



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 304 OF 2017

JOYCE KILONZO.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

THE NATIONAL LAND COMMISSION.....2ND DEFENDANT

MAKUENI COUNTY GOVERNMENT.....3RD DEFENDANT

RODAH MUTHEU.....4TH DEFENDANT

RULING

1. What is before this court for ruling is the Notice of Motion application dated 17th December, 2019 and filed in court on 19th December, 2019 by the counsel for the 4th Defendant/Applicant for orders: -

1) Spent.

2) Order made on 8th November, 2019 by this Honourable Court be reviewed and set aside and the last Defendant's witness B. K. Nge'ny, Director of Lands and Mining and Urban Development be allowed to give evidence on the allotment of plot No. 63 to the Plaintiff in 1997 and to the 4th Defendant on 3rd June, 2009 being evidence which was not available when this order was made on 28th October, 2019 and even before the hearing of this case.

3) Costs of this proceedings.

2. The application is expressed to be brought under Section 3A of the Civil Procedure Act, Cap 21 Orders 45 and 50 of the Civil Procedure Rules.

3. The application is predicated on the grounds on its face and is further supported by the affidavit of Rhoda Mutheu, the 4th Defendant/Applicant herein, sworn at Machakos on 17th of December, 2019.

4. The 1st Respondent has opposed the application vide his grounds of opposition dated 10th February, 2020 and filed in court on 3rd September, 2020 wherein he contends: -

1) That the application is incompetent and devoid of merit, as it fails to satisfy the legal and/or factual threshold for setting aside and/or vacating court orders.

2) That the applicant has not given sufficient reasons why the orders issued on 8th November, 2019 should be set aside.

3) That the application is a waste of the court's time as the Applicant was not keen of proceeding with this matter as she was granted several adjournments.

4) That the right to a fair hearing dictates that there should be an end to the litigation process hence this matter ought to be finalized.

5) That the application is misconceived, mischievous and an abuse of the court process.

5. The Plaintiff/Respondent has also opposed the application vide her replying affidavit sworn at Machakos on 19th October, 2020 and filed in court on 21st October, 2020.

6. The application was canvassed by way of written submissions and by the time of writing this ruling, it is only the 4th Defendant/Applicant and the Plaintiff/Respondent who had filed theirs.

7. In her supporting affidavit, the 4th Defendant/Applicant has deposed *inter alia* that when she gave evidence on how she was allocated plot No. 63 of 1997 and how she paid allocation fees and rent to Makueni County Government, the advocate for the Plaintiff/Respondent objected to the production of allotment documents and demanded verification of the said documents be done by the author since they were certified copies. That as a result of the objection, she was forced to apply for adjournment to enable her get an officer from Makueni County to verify the documents and also to adduce evidence, that the case was adjourned on four occasions the last being 28th October, 2019 when her advocate was sick, and that upon going to arrange for the County Government witness to attend the hearing, she found him sick as well and therefore he could not attend court, that on arrival in court, she found that the court had ordered for the case to proceed and since the counsel holding brief had no instructions to proceed, her case was closed, that on 2nd December, 2019 she was given a letter dated 28th November, 2019 written to the ELC court by the Director of County Government which disclosed the record of the said plot No. 63. The letter in question was annexed to paragraph 8 of the supporting affidavit as RM1. It was also the 4th Defendant/Applicant's deposition that the letter disclosed that the plot was allocated to the Plaintiff and her in 1997 and 1998 respectively, that the Director would have given evidence on 28th November, 2019 and verify receipts and documents issued to her in 2015 by Makueni County Government.

8. On the other hand, the Plaintiff/Respondent has deposed in her replying affidavit *inter alia* that the application dated 17th December, 2019 by the 4th Defendant/Applicant having been read to her by her advocates on record, the same is incompetent, lacks merit and is an abuse of the court process, that the orders sought to be reviewed do not exist and the Applicant has also failed to annex a copy of the alleged orders, that she is advised by her advocates on record which advise she verily believes that when the matter came up for hearing on 29th October, 2019, the 4th Defendant/Applicant who had severally adjourned the matter was not ready to proceed and the court declined to allow the application for adjournment, that the 4th Defendant's/Applicant's witness (the Director of Lands and Physical Planning – Makueni) was not present in court and the issue of the alleged indisposition was never raised and as such, the allegation which has not been proved is meant to mislead the court into granting underserved orders, that the purpose of the said witnesses' attendance was to produce the documents in the 4th Defendant's list of documents and to confirm their authenticity since the original documents were not available, that the applicant has not demonstrated that there is discovery of new and important matter or evidence which after due diligence was not within her knowledge at the time the matter came up for hearing, that the letter dated 28th September, 2019 and annexed to the Applicant's application as annexure "RM-1" does not state that there is a discovery of any new evidence as alleged by the Applicant, that the author of the letter dated 28th September, 2019 is the one who authored the letter dated 3rd June, 2015 and cannot therefore allege that he was unable to access the records of Makueni County offices. The Plaintiff/Respondent annexed a copy of the letter dated 3rd June, 2015 as "Jk-2".

9. In his submissions the counsel for the 4th Defendant/Applicant cited Article 50 of the Constitution and stated that all parties are entitled to be heard. The counsel went on to submit that even though the Plaintiff/Respondent and the 4th Defendant/Applicant were heard, the latter was not allowed to adopt as evidence documents of allotment of plot number 63 as they required to be verified by the County Government. The counsel pointed out that the witness who was to give evidence on the said documents was not available. The counsel correctly submitted that under Order 45 Rules 1 and 2, the 4th Defendant/Applicant is required to prove that the evidence sought to be produced was not available at the time the proceedings were closed and that it was impossible to obtain the same.

