



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC APPEAL NO. 65 OF 2019**

**BENARD GACHIE KAMAU.....APPELLANT**

**VERSUS**

**LIVINGSTONE WANYOIKE KINYANJUL.....1<sup>ST</sup> RESPONDENT**

**FREDRICK NGANGA THUO.....2<sup>ND</sup> RESPONDENT**

**MICHAEL KINUTHIA GATOTO.....3<sup>RD</sup> RESPONDENT**

**SPTEPHEN MUTHAMA MATHU.....4<sup>TH</sup> RESPONDENT**

**EUSTACE GITHAIGA NDIRANGU.....5<sup>TH</sup> RESPONDENT**

**HUMPHREY MALIMU LELECH.....6<sup>TH</sup> RESPONDENT**

**MICHAEL NDICHU MBURU.....7<sup>TH</sup> RESPONDENT**

**ROBERT RIUNGU NJOROGE.....8<sup>TH</sup> RESPONDENT**

**STEPHEN MAORE.....9<sup>TH</sup> RESPONDENT**

**JAMES WANYOIKE.....10<sup>TH</sup> RESPONDENT**

**PETER MUNUNE NJOROGE.....11<sup>TH</sup> RESPONDENT**

**STEPHEN KIOGORA.....12<sup>TH</sup> RESPONDENT**

**JOEL KAMATU KIARIE.....13<sup>TH</sup> RESPONDENT**

**GIDEON MARUBUA KIBURU.....14<sup>TH</sup> RESPONDENT**

**DAMARIS WACU NDUATL.....15<sup>TH</sup> RESPONDENT**

**ESTHER NYAGUTHII GITHAIGA.....16<sup>TH</sup> RESPONDENT**

**ANN NJERI KAMATU.....17<sup>TH</sup> RESPONDENT**

*( Being An appeal against the Ruling and Orders at Thika by the*

*Honourable A.M Maina ( Mrs) Senior Principal Magistrate*

**JUDGMENT**

The Respondents herein were the Plaintiffs while the Appellant was the Defendant in Thika **CMCC 879 of 2019** . By a Notice of Motion Application dated **14<sup>th</sup> January 2019**, the Defendant ( Appellant) sought for orders that;

- 1. That this Court be pleased to review and set aside its Judgment made on 10<sup>th</sup> December 2018.**
- 2. That the Court does make orders dismissing the Plaintiffs case with costs to the Respondents.**
- 3. That the cost of this Application be provided for.**

The Application was premised on the fact that there is new and overwhelming evidence that the 1<sup>st</sup> Plaintiff( 1<sup>st</sup> Respondent) fraudulently obtained share certificate and receipts produced in Court. That the receipts and share certificates produced in Court did not emanate from **Githunguri Constituency Ranching Company**. Further that the Plaintiff(1<sup>st</sup> Respondent) is currently facing various charges relating to obtaining registration of the suit premises by false pretenses and in light of the new evidence , the Plaintiffs title is obtained by fraud and cannot give any rights to the suit land.

In his Supporting Affidavit, **Bernard Gachie Kamau**, averred that a Judgment was entered in favour of the Plaintiffs on **10<sup>th</sup> December 2018**, and pursuant to the Judgment , the Plaintiff (Respondent) was awarded land parcel no. **Ruiru/Kiu/Block 2/3758**. That while the case was pending, the 1<sup>st</sup> Plaintiff and one **Edward Samuel Ngugi**, were charged at the Chief Magistrate Court at **Milimani Criminal Case No. 1863 of 2017** . That the prosecution was commenced and after documents were examined by the document examiner and were found not to originate from **Githunguri Ranching Company**. That the documents produced being title deed for **Livingstone Wanyoike Kinyanjui** , Share Certificate for **Samwel Edward Ngugi** , Clearance Certificate, a copy of the register of members and two receipts for **Samuel Edward Ngugi** for payments made for the water project. That the forgery was also reported and **Samuel Edward Ngugi** and **James Thendu** were charged at the Chief magistrates Court at Thika in Criminal case **No. 3105 of 2017** . That he did not have the said documents or the document examiner report when he filed his documents, hence he could not attach the same.

That when the Criminal case was being investigated, he managed to get one **Gerald N. Ngugi** who explained at length how the share certificates and the titles were obtained and he has made an affidavit explaining the entire process. Further that he has also compared the **Title Deed** produced as P. Exhibit 4 with several Titles issued by the Thika Lands Registry and its obvious the exhibit could not have emanated from the said land Registry as it lacks the government printers batch release code and it also lacks the Powers of Attorney for the signing Land Registrar.

That upon the filing of the instant case, the 1<sup>st</sup> Plaintiff filed a case at the Directorate of Criminal Investigations and a criminal case **No. 1355 of 2014** was commenced against the Directors of **Githunguri Ranching Company Limited**. That faced with the overwhelming evidence of fraud, the 1<sup>st</sup> Plaintiff(Respondent) and his witness have filed a Constitution Petition to stop the prosecution . That there exists a big body of evidence depicting fraud by the 1<sup>st</sup> Plaintiff which was not available at the time of Pre trial Directions and hearing of the case. That the Director who is alleged to have signed P Exhibit 1 has denied signing the same. That in the course of the Investigations, the Directorate of the Criminal Investigations was able to establish that the father of **Edward Samuel Ngugi**, the late **Francis Kamau** was not a shareholder and had not taken any shares from **Githunguri Ranching Company**. That he has the documents to show that he is the owner and the current and former Directors have recorded their statements with the Directorate of Criminal Investigations, giving a chronology of the events that led to his acquiring the suit property.

The Application was opposed and **Fredrick Nganga Thuo**, the 2<sup>nd</sup> Plaintiff( 2<sup>nd</sup> Respondent) who swore a Replying Affidavit on **28<sup>th</sup> August 2019**, and averred that they became aware of the sale of **L.R Ruiru/Kiu/ Block 2/3758**, when offers were made by the 1<sup>st</sup> Plaintiff (1<sup>st</sup> Respondent) to the public through advertisements placed on the suit property as well as on the flyers and being satisfied that he was the registered owner, they individually approached him and bought the plots for valuable considerations and the said transactions were being done in **2008 to 2010**. That upon subdividing the suit property, the Plaintiffs where the bonafide owners and that they are owners in possession and occupation to the various plots. That the Application as filed is an abuse of the Court process and only intended to frustrate them from enjoying the fruits of their Judgment that was obtained lawfully, since no new evidence is being brought by the Defendant that was not in his possession.

That on **10<sup>th</sup> December 2018**, the Court entered judgment in their favour, where it found that they are the legal owners of the plots subdivided from **L.R 2/3758** . That they are strangers to the allegations that the 1<sup>st</sup> Plaintiff(1<sup>st</sup> Respondent) has been charged at the Chiefs Magistrate Court . That it is fanatical for the Defendant(Appellant) to allege that they have filed frivolous Petitions and Applications in the High Court, of which they are not parties to. That they are bonafide purchasers for value without notice who generated an interest in the sale of the various plots and they conducted their due diligence. That the Defendants should have filed an Application at the Appellate Court, seeking to reverse the findings of this Court . That the Defendant is now attaching a forensic Document Examination report dated **21<sup>st</sup> September 2017**, which outlines numerous considerations made by a document examiner, who was not called as a witness for his evidence to be challenged. That it would not be prudent to set aside the Judgment based on baseless allegations.

The 1<sup>st</sup> Plaintiff **Livingstone Wanyoike Kinyanjui**, also filed a Replying Affidavit sworn on **1<sup>st</sup> April 2019**, and averred that after the entry of the Judgment by the Court, the Defendant ( Appellant) has done all he could do to frustrate registration of the said order at the Lands office. That the Defendant (Appellant) is working with **Githunguri Constituency Ranching Company Limited**, who he had called as witnesses and have restricted the suit property on claim that it is an open space and the Application for review is a further attempt to

frustrate the Plaintiffs( Respondents) from attaining the fruits of their Judgment. That the case has been in Court since **2010**, and the Plaintiffs(Respondents) filed all documents they would be relying on and the same were supplied to the Defendant and Defendant(Applicant) had ample time to look at them and examine them. Further, that as per the Charge Sheet, the Police file existed since **2014**, and the Applicant and his witnesses were listed as witnesses and the Applicant all along knew of the existence of the complaint and cannot claim that the same is new evidence. That various documents were produced by the Plaintiffs, which the Defendant(Applicant) had ample time to **cross examine** on, and the Defendant had time to subject them for examination. Further, that the examination by an expert is alleged to have been done on **21<sup>st</sup> September 2017**, when the suit was still pending and the Defendant did not bring the document examiner as his witness nor the said document examiner report for cross examination. That the only way the Plaintiffs (Respondents) can query the said expert report is the production of another report by their own examiner, but that the Court cannot be swayed to clear evidence by people who work on behalf of the Defendant(Appellant).

That the fact that the 1<sup>st</sup> Plaintiff ( Respondent) has been charged does not make a case as he remains innocent until proven guilty. The cases date back to **2014 and 2017** and the cases were well within the knowledge of the Defendant and that none of the cases have been determined to the fullest to indicate criminal element . That one **Gerald Ngugi**, is a friend to the Defendant and his allegations cannot form a basis for review. That the Defendant had a copy of the title and he would have cross examined on it and the office of the Land Registrar ought to have been called if he was of the opinion that the same was not genuine. That the officials of **Githunguri Constituency Ranching Company**, were not barred from testifying by complaints of the Plaintiff, and no evidence has been tendered to conclude that the 1<sup>st</sup> Plaintiff was fraudulent. That the Defendant(Appellant) cannot be allowed to collect evidence from people, he never called to testify and the filing of the Application is an attempt by then Applicant to argue his case afresh.

