to be 49.9 hectares and that it extended to the development on the land comprising the cattle dip, agricultural land and the grazing area. He added that there was a recommendation that the title was to be issued to him since the land which had been sold to him included the developments on the land. He denied that he was in rent arrears.

Parties filed and exchanged written submissions which the court considered. The Defendants submitted that they had discovered new and crucial documents after reviewing the relevant files which were not made available to the Attorney General (AG) at the time of preparing the defence. That consequently, the court did not have a full and complete picture of the relationship between the parties regarding the land. The Defendants submitted that the evidence contained in the files revealed that the Plaintiff was not entitled to the orders made in the decree. Further, that the Plaintiff misguided and misled the court since most of the evidence intended to be adduced was in the custody of or known to the Plaintiff.

The Defendants contended that had the court considered the evidence which is contained in those files, it would have reached a different conclusion. Further, that it was just and proper that all the material available which in any case were public documents be availed to the court for the court to reconsider them and review its judgement. The Defendants submitted that some of the documents intended to be produced were authored by the Plaintiff who they contended was merely opposing this application because having misguided the court he was afraid that the truth would emerge.

The Defendants analysed the additional evidence they wished to introduce in their submissions and went into great lengths to set out the process of acquisition of land in a settlement scheme. The Defendants relied on Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act. They cited the decision in **Jeremiah Muku v Methodist Church of Kenya Registered Trustees & Another [2009] eKLR** on the three conditions for which the court may review its orders. The first is the discovery of new and important evidence which could not be produced by the applicant after even with the exercise of due diligence and which was not within his knowledge or could not be produced at the time the decree was passed. Secondly, on account of mistake or error apparent on the face of the record and lastly, for any other sufficient reason. The AG contended that they acted with due diligence and the counsel was not in possession of the evidence prior to the conclusion of the matter. The AG conceded that this was a protracted dispute dating back to the 1960s and that it was conceivable that the client inadvertently failed to avail the evidence to the counsel. The AG submitted there were sufficient reasons to demonstrate that the court ought to review its judgment. The Defendants maintained that the Plaintiff was not entitled to all the land comprising Koinange Township known as plot number 46 awarded to him in the judgement. Lastly, the Defendants invoked the issue of public interest as one of the sufficient reasons and relied on the definition of public interest in **High Court Petition No. 60 of 2012- John Wekesa Khaoya v Attorney General**.

The Plaintiff submitted that the Defendants had not met the threshold set by law to warrant a review of this court's judgment. He relied on Order 45 Rule 1 of the Civil Procedure Rules and maintained that the documents which the AG wishes to introduce should have been availed during pre-trial and added that both he and the Defendants called their respective witnesses during the hearing. He cited the decision in **Martha Wambui v Wanjiru Mwangi & Another [2015] eKLR.** He also relied on the *functus officio* doctrine and argued that that doctrine was one of the means through which the law gives expression to the principle of finality. That once a decision has been given, it was final and conclusive subject to any right of appeal.

The issue that falls for determination is whether the court should review, vary or set aside the judgement and orders it made on 16/4/2018 and substitute those orders with other appropriate orders. Judgement was delivered on 16/4/2018. The Defendant filed the instant application on 15/5/2019, which the court notes is dated 8/4/2019. There was delay in filing this application more than a year after the court delivered its judgement yet Order 45 Rule 1 (b) of the Civil Procedure Rules enjoins an applicant seeking review, variation or the setting aside of an order or decree to make the application without unreasonable delay. The Defendants did not explain the delay. Nevertheless the court will deal with the application.

Section 80 of the Civil Procedure Act empowers any person who considers himself aggrieved by a decree or order from which an appeal is allowed but who has not preferred an appeal, or by a decree from which no appeal is allowed by the Act to apply for review of the judgment to the court which passed the decree.

The court notes that the AG filed a notice of withdrawal of the notice of appeal on 23/10/2019 which confirms that the initial intention was to appeal against the judgment of this court which was delivered on 16/4/2018.

Order 45 Rule 1 of the Civil Procedure Rules entitles a person aggrieved by a decree who has not preferred an appeal and who from the discovery of new and important evidence which after the exercise of due diligence was not within his knowledge or could not be produced by

him at the time the decree was passed to apply for review of the order or decree.

In seeking the review, the Defendants relied on the discovery of new material facts which they contended had not been availed to the State counsel or the court for that matter when this case was heard. The correspondence relied on by both parties and the concession on the part of the AG confirm that this dispute dates back to 1968 or thereabouts. This suit was filed in the High Court in 1999 as Nairobi High Court Civil Suit No. 2027 of 1999. It was transferred to the Environment and Land Court (ELC) and given the number ELC Case No. 893 of 2015.

All public records relating to land are kept in the custody of the Ministry of Lands and Settlement, which was sued as the 2nd Defendant. Although the ministry has changed names over the years, the lands registries falling under the Ministry have maintained all land records and documents in their safe custody.

The Permanent Secretary, Ministry of Lands and Settlements was sued as the 2nd Defendant in this case. It is noteworthy that Peter Kamau Waithaka who swore the affidavit in support of application for review gave evidence in court on 27/9/2017 when this case was heard. He did not explain why the evidence the Defendants now seek to introduce could not be produced before or during the trial.

Order 45 Rule 1 certainly cannot come to the aid of a party who fails to exercise due diligence in the conduct of his case or production of documents before the case is decided. Someone who is diligent works hard and is careful and thorough. Had the Defendants exercised due diligence and produced the documents they now seek to introduce which in the court's view were within their knowledge, they would have placed all the relevant documents before the court during the trial. The Defendants have not demonstrated that they could not produce those documents during the trial. The court agrees with the Plaintiff that the Defendants should not be allowed to benefit from their failure to produce evidence which was in their possession.

The State counsel appeared to be blaming the Ministry of Lands for not availing the documents. For a dispute spanning over 40 years the court is not persuaded that the AG exercised due diligence in the conduct of this matter, more so when one considers that the 2nd Defendant is the custodian of all public records relating to land.

The overriding objective of the Civil Procedure Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objectives of the Act. The court has a duty under Section 1B of the Act to handle matters presented before it for the purpose of attaining the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial resources; and the timely disposal of proceedings at a cost affordable to the parties.

The court is not persuaded that the objective of the Act would be met by parties failing to present all their evidence at the trial and seeking to introduce new evidence after a court has rendered its decision after giving the party an opportunity to present its evidence. It would be remiss of this court to allow the Defendants' application and start the process of hearing the suit all over again. The State counsels need to pay heed to the public interest when they are conducting the trial by presenting all the relevant evidence and not wait to bring up the issue of public interest after a court has delivered its judgment.

The court declines to grant the orders sought in the application dated 8/4/2019. The Defendants will meet the Plaintiff costs of that application.

DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF JULY 2021.

K. BOR

JUDGE

In the presence of: -

Mr. David Kungu- the Plaintiff

Mr. Cliff Menge for the Defendants

Mr. V. Owuor- Court Assistant