



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO 1079 OF 2016

DANIEL NYABARO OMWEGA.....1ST PLAINTIFF/RESPONDENT

ELIZABETH BOCHERE.....2ND PLAINTIFF/RESPONDENT

VERSUS

KENNEDY OMWEGA MAGACHI.....DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. On 16th June 2021, the Applicant filed a Notice of Motion dated 16th June 2021 brought pursuant to Order 45 Rule 1 and 2 of the Civil Procedure Rules 2010, Order 22 Rule 22 of the Civil Procedure Rules 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21, seeking the following orders:

- a. Spent
- b. Spent
- c. That the court be pleased to review and or set aside its judgment dated 29th September, 2020 and all subsequent orders and the Plaintiff be punished for taking this court for a ride.
- d. That the court to allow the defence and the suit to start *de novo*.
- e. Costs of this application be provided for.

2. The application is anchored on the grounds set out on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 15th June, 2021. The Applicant has advanced two main grounds as the basis for his application. The first one is that the discovery of a new and important matter or evidence while the second one is that there is an error apparent on the face of the record.

3. With regard to the new evidence, he depones that the court was not made aware of the fact that the Grant that caused the suit property to be transmitted to the Plaintiff's late mother was revoked. In his affidavit he explains that his late father was the registered owner of land parcel number MAJOGE/KANYIMBO/385. Following the demise of his father, the said parcel of land was to be shared between his two widows and children. Since the Applicant's mother who was the second wife had left the homestead, her and her son (the Applicant) were not included in the list of beneficiaries when his step-mother applied for a Grant of Letters of Administration vide Kisii HC Succession Cause No.366 of 1993. When he discovered that a Grant had been issued to his step-mother, he applied for revocation of Grant and the said Grant was revoked in 1997.

4. He claims that he discovered this new evidence when he instructed his advocate to retrieve the Succession file from the National Archives in Kisumu. It is his contention that the court would not have arrived at the judgment it did if this evidence had been brought to the court's attention at the time the case was heard.

5. The Respondent did not file any response to the application.

6. On 14th July, 2021, the court directed that the application be disposed of by way of written submissions. Both parties have filed their respective submissions which I have considered.

ISSUES FOR DETERMINATION

7. Having considered the application and the affidavit in support thereof together with the rival submissions, the only issue for determination is whether this court should review and or set aside its judgment dated 29th September, 2020 and all subsequent orders.

ANALYSIS AND DETERMINATION

8. The provisions that govern 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. *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 Rule 1 of the Civil Procure Rules provides that : -

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

9. In this instant case, the Applicant argues that there are new and important facts that were not before the court at the time it entered judgment in favour of the Plaintiff. The Applicant claims it was only when his advocate retrieved the Succession file in **Kisii HC Succession Cause No. 366 of 1993** from the Kisumu National Archives that he discovered that the Grant of Letters of Administration that had been issued to the Plaintiff's late mother was revoked in 1998.

10. The question therefore is whether the said discovery of the new and important evidence could not have been made after the exercise of due diligence and whether the said evidence could not be produced by him at the time when the court made its judgment.

11. From the record, the Applicant filed an application dated 9th December, 2020 seeking that the Succession file in **Kisii HC Succession Cause No. 366 of 1993** be retrieved from Kisumu National Archives. In the said application he claimed that he had been completely left out of the said succession process and as a result he had been disinherited from his late father's estate. The application was granted and he went on to retrieve the said file.

12. He argues that upon perusal of the said file he discovered that the Grant of Letters of Administration issued to the Respondent's late mother had been revoked. Contrary to his assertion that he discovered that the Grant had been revoked after perusing the Succession file, it is clear from the proceedings in the said file that he is the one who filed the application dated 1st July, 1997 for revocation of Grant. The Applicant annexed the said application to his supporting affidavit.

13. Notwithstanding the above observation, I find that even if this court was to determine that the evidence discovered by the Applicant was new and important evidence which was not within his knowledge and which could not have been found after the exercise of due diligence, so that it or could be produced by the Applicant before the Judgment was delivered, it would not be possible to set aside or review the judgment. This is because the Court was only called upon to make a declaration that the award that was issued in favour of the Defendant by Ogembo Land Dispute Tribunal dated 28th June, 2011 and the adoption of the same by the Senior Principal Magistrate's Court on 10th April, 2011 was null and void for lack of jurisdiction.

14. The court in its judgement declared that the Ogembo Land Disputes Tribunal had no jurisdiction to entertain a claim for ownership of land and that the adoption of the said award by the court was null and void for lack of jurisdiction. This clearly shows that the court was not called upon to review the merits of decision of the tribunal but rather it was only called upon to make a determination as to whether the Tribunal had jurisdiction to hear and determine the dispute. The "new evidence" would therefore not change the finding of this court that the Ogembo Land Disputes Tribunal did not have jurisdiction to hear and determine the dispute between the parties.

15. In light of the foregoing, I find no merit in the application and I dismiss it with costs to the Respondent.

Dated, signed and delivered at Kisii this 30th day of November, 2021.

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J.M ONYANGO

JUDGE