



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 185 OF 2013

LUTULI ALEX WANYONYI

NYONGESA PAUL (Suing under

the Power of Attorney for, on behalf

of and for the benefit of WEKESA

RAPHAEL NYONGESA LIHANA).....PLAINTIFF

VERSUS

ALICE KHISA.....1ST DEFENDANT

R U L I N G

LUTULI ALEX WANYONYI NYONGESA PAUL (the plaintiff herein) filed this suit on 29th July 2010 against **ALICE KHISA** (the defendant herein) seeking the main prayer that the defendant be evicted from the land parcel **NO NDIVISI/ NDIVISI/2646** (the suit land).

The defendant filed a defence claiming, inter alia, that the suit was subjudice and accusing the plaintiff of interfering with the map and thereby enlarging the suit land.

The suit was heard and by a Judgment delivered on 29th September 2016, **MUKUNYA J** found in favour of the plaintiff.

The defendant has now moved to this Court by a Notice of Motion dated 12th November 2019 seeking the following orders: -

- 1. Spent**
- 2. Spent**
- 3. The Judgment and decree dated 14th September 2016 be reviewed and/or set aside and the defence be re-opened to allow for new evidence from the defence.**
- 4. Costs of this application be provided for.**

The application is premised on the grounds set out therein and is also supported by the defendant's affidavit.

The basis of the application is that there is a serious miscarriage of justice in that the suit land had two registers and that the plaintiff relied on the fake register since the true register had mysteriously gone missing. Further, that the original title deed for the land parcel **NO NDIVISI/NDIVISI/1036** which was kept by one **PRISCILLA WAKHALAKWA**, who was and still is insane, could not be traced but is now available for use as evidence and shows the correct acreage of the suit land which was created from parcel **NO NDIVISI/NDIVISI/632** and the defendant, though ordered to be evicted from the suit land, in fact occupies parcel **NO NDIVISI/NDIVISI/1036**. There is also new evidence in the form of the original title deed for the land parcel **NO NDIVISI/NDIVISI/1036** which is generally known to belong to the family of **JOTHAM SIBERENGE** – deceased – and measures 17 acres and which has been sold to many purchasers and is occupied by more than 50 families that are likely to be effected by the eviction order. That the original register surfaced after the Judgment and is new evidence that will alter the outcome of this case.

The application is opposed and the plaintiff in his replying affidavit dated 25th November 2019 has deponed, inter alia, that there is no justifiable cause for reviewing the Judgment herein and this application has been filed after three (3) years which amounts to unreasonable delay. That the allegations that the plaintiff produced fake documents was raised in the defence and this application is an attempt to ask this Court to sit on appeal of its own decision. That the said **PRISCILLA WAKHALAKWA** is not insane at all and lives with her sister on land parcel **NO NDIVISI/NDIVISI/1036**. That the purported new evidence was infact obtained on 17th August 2016 when this suit was still pending and nothing prevented the defendant from obtaining a search at the Lands Office. That there is therefore no new evidence that could not be obtained after due diligence. Further, that if the land parcel **NO NDIVISI/NDIVISI/1036** was sub – divided, then it cannot be possible that the original title deed would still be in possession of **PRISCILLA NAKHALAKWA** and during the trial, it was never alleged that she had such evidence. That it is not true that the suit land is occupied by 50 families and the defendant has demolished her house on the suit land and vacated. In any event, the purported new evidence is of no probative value. This application is therefore an afterthought and an abuse of the Court process and should be dismissed.

The defendant filed a supplementary affidavit stating that the application is filed in good faith and denied that it is meant to get the Court to sit on appeal over its own decision. She reiterated that the register that was available at the trial was a fake one and that indeed **PRISCILLA WAKHALAKWA** is insane and had custody of the original documents showing the acreage of the land parcel **NO NDIVISI/NDIVISI/1036**. That she could not report about the fake documents as she is not the proprietor of the land parcel **NO NDIVISI/NDIVISI/1036**. That this fraud should be corrected and when he tried to file this application at the Court of Appeal, he was advised by one **MR WAMALWA** to file it in this Court.

The application has been canvassed by way of written submissions filed both by **MS MUMALASI ADVOCATE** for the plaintiff and **MR SIFUMA ADVOCATE** for the defendant.

