



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO 5 OF 2019

AGNES MORAA GICHANA.....PLAINTIFF/APPLICANT

VERSUS

GRACE MORAA MOGOI.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 18th January 2021 the Plaintiff/Applicant has moved the court seeking the following orders:

1. That the Honourable Court be pleased to review and/or vary the orders given on 28th May 2020.

2. Upon granting prayer (1) above, the Honourable Court be pleased to expunge from the record, the affidavit sworn on 25th June 2010 by Charles Gichana Angwenyi.

3. The Honourable Court be pleased to make suit able orders in respect to the Plaintiff/Applicant's application dated 14th June 2018.

4. The costs incidental to this application be provided for.

2. The application in anchored on the grounds set out on the face of the Notice of Motion, the main one being that there is an error apparent on the face of the record and that there is sufficient cause for review, as the court relied on an affidavit sworn by Charles Gichana Angwenyi on 25th June 2010 annexed to the Respondent's Replying Affidavit which was never served upon the Applicant and which was not properly before the court.

3. The application is also based on the Applicant's Supporting Affidavit sworn on the 18th January 2021. In the said affidavit the Applicant depones that after filing the application dated 14th June 2018, the Respondent filed a Replying Affidavit on 4th December 2018 to which she annexed another Replying Affidavit sworn on 27th August 2018 without any annexures. Among the annexures to the said affidavit was the affidavit sworn by Charles Gichana Angwenyi on 25th June 2010 which is highly contested.

4. The Applicant has taken issue with the fact that the affidavit was purportedly filed in the High Court at Kisii in an appeal whose number is not given and therefore the appeal is non-existent. Secondly, the suit herein was transferred from Keroka SRM's Court to Kisii ELC in 2019 and hence the said affidavit could not have been filed in this court before then. She is of the view that the said affidavit was stealthily prepared or forged with intent to steal a match.

5. She further depones that the deponent of the said affidavit denies having signed it as he told her that he had donated a Power of Attorney to his son Kennedy Bosire Gichana to act on his behalf in all his legal matters. She adds that her husband suffers from serious memory lapses and could not have signed the said affidavit. She depones that since the affidavit dated 25th June 2010 was not served upon her, it took a while for her to get a copy of the same from the court file as the courts had scaled down operations following the outbreak of the Covid-19 pandemic.

6. The application is contested through the Defendant/Respondent's Replying Affidavit sworn on 5th February 2021. She depones that the affidavit dated 25th June 2010 which was sworn by the Applicant's husband was filed in Keroka court on 28th August 2018 and served upon the Applicant before this matter was transferred to this court and the Applicant has therefore been aware of its existence. She faults the Power

of Attorney issued to the Kennedy Bosire Gichana for only mentioning Kisii HCCC No. 157 of 2005 between the Applicant's husband and Samuel Mayienga Openda. She depones that there is no medical certificate to show that the Applicant's husband is senile or when he became senile. She is therefore of the view that the Applicant has not demonstrated that there are sufficient grounds for reviewing the court's ruling.

7. By consent of the parties the court directed that the application be disposed of by way of written submissions and the Respondent filed his submissions on 15th March 2021 while the Applicant filed his on 25th March 2021 which I have considered.

ISSUES FOR DETERMINATION

8. The singular issue for determination is whether the court should review its ruling made on 20th May 2020.

ANALYSIS AND DETERMINATION

9. The provisions that govern the orders of review are found in Section 80 of the Civil Procedure Act and Order 45 (1) of the Civil Procedure Rules which provide as follows:

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.

Order 45(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 a 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 review of judgment to the court which passed the decree or made the order without unreasonable delay”.

10. In the instant case the Applicant contends that there is a mistake or error apparent on the face of the record as the court relied on an affidavit sworn by Charles Gichana Angwenyi on 25th June 2010 and which was purportedly filed in an appeal in the High Court whose number is not disclosed. Even though the said affidavit was annexed to the Respondent's Replying Affidavit, the Applicant has stated on oath that the copy of the Replying affidavit that was served upon her did not have this annexure.

11. On her part the Respondent has in her Replying Affidavit deponed that the said affidavit was filed in when the matter was still at Keroka SRM's court and served upon Applicant. What is not clear is whether this apparent omission was deliberate as the court copy contains all the annexures.

12. Be that as it may, the Applicant having belatedly obtained a copy of the said affidavit has raised pertinent questions regarding its veracity which the court cannot ignore. The main one is in which appeal was the said affidavit filed? The Respondent has carefully avoided responding to this question. The Applicant has also raised the issue that the deponent of the said affidavit who is her husband denies having signed it. Furthermore, she has deponed that he suffers serious memory lapses and he has donated a Power of Attorney to two of his sons to represent him in all his legal matters.

13. Having perused the said affidavit, I am constrained to agree with the Applicant that its authenticity is questionable as it appears to have been filed in a non-existent appeal. The court was therefore misled into relying on the said affidavit. I am of the view that this constitutes sufficient cause for reviewing the court's ruling.

14. In the premises, I find merit in that application and I grant it in terms of prayers 1 and 2 of the Notice of Motion. More specifically, I expunge from the record, the Affidavit purportedly sworn on 25th June 2010 by Charles Gichana Angwenyi. I hereby review and set aside the ruling dated 20th May 2020 and substitute it with the following orders;

a) That the status quo obtaining at the time of this ruling be maintained pending the hearing and determination of this suit.

b) The Plaintiff/Applicant is granted leave to amend her Complaint in terms of the Draft Amended Complaint by enjoining Francis Nyagaka Onchoka as a 2nd Defendant.

c) The Amended Complaint be filed within 21 days from the date of this ruling.

d) The costs of this application be in the cause.

Dated, signed and delivered at Kisii this 29th day of September, 2021.

J.M ONYANGO

JUDGE