REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 3 OF 2020

SAMUEL NGANGA KIAMBUTHI.....PLAINTIFF/RESPONDENT

VERSUS

ERIC MUNENE GITONGA .....1ST DEFENDANT/ APPLICANT

CLEMENT GICHOHI KUNGU.....2ND DEFENDANT/ APPLICANT

CHRISTOPHER WARUINGI.....3RD DEFENDANT/ APPLICANT

WILSON MBUKI.....4TH DEFENDANT/ APPLICANT

SAMUEL MACHARIA.....5TH DEFENDANT/ APPLICANT

RULING

Vide a Notice of Motion Application dated **6th October 2020,** the Defendants/ Respondents sought for the following orders that;-

1. That this Honourable Court be pleased to review and set aside its orders made on 1st October 2020.

2. That this Court be pleased to strike out the Plaint filed herein for being untenable and disclosing no cause of action and having been overtaken by events.

The Application is premised on the grounds that while the parties were awaiting for the Ruling herein, and having filed submissions, the Plaintiff/ Respondent embarked on the subdivision of the suit property **L.R Ruiru/ Ruiru East Block 2/2049,** without disclosing the same to either the Court or the Defendants/ Applicants. That by a mutation dated and stamped as approved on **28th May 2020**, the Plaintiff/Respondent caused the suit property to be subdivided into **land parcels No. L.R 2/35038 to 35053,** both numbers inclusive. Further that on **24th June 2020, title No. L.R 2/2049,** was closed on subdivision and new title numbers issued. That the Defendants/ Applicants learnt about this when they visited the lands office where they obtain copies of the mutation form, green card and by that time, the Court could not take any evidence. That the Plaintiff/ Respondent has rendered this suit incompetent, untenable and incapable of being corrected by amendments and once the suit falls, the orders cannot stand in vacuum.

That the Defendants/ Applicants stand to be deprived of access to their homes as the basis of the order that has now been rendered unsustainable and the substratum of the suit has ceased to exist. That even if the Plaintiff/Respondent was to attempt amendment, the suit would be incurable defective on account of misjoinder, since each Defendant would be trespassing on a distinct parcel of land. That the Defendants/ Applicants cannot be enjoined together in one suit nor can the distinct parcels of land.

In his Supporting Affidavit, **Eric Munene** the 1st Defendant/ Respondent averred that he had the authority of his Co Defendants/ Applicants to swear the Affidavit and averred that in **August 2020,** he saw someone walking around the suit property and he decided to conduct a search and procure a green card. He applied for the green card, and it was not availed until **25th September 2020**. That the Mutation and green card shows the Plaintiff/ Respondent had subdivided the land between **May and June 2020,** while the matter was awaiting Ruling. That he has been advised by his Advocate, which advice he believes to be true that the subject matter of the suit is no longer in existence. That the Plaintiff is altering the subject matter of the suit property, which demonstrates that he obtained his title fraudulently.

The Application is opposed and the Plaintiff/ Respondent swore a Replying Affidavit dated **17th February 2021,** and averred that at the time of fling the suit, he had commenced subdivision of the main title **L.R 2/2049,** in order to specifically deal with each Defendant/ Applicant on the portion they occupied. That the subdivision of the main title is complete and new titles have been issued by the Registrar of lands. Further that the subdivision and transfer of the old title deeds happened before and continued after he lodged the suit and he did not anticipate that the subdivision process would be concluded before the hearing and final determination of the suit which has

materialized.

That it is only the titles numbers that have changed and the Defendants/ Applicants still occupy albeit illegally and/ or unlawfully his land under the new titles. That he has been advised by his Advocates which advice he believes to be true that it is necessary to amend the Plaint to include the new title deeds so as to reflect the true and genuine position. That he had approached the Court vide his Application dated **15th February 2021,** seeking the leave of the Court to amend the Plaint and therefore there is no need or reasonable cause to stay or suspend or set aside the orders of the Court issued on **1st October 2020,** as there is no Appeal preferred against eth said orders. Further that there is no reasonable cause to strike out the suit as the Defendants/ Applicants have already filed a Defence to the main suit and what remained is fixing of a **Pretrial** date. Further, that the Orders of **1st October 2020,** were issued in the best interest of all the parties and to protect the subject matter.

He further averred that he has been advised by his Advocates on record which advice he believes to be true that the position taken by the Defendants/ Applicants in their current Notice of Motion Application offends the provisions of the Constitution of fair hearing on procedural technicalities and their conduct is out to ensure that the matter does not proceed to full hearing. That the Defendants/ Applicants have started inviting third parties to make Applications so as to delay the suit. He averred that he has explained the circumstances surrounding the change of titles in the matter and the Court was urged to dismiss the Instant Application.

