



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**MISC. APPL. JUDICIAL REVIEW NO. 97 OF 2008**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE DISTRICT LAND ADJUDICATION & SETTLEMENT**

**OFFICER TIGANIA & IGEMBE.....RESPONDENT**

**M'MBAU THAMBAU .....INTERESTED PARTY**

**EX-PARTE APPLICANT .....MUSA NGAITI**

**RULING**

1. By an application dated **30.7.2021** the interested party hereafter the applicant seeks for the review of a judgment made on **22.9.2015**, revocation of title **No. L.R Athinga/Athinja/2639** now in the name of the exparte applicant, and to revert the land to **M'Ambau Thambau** now deceased, inhibition over the property and lastly temporary orders of injunction against the respondents.
2. The application is based on grounds on its face and a supporting affidavit of Luli M'Ambau sworn on 29.7.2021.
3. The applicant states the exparte applicant had sued the 2<sup>nd</sup> respondent posthumously in 2008, yet he passed on 1.10.1976. That the deceased family only became aware of the suit in 2021 after conducting a search at the land registry and that the exparte applicant moved in to fence the property and evict them w.e.f July 2021.
4. Further the applicant states three sons of the deceased live on the property, surveyors were brought on the land on 15.7.2021 after which fencing was done hence blocking their access to the land.
5. Additionally the applicant states the judgment obtained by the exparte applicant by concealing material facts yet he is a neighbour hence the court should intervene and review the judgment.
6. By a replying affidavit sworn on 9.9.2021 the exparte applicant opposes the motion for review, claims he bought the property from one Stephen E. Erongi and took vacant possession.
7. He avers he did not know the deceased personally but the intended interested party is the one occupying the property and his family. That it is the applicant who was served with the judicial review case by Fred Mwenda on 4.2.2009, after he presented himself as M'Ambau Thambu.
8. Further he states the interested party continued appearing in court and eventually instructed the firm of Kimathi Kiara Advocates to represent him and never denounced that throughout the hearing including during the judgment on 22.9.2015.
9. The exparte applicant avers he lawfully went to take the decision for the implementation at the land registrar and hence the land restored to him.
10. Additionally, the exparte applicant maintains that if the deceased passed on in 1976, the applicant herein should as well explain how he got registered on the land on 26.6.2008 while deceased.
11. In a further replying affidavit sworn on 22.10.2021 the exparte applicant states since he did not know the deceased in person he took it

that the interested party who was on the land was the deceased and included him in the application and upon service of summons he proceeded to appear. He defended the claim without raising any issue as to his identity.

12. With leave of court parties filed written submissions dated 7.10.2021 for the interested party and 22.10.2021 for the exparte applicant.
13. The interested party submits a death certificate is prima facie evidence of death and logically the exparte applicant has not explained how he knew the person who was all along appearing with was the interested party yet they were neighbours.
14. Secondly it is submitted there exists no proper affidavit of service on record to demonstrate service upon the interested party.
15. Thirdly, it is submitted the exparte applicant has laid no basis on who told the person served was actually the interested party.
16. Fourthly, it is submitted the application was a scheme to defraud the exparte of the deceased without a fair hearing contrary to **Section 45 of the Law of Succession Act Cap 160**.
17. On the other hand, the exparte applicant submits it could not have been true the deceased was no more since the suit land was transferred on 26.6.2008 to him and it is interested party who is on the land and has continued to appear as such in the proceedings in person and through counsel hence the application is based on falsehoods, is an afterthought and lacks merits.
18. Lastly the exparte applicant submits the applicant has not met the grounds for review of the judgment under **Order 45 Rule 1**.

### **COURT RECORD**

19. On 11.12.2008 the exparte applicant sought and obtained leave to institute judicial review orders against the respondent and one Musa M'Ambau Thambau, interested party whom he described in his statement of facts dated 8.12.2008 as an adult male of sound mind residing at Athanja Tigania East District. He was ordered to file and serve a notice of motion dated 29.12.2008.
20. An affidavit sworn on 11.2.2008 by Fred Mwenda of P.O. Box 118 Meru was filed on 11.2.2009 wherein he stated at paragraph 3 that on 4.2.2009 in company of Mr. Mburugu Advocate, to have effected service upon M'Ambau Thambau at Muthara village who accepted service but refused to sign. He states at the time of service he was also in the company of the exparte applicant.
21. Again by an affidavit of service filed on 2.6.2009 the record shows Fred Mwenda effected service for a hearing notice of 3.6.2009 upon the interested party on 28.5.2009 at Nguthiru Muthara Division which was received by his son one Joseph Kobia a son.
22. By a notice of appointment dated 29.10.2012, the firm of Kimathi Kiaria & Co. Advocates came on record for the interested party and proceeded to file written submissions dated 12.7.2012 against the notice of motion dated 29.12.2009. Likewise the respondents filed written submissions dated 13.4.2015. The exparte applicant responded by submissions dated 24.4.2015 over and above the previous ones filed on 13.4.2012 leading to a judgment which was delivered on 22.9.2015 in presence of the interested party.
23. The record shows an application dated 12.2.2016 was filed and the interested party was served. A return of service was filed by Wilson Mburugu Advocate leading to a ruling delivered on 14.4.2016 directing the land registrar Meru North and District Surveyor Meru North to implement the orders of 22.9.2016 together with the removal of restriction placed thereof.

### **GROUND FOR REVIEW**

24. **Order 45 Rule 1** provides any person considering aggrieved by a decree and who has discovered new and important matter or evidence which after exercise of due diligence and which was not within his knowledge or could not be produced by him at the time when the decree was passed, or on account of some mistake or error apparent on the face of the record or for another sufficient reason desires to obtain a review, to apply without unreasonable delay.
25. The reasons given for this application is that the interested party was deceased since 1.10.1976. Death is death and known to immediate family members and by extension the entire neighborhood. The intended interested party describes himself as a son of the deceased. So he knew of the death as soon as it happened. It was always within his knowledge and hence cannot say at the time the decree was passed by this court on 22.9.2015 he did not have that knowledge with him.
26. The death certificate attached though not certified indicates the death was registered on 2.12.2015 and the seal of the registrar affixed on 3.12.2015. The person registering the late death said to be a son of the deceased. The place of death is Athanja and the residence is Muthara.
27. The interested party waited until 19.7.2021 to seek for the letters of grant. Assuming he did not know the death or the pendency of the case and that he obtained the death certificate in December 2015, the court has not been told why he had to wait for over five years to apply for the review of the judgment. In my view the delay is so inordinate and unexplained that it would not be in the interest of justice for this court to review the judgment.
28. Secondly the exparte applicant has stated the interested party was actively involved in the case to the extent of hiring a law firm to represent him. The interested party has not denied those facts and or attempted to offer any explanation to the contrary.
29. Further the record indicates there was service of all court processes upon the interested party and his lawyers on record. The applicant did not seek to have the process server summoned for cross-examination if he doubted service.

30. Again the record indicates the law firm on record who represent him before and after the judgment in the post judgment applications. So if the interested party was aggrieved by the decision of the court he would have immediately moved the court for the review and or appeal given he had the benefit of legal representation. He has now filed this application through a new set of lawyers who have not sought leave to come on record in line with the law from the previous law firm.

31. A germane issue of an imposter has been raised against the said law firm and whose input in my considered view would have been crucial to unravel if there was misrepresentation of facts or not. In absence of any explanation from either his lawyers then on record or himself on whether or not someone instructed the law firm to actively participate in the proceedings for or on behalf of the interested party. My finding is the applicant has failed to meet grounds of review under **Order 45 of the Civil Procedure Rules** as read together with **Section 80 of the Civil Procedure Act**.

32. The application herein lacks merits. It is dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 20<sup>TH</sup> DAY OF DECEMBER, 2021**

**In presence of:**

**MBURUGU FOR EXPARTE APPLICANT**

**ONDIEKI FOR INTERESTED PARTY**

**KIETI FOR THE RESPONDENTS**

**COURT ASSISTANT – KANANU**

**HON. C.K. NZILI**

**ELC JUDGE**