I have considered the application, the rival affidavits and the submissions by counsel.

The power to review this Court's Judgment is donated by **Section 80 of the Civil Procedure Act** as follows: -

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."

The procedural rule is found in **Order 45 rule 1(1) of the Civil Procedure Rules** which reads: -

45(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 a review of Judgment to the Court which passed the decree or made the order without unreasonable delay."
Emphasis added.

It is clear from the above that this Court can only review its Judgment on the following grounds: -

(a) Discovery of new and important matter or evidence which, even after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced when the decree or order was made, or

(b) On account of some mistake or error apparent on the face of the record; or

(c) Any other sufficient reason; and

(d) The application must be made without unreasonable delay.

From the application herein, the defendant is seeking a review of the Judgment dated 14 September 2016 on the basis that there is now 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. The new and important matter or evidence is that the plaintiff used fake documents and that the original documents were in the custody of **PRISCILLA WAKHALAKWA** who is insane and could not remember where she kept them. I do not see how that can be new and important evidence that could not, with due diligence, be availed during the trial. Search certificates, registers and other such documents are usually available at the Lands Office upon request. And if the plaintiff produced fake documents, that ought to have been raised at the trial so that the Judge could rule on their admissibility. In her supplementary affidavit dated 16th January 2019, the defendant has deponed in paragraph 6 that one **PAMELA LUMBASI** and the **LANDS REGISTER** are ready to testify and produce documentary evidence. These are persons who were available and should have been summoned to testify. Yet in paragraph 12 of the same affidavit, she says that **"PAMELA LUMBASI who should follow up the issues is fearful due to the history concerning those who attempted to follow up the law in order to**

recover land starting from my own husband WILFRED KHISA SIBERENGE who died mysteriously.” If the said PAMELA LUMBASI was fearful, that does not amount to new and important matter or evidence. In paragraph 9 of the same affidavit, the defendant depones that PRISCILLA WAKHALAKWA who is insane and had custody of the documents stays with her sister YISWA who nurses her. Surely the said YISWA was in a position to look for the said documents even if PRISCILLA WAKHALAKWA was insane. The insanity of the said PRISCILLA WAKHALAKWA was well known to the defendant. In D.J LOWE & COMPANY LTD .V. BANQUE INDOSUEZ C.A CIVIL APPLICATION NO 217 OF 1988, the Court while considering an application for review on the basis of discovery of new and important evidence or matter said: -

“Where such a review application is based on fact of the discovery of fresh evidence, the Court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

In ROSE KAIZA .V. ANGELO MPANJU KAIZA C.A CIVIL APPEAL NO 225 OF 2008, the Court addressing the same ground said: -

“Application on this ground must be treated with great caution. Before a review is allowed on the ground of discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on ground of discovery of new evidence but it was found that the Petitioner had not acted with due diligence it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for review, but the discovery of new and important matter which was not within the knowledge of the party when the decree was made.”

What is clear to me is that for a party to succeed in an application for review on the basis of the discovery of new and important evidence or matter, he must go further than that and demonstrate that the new and important evidence or matter was not within his knowledge and further, that it could still not be produced even *“after the exercise of due diligence.”* In the circumstances, of this case, I don’t see how, with the exercise of due diligence, the original documents could not be retrieved from PRISCILLA WAKHALAKWA who is living with a nurse to take care of her or how, again with due diligence, the Land Registrar could not be called as a witness to testify on the fake documents presented to the Court by the plaintiff or even avail new searches. The defendant, in my view, has failed to meet the threshold to warrant a review of the Judgment herein on account of discovery of new and important evidence or matter that could not, with due diligence, be produced or was not within his knowledge.

Ultimately therefore, the defendant’s Notice of Motion dated 12th November 2019 is dismissed with costs.

Boaz N. Olao.

J U D G E

20th February 2020.

Ruling dated, delivered and signed in Open Court this 20th day of February 2020 at Bungoma.

Mr Wekesa for Ms Mumalasi for Respondent present

Respondent present

Mr Kassim for Applicant – absent

Joy/Okwaro – Court Assistants

Boaz N. Olao.

J U D G E

20th February 2020.