The Application was canvassed by way of written submissions and on **15<sup>th</sup> October 2019** , the Court delivered its Ruling, and dismissed the Appellant's Application and held that;

*‘ In my view, the Defendant is attempting to bring in evidence that he ought to have brought in his Defence . He is also indirectly asking this Court to sit on an appeal against its orders. It is my finding that the issues raised herein ought to have been raised in an appeal at the High Court . The Application dated 14<sup>th</sup> January 2019, lacks merit and I dismiss the same with costs to the Respondents .’*

The Appellant being dissatisfied with the said Ruling filed an Appeal against the said decision vide Memorandum of Appeal dated **7<sup>th</sup> November 2019** , on the grounds that ;

- 1. The Learned Magistrate erred in failing to appreciate there was new compelling evidence necessitating a review of Judgment .*
- 2. The Learned magistrate erred in failing to review the Judgment on the face of overwhelming evidence of fraud.*
- 3. The Learned Magistrate erred in equating an Application for review to an appeal against her orders.*
- 4. That the Appellant therefore seeks that the orders of the lower Court be set aside and they be substituted with an order allowing the Application dated 14<sup>th</sup> January 2019.*

On **16<sup>th</sup> April 2021**, the Court directed that the Appeal be canvassed by way of written submissions and in compliance with the said directive, the Appellant filed his written submissions through the **Law Firm of Sim Advocates LLP** dated **17<sup>th</sup> May 2021**, and submitted that the holding of the trial Court that no ground had been established for the grant of Review Orders was erroneous in view of the overwhelming evidence of fraud that the documents annexed to the Application shed light on the matter . That there exist overwhelming evidence of fraud and that was not available at the time of Pre trial Hearing of the case, which evidence came to the attention of the Appellant after the Judgment.

It was further submitted that the Appellant exercised due diligence throughout the hearing of the case and the evidence introduced through the Application dated **14<sup>th</sup> January 2019**, was not within his Knowledge as he was neither a complainant nor a witness in the criminal case and had the trial Court interrogated the documents, it would have established that the Respondents title to the suit property was colored with fraud. The Appellant relied on the case of **Khalif Sheikh Adan...Vs... Attorney General ( 2019) eklr** which facts fit to the facts of the instant Appeal, in which the Court allowed an Application for Review. It was submitted that at hand, there is an apparent miscarriage of justice if the Court does not intervene.

The Appellant further relied on the case of **Attorney General ...Vs... Torino Enterprises Limited ( 2019) Civil Appeal ( Application) No. 84 of 2012**, and submitted that the same shows the lengths apex Courts go to ensure the proceedings before them produce a just outcome, reflective of the facts obtaining in any particular disputes. That upon being pointed to proof of fraud, the Magistrate declined the invitation to set aside her Judgment. The Court was therefore urged to allow the Appeal.

The 2<sup>nd</sup> to 17<sup>th</sup> Respondents filed their written submissions dated **25<sup>th</sup> June 2021** through the law Firm of **Gachie Mwanza & Company Advocates**, who submitted that the basic structure of consideration in an Application for **review** of a Judgment is guided by the principles of discovery of new and important matter of evidence, an error apparent on the face of Record or any other sufficient reasons. They relied on the case of **Muyodi ...Vs...Industrial Commercial Development Corporation & Anor (2006)1EA 243**. They further relied on the case of **Pancras T. Swai ...Vs... Kenya Breweries Limited (2014) eklr** where the Court held that;

*“ The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in Rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules ) relates to issues of facts which*

*may emerge from evidence . The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the Court is deemed to be alive to'*

The Court was called upon to look at the new evidence that the Appellant sought to rely on and that the trial Court having analyzed the facts, it came to a conclusion that there was new and important evidence that the Appellant had discovered that could not have been within his knowledge with due diligence. That all the issues raised in the Appeal were conclusively considered and determination made by the trial Court and that the Appellant is seeking to re open his case and have a second bite at the cherry.

It was further submitted that the Appellant made allegations of fraud in an Amended Defence and Counter Claim, but the same were never proved or led evidence to the same and a determination was made on the same. That the introduction of evidence that was all along within the Appellant's knowledge at the review stage amounted to asking the trial Court to sit on appeal against its orders . Further, that the Appellant failed to prove the components of review provisions and therefore the Appeal should be dismissed.