10. Arising from the above, the counsel submitted that the witness from the County Government was required to verify documents of allotment of plot number 63 to the 4th Defendant/Applicant and that his evidence was indispensable. The counsel pointed out that the 4th Defendant/Applicant seeks for the benefit of justice otherwise she will suffer irreparable damage. The counsel relied on the case of **Ngure - Vs- Gachoki Gathaga [1979] KR 152.**

11. And in her submissions, the counsel for the Plaintiff/Respondent framed two (2) issues for determination namely;

i) Whether or not the orders sought to be reviewed exist?

ii) Whether or not the orders sought can be granted?

12. In answer to the first issue, the counsel submissions were that no orders were granted either on 8th November, 2019 or on 28th October, 2019 and that even after being served with a replying affidavit, the 4th Defendant/Applicant did not rebut or otherwise respond to the averments made thereto. The counsel was of the view that there are no orders capable of being reviewed.

13. On whether the orders ought can be granted, the counsel cited Order 45 Rule 1 Civil Procedure Rules which provides;

“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 a review of judgement to the court

which passed the decree or made the order without unreasonable delay.”

14. The counsel submitted that the 4th Defendant/Applicant ought to have exercised due diligence to establish how she was allocated the suit land. The counsel was of the view that the facts being introduced now are of no additional value and besides nothing stopped her from getting those facts at the time of filing her defence.

15. It was also the counsel’s submissions that there is no proof to ascertain that the witness was attending a meeting on 29th October, 2019 since the documents do not prove such fact. The counsel added that the alleged indisposition was never disclosed to the court at the earliest time possible and as such, the application is full of falsehoods meant to mislead the court.

16. In support of her submissions, the counsel relied on the following cases;

1) Ansazi Gambo Tamgo & Another -Vs- Nicholas Patrick Tabuche [2019] eKLR;

2) Skool Enterprises Ltd -Vs- Housing Finance Company of Kenya Ltd & 3 Others [2017] eKLR;

3) The Executive Committee Chelimo Plot Owners Welfare Group & 288 Others -Vs- Lengat Joel & 4 Others [2018] eKLR.

17. The counsel concluded by urging the court to dismiss and/or struck out the application with costs as it does not meet the threshold for review.

18. Having read the application, the 1st Defendant’s/Respondent’s grounds of opposition, the Plaintiff’s/Respondent’s replying affidavit as well as the submissions filed by the counsel on record for the 4th Defendant/Applicant and the Plaintiff/Respondent respectively, the only issue for determination is whether the Applicant has discovered new and important matter or evidence which after due diligence, was not within her knowledge or could not be produced at that time.

19. It is common ground that when the substantive suit come up for further hearing on the 28th October, 2019, the witness from the County Government of Makueni was to verify the copies of the allotment documents that the 4th Defendant had so that they could be produced in evidence. As correctly submitted by the counsel for the Plaintiff/Applicant, the 4th Defendant’s/Applicant’s contention that after her case was deemed as closed on 28th October, 2019, she discovered new evidence to wit the letter dated 28th November, 2019 and annexed to paragraph 8 of her supporting affidavit as RM-1 cannot hold since her witness was seized with all the information relating to the said plot. The letter in question states *inter alia*;

“The plots in question were subject to repossession notice from the Wote Town Council of Wote dated 31st December, 2009 and backed by minutes of Works Town Planning and Markets Committee meeting held on Tuesday 22nd December, 2009 sanctioning the repossession of site plots in Wote market and publicizing of the same.”

20. For the record the court proceedings where the 4th Defendant’s/Applicant’s suit was deemed as closed are dated 29th October, 2019 and not 28th October, 2019. There seems to be no connection between repossession of plots referred to in RM – 1 and the deposition in paragraph 5 of the supporting affidavit by the 4th Defendant/Applicant that she was allocated plot number 63 Wote Town in 1997.

21. That cannot possibly be a new matter or evidence which was not within the Applicant’s knowledge. I minded to agree with the counsel for the Plaintiff/Respondent that the facts being introduced are of no probative value. I also agree with the counsel for the Plaintiff/Respondent that whereas the 4th Defendant/Applicant has deposed in paragraph 6 of her supporting affidavit that her witness was sick on the 28th October, 2019 and therefore could not attend court, her submissions at paragraph 3 shows that the witness was in Nairobi on official duties. This would explain why the 4th Defendant/Applicant annexed the letter dated 25th November, 2019 from the Ministry of Transport, Infrastructure, Housing and Urban Development written to the Chief Executive Officer of the Council of Governors to invite the latter to a meeting scheduled to be held on 3rd and 4th December, 2019 in Naivasha. That is material contradiction.

22. There is no deposition by the 4th Defendant’s/Applicant’s witness to show that he was either sick or had travelled to Nairobi on the 29th November, 2019.

23. The application herein was filed in court on 19th December, 2019 which was close to two (2) months from 29th October, 2019. Certainly, that was not unreasonable delay but in my view, there is no other sufficient reason that can warrant this court to review the orders of 29th October, 2019.

24. The upshot of the foregoing is that the application herein does not meet the threshold for review under Order 45 Rule 1 of the Civil Procedure Rules. It must therefore fail and in the circumstances, same is dismissed with costs to the Plaintiff/Respondent and the 1st Defendant/Respondent.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 13TH DAY OF SEPTEMBER, 2021.

.....

HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi