



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CASE NO. 20 OF 2014

AGRIPINA NEKESA WAFULA.....PLAINTIFF/APPLICANT

= VERSUS =

VINCENT WESONGA OSIMATA.....DEFENDANT/RESPONDENT

RULING

1. On the 27th of November, 2020 the Applicant moved this Court with an application brought under the provisions of order 45 of the Civil Procedure Rules seeking for orders that:

a. This Honourable Court does review its decree by revoking subdivisions made on L.R BUKHAYO/MUNDIKA/329 creating L.R BUKHAYO/MUNDIKA/ 13998, 13999 & 14000 for purposes of execution;

b. That the costs of the application be provided for.

2. The Application was supported by the affidavit of AGRIPINA NEKESA WAFULA dated 27th November, 2020 and the following grounds;

a. When the suit was preferred in 2014 L.R BUKHAYO/MUNDIKA/329 was in existence;

b. The Respondent subdivided the parcel as we waited for the judgement and created L.R BUKHAYO/MUNDIKA/ 13998, 13999 & 14000 hence frustrating execution;

c. The Applicant took steps to maintain status quo during the existence of this case;

d. The Applicant has been unwell hence delay in filling the application for review.

3. The Respondent filed his grounds of opposition on the 1st of February, 2021 in opposition to the application impleading that:

a. That the said application is similar to the one dated 20th February, 2020 which application was withdrawn by the Applicant with costs yet to be paid;

b. That the said application is purely an abuse if the court process as litigation has come to an end;

c. That the Defendant entirely relies on judgement delivered by this honorable court in the 18th of February, 2019 as stated by the defendant in the earlier pleadings filed before this court;

d. That further the defendant herein fully relies on his replying affidavit sworn on the 12th of March, 2020 and filed before this Court in the 21st of September, 2020.

4. The Respondent also filed a Replying Affidavit on the 16th of June, 2020 stating that the prayers sought in the current application are totally misleading and the court cannot therefore issue the same. In paragraph 5 of the Replying Affidavit the Respondent quotes the judgement by this Honourable Court delivered on the 18th of February, 2019 adding that the Plaintiff has been in occupation and cultivating a quarter of an acre of the Suit Land and not 2.0ha as claimed. He further claims that the area occupied and cultivated by the Plaintiff is clearly demarcated on the ground by existing boundaries over the years. The Respondent states that he is ready and willing to assist the Plaintiff in obtaining the Title document to a quarter portion of the land occupied and cultivated by her as per the judgement of the court.

5. In response to directions issued by this court on 21st April 2021, for parties holding titles to the subdivision of the suit title be served. Mr William Osimata Emasete as an Interested party filed his replying affidavit on 21st May 2021 in which he deposed inter alia that the Respondent had sold a quarter acre of the suitland to the Applicant and another quarter acre to one George Albert Wambongo. The Interested party deposed about the terms of the judgement delivered on 18th Feb 2019. According to him, the Defendant is entitled to LR no Bukhayo/Mundika/13999 measuring 0.337ha which is not anywhere near 2.0ha claimed by the Applicant.

6. The Applicant filed her submissions on the 11th day of February, 2021 and the Respondent on the 9th day of February, 2021. The Applicant submits that while the case was concluded on the 30th of January, 2018, the Respondent made subdivision over the Suit Land on the 28th day of May, 2018 making it impossible for the decree holder to execute the judgement because of the changed situation of the land hence the application for review. The Applicant relied on the case of **ECM Chelimo Squatters Group & Another vs. Langat Joel & Others (sued as the Management Committee of Chelimo Squatters) 2016 eKLR**.

7. The Respondent submits that the averments in the affidavit sworn in support of the application are totally misleading and contrary to the judgement delivered by this Court on the 18th of February, 2019. That the land that has been in use and occupation and cultivated by the Plaintiff is a quarter of an acre and not 2.0ha as claimed by the Plaintiff. The Respondent further averred that the parcel now occupied and cultivated by the Plaintiff is known as LR BUKHAYO/MUNDIKA/13999 which measures approximately 0.337Ha and not the alleged 2.0Ha.

8. The Respondent further submitted that the review sought even if granted to the Plaintiff, the judgement of adverse possession will not change. That the Plaintiff was aware at all times that the original land LR BUKHAYO/MUNDIKA/329 was not registered in the name of the Respondent and that it was subdivided and other portions given to the beneficiaries of the deceased.

9. The Respondent sought to rely on the case of **Stephen Gathua Kimani vs. Nancy Wanjira Waruingi t/a Providence Auctioneers (2016) eKLR** highlighting the holding on the provisions of order 45; that review cannot issue on the basis that the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue since such makes a good ground for appeal not review.

10. For an Application for review to be successful, one must satisfy the following;

a. Discovery of new and important matter or evidence, which after the exercise of due diligence was not within the Applicant's knowledge or could not be produced at the time the decree was passed or the order made;

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

c. Or for any other sufficient reason; and

d. The application should be brought without unreasonable delay.

11. The foregoing considerations are outlined under Order 45 Rule (1) of the Civil Procedure Rules. This order is buttressed by the provisions of section 80 of the Civil Procedure Act which provides in verbatim that,

'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 an appeal is allowed by this Act;

may apply for a review of judgement to the Court which passed the decree or made the order, and the court may make such orders thereon as it thinks fit.'

12. The Applicant has indicated to this Court that she discovered after judgement had been entered that the Respondent subdivided the Suit Land LR BUKHAYO/MUNDIKA/329 into three parcels namely LR BUKHAYO/MUNDIKA/13998, 13999 and 14000 on the 28th of May, 2018 before the judgement in this case was delivered in February, 2019. From the title deed for LR BUKHAYO/MUNDIKA/13999 marked as VW04 attached to the Respondent's Supporting Affidavit, it is evident that the subdivision was done on the 28th of May, 2018 before judgement was delivered and in contravention of the restriction placed on the Property.

13. Despite the Respondent's explanation that the subdivision occurred as result of the subdivision of the Suit Land to the beneficiaries of the estate of the deceased, one, **Desiranda Akawyait Osumata**, they have failed to provide this Court with evidence of the confirmation of grant for the deceased's estate or an order of Court lifting the restriction placed on the Suit Land by the Applicant until the determination of this matter.

14. The submissions in this matter was filed by 8th February 2018 and judgement reserved for 21st March 2018 although it was subsequently delivered on 18th Feb 2019. Therefore, it is evident that this Court while delivering its judgement did not have the information about the changes made to the suit title by the Respondent which information would have changed part of the orders issuing. The Respondent's attempt to try and persuade this Court that the application for review would not affect the Court's judgement nor its execution is far-fetched.

15. The subdivision was undertaken while the matter was pending judgement contrary to the doctrine of *lis pendens*. In the case of **Mawji vs**

US International University & another [1976] KLR 185, Madan, J.A. stated thus:

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

16. In regard to the rights of the Interested Party, he seemed to have been aware of the dispute between the Applicant and the Respondent as deduced from contents of his replying affidavit. In the **Mawji case supra**, the court went further to hold that, ***“every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore, purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”***

17. The Court of Appeal considered the applicability of *lis pendens* in our legislation and case law in the case of **Naftali Ruthi Kinyua V Patrick Thuita Gachure and Another (2015) eKLR** where the Court held that the doctrine of *lis pendens* is applicable pursuant to the provisions of section 107 of the Land Registration Act. As to whether the requirements of the principles of *lis pendens* were met, there is no doubt that the instant case concerns a contested property dispute, where the rights to the suit property are in serious contention.

18. It is evident from the actions of the defendant undertaken while the case was pending judgement that the Applicant has shown cause for review of the judgement to include an order for cancellation of the titles issued that in effect defeats the execution of the judgement. The question whether the Applicant is occupying ¼ acre or 2.0ha is not for my determination since this court was not moved to interpret the judgment nor was I re-hearing the case to make a determination of the size occupied by the Applicant.

19. With respect to the issue of undue delay in filing the application for review, the Applicant has explained to this Court that she had been unwell although no evidence was tendered to support that allegation. That being said it is evident that the application raises new and important issue which was not within the knowledge of the Applicant nor the Court's at the time when judgement was being delivered. I am certain that had the trial judge received the information that the Suit Land had been sub-divided then he would have varied the orders appropriately.

20. In the case of **TOKESI MAMBILI & OTHERS VS. SIMION LITSANGA CIVIL APPEAL NO. 9 OF 2001 AT KISUMU**, the Court held that,

“In order to obtain an order for review, an applicant has to show to the satisfaction of the Court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made...Where the application is based on sufficient reason, it is for the Court to exercise its discretion.”

21. In view of the above analysis, I find that the grounds cited by the Applicant qualify to be grounds for review therefore bringing the application within the ambit of the grounds specified in Order 45 Rule 1 and therefore a proper case for this Court to grant this review. The application is thus granted and an order made revoking the subdivisions undertaken on the suit title **L.R BUKHAYO/MUNDIKA/329 which subdivision created L.R BUKHAYO/MUNDIKA/ 13998, 13999 & 14000**

22. The costs of the application awarded to the Applicant.

DATED, SIGNED & DELIVERED AT BUSIA THIS 11TH DAY OF AUGUST, 2021.

A. OMOLLO

JUDGE