



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC No. 164 OF 2012

GATONGU FARMERS CO. LTD.....PLAINTIFF

VERSUS

THE COMMISSIONER OF LANDS.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

AND

GATTONGU FARMERS.....INTERESTED PARTY

RULING

1. This ruling is in respect of the plaintiff's Notice of Motion dated 12th April 2021. The following orders are sought in the application:

1) *[Spent]*

2) *[Spent]*

3) *THAT this Honourable Court be pleased to review and/or vary the order of Court of 20th November, 2019 allowing the Interested Party's Application dated 11th November, 2019 and as a consequence allowing joinder of the interested parties as parties to the present suit for reasons that;*

a) *THAT there is an error/mistake apparent on the face of the record considering GATONGU FARMERS CO. LTD & GATTONGU FARMERS CO. LTD are one and the same entity and the application to enjoin is a treacherous attempt by one ELIUD MUYA (non-director) to reinsert himself into the affairs of the Applicant.*

b) *THAT there are sufficient reasons to warrant review the order of joinder.*

4) *THAT this Honourable Court upon reviewing/varying the order set down the Application for fresh hearing and the Respondents be allowed to put in their supplementary responses to the Replying Affidavit by the Applicant dated 19th February, 2021 and filed on 25th February, 2021 if need be.*

5) *THAT the costs of this suit be awarded to the Applicant.*

2. The application is supported by the affidavit sworn by Mary Wanjiru Njenga, the Secretary to the Plaintiff herein who deposed that following an Annual General meeting of Gatungo Farmers Co. Ltd held sometime in or about 1988, nine new members including herself were appointed as directors to run the affairs of the company. The AGM was informed by the decision of the shareholders to change the management of the company following concerns that the then shareholders were running affairs of the company poorly.

3. Ms Njenga stated that the AGM and the new appointments replaced the directorship statuses of seven (7) former directors of the company including one Eliud Muya Kariuki the deponent of the affidavit in support of the Interested Party's application dated 11th November 2019 following their ouster. That upon his ouster, Eliud Muya Kariuki disappeared with the company seal, company books as well as title deeds for the company's properties.

4. She further deposed that Eliud Muya Kariuki is the sole reason for the troubles of the company and has no serious claims over any control of the company and cannot purport to institute a claim for and/or on behalf of the company. That there are no two companies and the

purported interested party is the Plaintiff and already an active participant in the proceedings and therefore there can be no duplication of parties and thus in the circumstances there exists no justifiable reason to join an already participating party in the proceedings, by virtue of misrepresentations and misleading assertions. She added that at the time the parties consented to joinder of the parties, the company was still reeling from the effects of the poor management by the said Eliud Muya Kariuki and his companions and that the different factions illegally supported his inclusion thus giving conflicting instructions to the advocates on record. That it is thus in the interest of justice to review the order allowing joinder.

5. In response to the application, a replying affidavit sworn by Eliud Muya Kariuki was filed. He deposed that he is a member of Gattongu Farmer Co. Ltd and that the original name of the company was Gattongu Farmer Co. Ltd having been incorporated in the year 1971. That he was the secretary of Gattongu Farmer Co. Ltd from the year 1978 to 2005. He denied that he was ever ousted from his position in 1988 and added that Ms Njenga (the deponent of the supporting affidavit) placed herself together with other members of her splinter group as directors of Gattongu Farmer Co. Ltd and thereafter acted ultra vires by changing the company name to Gatonguh Farmers (1999) Company Limited without a resolution from members as required under articles of association of the company. That Ms Njenga is not the secretary of Gattongu Farmer Co. Ltd and that this suit was instituted without resolution or consultation with members of Gattongu Farmer Co. Ltd. He added that members became aware of the suit after one of the sons of deceased members known as John Njuguna Muchina tried carrying out a search at Nakuru Land registry for purposes of succession but was informed all transactions of Gattongu Farmers parcels had been suspended. That thereafter the interested party appeared before this court to be enjoined and their application was duly consented to by all parties.

6. Mr Kariuki further deposed that member of Gattongu Farmer Co. Ltd were issued with title deeds by the company after subdivision in 1983 and would be greatly affected by the decision of the court. He concluded that if the suit was allowed to proceed without their participation they would be greatly prejudiced as they have an interest in the suit property as they are not only registered proprietors but have subsequently developed their respective parcels and also buried their loved ones on the parcel. He therefore urged the court to dismiss the application with costs.

7. The application was canvassed by way of written submissions. I have duly considered the application, the affidavits and the submissions.

8. The present application seeks review and variation the order of 20th November 2019 pursuant to which allowing the Interested Party was admitted into the matter. The record shows that the order was made by consent of all parties after counsel appearing for the plaintiff notified the court that the plaintiff was not opposed to the joinder.

9. The law relating to review is found at **Section 80** of the **Civil Procedure Act** which provides:

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.

10. **Order 45 Rule 1** of the **Civil Procure Rules** makes further provisions on review as follows:

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 judgment to the court which passed the decree or made the order without unreasonable delay.

11. The plaintiff seeks review on the ground that there is an error or mistake apparent on the face of the record. The mistake is said to be that the plaintiff and the Interested Party are one and the same entity and that the application to enjoin the Interested Party was an attempt by a non-director to reinsert himself into the affairs of the plaintiff.

12. The Court of Appeal held in **National Bank of Kenya Limited v Ndungu Njau (1997) eKLR** as follows:

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter.

13. The alleged mistake that the applicant is citing herein is certainly not apparent on the face of the record. It relates to disputes within the plaintiff company and the Interested Party regarding management of the two entities which are incorporated companies. The law is clear that any error or omission that is sought to be the basis of an application for review must be self-evident and must not require an elaborate argument to be established. A dispute regarding management and directorship of an incorporated company cannot be said to be a self-evident matter which requires no elaborate argument. Such disputes should be resolved by the parties under the **Companies Act, 2015** failing

which they should move the High Court under the same statute. Since the disputes may impact the progress and direction of suits involving the company, the parties would do well to resolve the disputes without further delay. I am not persuaded that the application for review is merited.

14. I also note that the effect of granting review herein would be the setting aside of the consent order of 20th November 2019. The grounds upon which a consent order can be set aside are well settled. In the Court of Appeal case of **Flora N. Wasike v Destimo Wamboko [1988] eKLR**, Hancox JA stated;

It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out...

15. The position adopted in **Flora N. Wasike v Destimo Wamboko** (supra) has remained unchallenged and was restated in **Njagi Wanjeru & Company Advocates v Nairobi City County [2019] eKLR**. The general position is that an order made by consent cannot be varied or set aside unless it was obtained through fraud or collusion or in general for a reason which would enable the court to set aside an agreement. See **Setton on Judgments and Orders (7th edn), vol 1, P 124**. The arguments advanced by the applicant do not meet the foregoing criteria.

16. In the circumstances, Notice of Motion dated 12th April 2021 is dismissed with costs to the Interested Party.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF OCTOBER 2021.

D. O. OHUNGO

JUDGE

Delivered through Microsoft Teams video link in the presence of:

No appearance for the Plaintiff

No appearance for the Defendants

No appearance for the Interested Party

Court Assistant: E. Juma