Being a first Appeal, it is the duty of the first appellate court to re-evaluate the evidence led before the trial court both on points of law and facts and come up with its own findings and conclusions. See the case of Kamau ...Vs...Mungai [2006] 1 KLR 15, where the Court held that;

***“Being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard witnesses hence making due allowance for that.”***

Further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of Ocean Freight Shipping Co. Ltd....Vs.. Oakdale Commodities Ltd(1997)eKLR, Civil App.No.198 of 1995, where the Court held that:-

***“This is of course not an appeal to us from the decision of the single Judge. The discretion given by Rule 4 is exercised on behalf of the court by a single Judge and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong”.***

The Court has carefully read and considered the written submissions, the Record of Appeal, the grounds thereof and the Judgment by the trial Court and finds that the issue for determination is ***Whether the Appeal is merited.***

The Application by the Appellant in the trial Court was seeking for review of the Judgment of the trial Court. As the Court seeks to re-evaluate the evidence adduced, the Court will be guided by the provisions of sections **80, 63 (e) and 3A of the Civil Procedure Act and Order 45 Rule 1** of the Civil Procedure Rules which provide that:

**“Section 80. Review**

***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 order thereon as it thinks fit.”***

**Further Order 45, rule 1.] Application for review of decree or order.**

*(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or*

*(b) There was a mistake or error apparent on the face of the record; or*

*(c) There were other sufficient reasons; and*

*(d) The application must have been made without undue delay.*

For purpose of Review of the Judgment of the Court in the instant case, the Appellant sought to rely on the grounds that there was discovery of new and important evidence, which after the exercise of due diligence, was not within the knowledge of the Applicant at the time the Decree was passed .

Amongst the new evidence as alleged by the Appellant, is that there is evidence that the 1<sup>st</sup> Respondents fraudulently obtained share Certificate and receipts produced in Court and that he is facing charges relating to obtaining registration of the suit land by false pretenses . Among the documents produced in support of the said ground is a charge sheet in **Criminal No. 1863 of 2017**. A charge sheet in Criminal case **No. 3105 of 2017**, a document examiner Report dated **21<sup>st</sup> September 2017**, Statement of one **Gerald N. Ngugi** , comparison of Titles issued by Thika Lands Registry and the title produced by the Respondents in evidence and a further charge sheet in which Directors of the **Githunguri Constituency Ranching Company Limited**, were charged in criminal case **No. 1355 of 2014**.

The suit was filed in **2010**, and first proceeded on the Plaintiffs case on **3<sup>rd</sup> June 2015**, and the final witness in this case testified on **20<sup>th</sup> July 2018** .The documents and evidence that the Appellant seeks to rely on are documents dated between **2014 and 2017** . Further the ground upon which the Review is premised on is that the 1<sup>st</sup> Respondent fraudulently acquired the documents adduced in Court . It is not in doubt that the statements that the Appellant seeks to rely on were recorded on **17<sup>th</sup> May 2011**, during the pendency of the suit. It is further not in doubt that on **22<sup>nd</sup> June 2016**, the Appellant sought to adduce more evidence and the said Application was dismissed by the trial Court . In his Amended Statement of Defence dated **13<sup>th</sup> November 2014**, the Appellant averred that the title documents held by the Respondents were obtained by fraudulent misrepresentation and using falsified documents.

The Appellant can therefore not turn around and claim to not have had evidence to show that the alleged documents were fraudulent. The Appellant, in the Court's considered view did not need the Documents Examiner's Report from the criminal case, if in his own pleadings he had pleaded that the said documents were falsified. Then he had an obligation to prove fraud to the Court by having the said documents examined. The title deed which the Appellant alleges to have examined was produced in evidence by the Respondents and therefore there was nothing that was stopping the Appellant from comparing the two.

Is there discovery of new or important evidence?, certainly not. The Appellant had pleaded on the alleged falsified documents that he needed to have proved the same. In its Judgment, the Court found that the Appellant had not proved fraud and therefore the matter had been dealt with by the Court and the evidence seeking to be adduced were within the Appellant's reach. See the case of **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** where the **Court of Appeal** held that:

*“In Francis Origo & another v. Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated:-*

*“our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.”*

The Court has considered the reasons given by the Appellant for seeking an order of review. The Court finds and holds that the Appellant has not satisfied the requirements for grant of the orders of review. The Court agrees with the trial Court that the Appellant is seeking to bring in new evidence which he ought to have adduced and therefore not entitled to the orders of Review as sought. Therefore, it follows that this Appeal is not merited.

Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the Memorandum of Appeal together with the written submissions, the Court finds that the trial Magistrate arrived at a proper determination and this Court finds no reason to upset the same.

The upshot of the foregoing is that the Appellant's Appeal herein is found **not merited** and consequently the said Appeal is dismissed entirely and the **Ruling and Order** of the trial court is upheld. The Respondents will have the costs of this Appeal.

It is so ordered.

**Dated, signed and Delivered at Thika this 30<sup>th</sup> day of September, 2021.**

**L. GACHERU**

**JUDGE**

**Court Assistant – Kuiyaki**