The Defendants/ Applicants through **Eric Munene Gitonga,** swore a Supplementary Affidavit on **24th March 2021,** and averred that the subject matter of the suit no longer exists and although the Plaintiff/ Respondent claims to be aware which current parcel is occupied by which Defendants, the same can not be authenticated except by a surveyor since there are 16 subdivisions, and in any event they are not settled in any systematic order and without a Surveyors report, it is not possible to ascertain who is occupying which current sub titles. That the Plaintiff/Respondent has not come to Court with clean hands and the order was obtained in violations of the rules as the Plaintiff/Respondent did not disclose to the Court that he was subdividing the land.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also read and considered the pleadings in general, the Affidavits , the annextures and provisions of law and finds that the issue for determination is ***Whether the Application is merited.***

The Defendants/ Applicants have sought for the Review of the Court's orders dated **1st October 2020,** that granted an injunction to the Plaintiff/Respondent and therefore restraining the Defendants/ Applicants from interfering with **L.R Ruiru/ Ruiru East Block 2/2049.** The said review is based upon the fact that the said suit property does not exist since the same had been subdivided and new numbers were issued.

The guiding provisions of Law with regards to review have been set out under **Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules . Section 80 provides;**

> ***" 80. Any person who considers himself aggrieved-***
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> ***(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 judgement 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 of the Civil Procedure Rules, 2010** provides as follows:-

> ***1 (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 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 judgement to the Court which passed the decree or made the order without unreasonable delay."***

The above provisions of law have laid down the jurisdiction and scope of review. They limit review to the following grounds-

> ***(a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;***
>
> ***(b) on account of some mistake or error apparent on the face of the record, or***
>
> ***(c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.***

The ground upon which the Defendants/ Applicants have relied upon is that there is discovery of **new** and **important matter**, of evidence which after exercise of due diligence was not within their knowledge and thus they could not produce it by the time the order was made. In the case of ***Daniel Macharia Karagacha Vs Monicah Watithi Mwangi, Civil Appeal No. 159 of 2000*** the Court of Appeal held that:-

> ***"Review is only available where there is an error of law apparent on the face of the record or there is a discovery of new and important matter of evidence, which the applicant could not by exercise of due diligence have placed in his pleadings or before the Judge when he heard the earlier application"***.

The suit property was subdivided and title closed on **26th June 2020** as per the green card produced in evidence . The Defendants/Applicants aver that this could not have been in their knowledge. The Court notes that the Application that gave rise to the order was made on **15th January 2020,** and the Defendants/ Applicants filed their response on **6th February 2020,** and automatically it is not in doubt that they could not have been aware of the same in any way since it did not exist. Further, by the time the Court was delivering its Ruling, the same had not been brought to its attention and therefore the Court could not have been aware.

The Court concurs with the applicants that there is a discovery of new evidence that even with due diligence, could not have been discovered. This However does not mean that the Court will automatically review its order, The Court must then go further and determine whether the discovery of the said new evidence is sufficient to warrant it to set aside and review its orders.

It is important for the Court to further acknowledge that when filing the suit, the **L.R Number** provided by the Plaintiff/Respondent would still be in existence. The principles for granting an interlocutory order are well set out in the case of **Giella…Vs… Cassman Brown.**

In its Ruling delivered on **1st October 2020,** the Court found that the Plaintiff herein had established the threshold for grant of the said order and went ahead to grant injunctive orders to preserve the suit property. The question that the Court then asks itself is whether if the evidence that the suit property had been subdivided and new numbers issued would have been brought before it, would it have found otherwise? Have the circumstances of this case changed?

The Court notes that all the facts remains constant save for the new numbers issued to the suit property. The suit property is not different as the Plaintiff still remains the registered owner and therefore would still have established a prima facie case. Therefore, the Court finds and holds that the new evidence produced before it does not change the circumstances of the case for it to exercise its discretion and **Review** its Ruling.

The Court being cognizant of the fact that at the time of filing of the instant Application, the said land was in existence and further the Plaintiff/ Respondent has sought to Amend his Plaint to reflect the new numbers, which in any event remain the same suit property.

The Defendants/ Applicants have also sought for the striking out of the suit indicating that the substratum of the case has changed. This again is because of the change of the numbers. As noted above, the Court notes that the Plaintiff/Respondent has sought to amend his Plaint to include the new numbers and unless the said Application is determined, it would be premature to strike out the suit. In the case of ***Kivanga Estates Limited ….Vs… National Bank of Kenya Limited [2017] eKLR*** as follows:

> ***"Striking out a pleading, though draconian, the Court will, in its discretion resort to it, where, for instance, the Court is satisfied that the pleading has been brought in abuse of its process or where it is found to be scandalous, frivolous or vexatious. …"***

The Defendants/Applicants have sought the striking out the suit on the basis that they ought not have been sued together since they all live in different parts of the property as the suit property has been subdivided and different numbers issued.

> **Order 1 Rule 9 of the Civil Procedure Rules** provide that;
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> > ***" No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."***

Further in the case of ***William Kiprono Towett & 1597 Others Vs Farmland Aviation Ltd & 2 Others (2016) eKLR*** **the Court** held that:

> ***"…Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."***

The Court cannot strike out the suit based on the misjoinder attributed by the Defendants/ Applicants. This Court finds and holds that no sufficient reason has been advanced to warrant it take the draconian step and strike out the suit as the Plaintiff has sought for Amendment of the Plaint and therefore any anomaly may be cured.

The upshot of the foregoing is that the Court finds and holds that the Defendants/ Applicants have failed to establish the threshold required for review and setting aside of an order already issued by the Court.

Consequently, the Court finds the Notice of Motion Application dated **6th October 2020 is not merited** and the same is dismissed entirely with costs to the Plaintiff /Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF SEPTEMBER, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy