



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 253 OF 2010**

**CHARLES MURUTHI.....PLAINTIFF**

**VERSUS**

**KAMITI FARMERS COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**REGINA NYAKIO KARAU.....2<sup>ND</sup> DEFENDANT**

**ABRAHAM GITAU NDUNGU.....3<sup>RD</sup> DEFENDANT**

**NAOMY WANYI GITAU.....4<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**RULING**

The Plaintiff brought the application dated 23/5/2019 seeking to have the judgement delivered by this court on 13/11/2018 reviewed and set aside and case heard afresh. The application was made on the ground that the Plaintiff discovered new and important evidence which was not placed before the court and which the Plaintiff claimed would have led the court to issue different orders had the court had sight of the important information. The new evidence relates to directions given by Lady Justice Gacheru on 27/8/2013 in the case of **Gatei Wanganda v Kamiti Farmers Company Limited and 4 others [2013] eKLR** in which the court found that Mbugua Kariuki was the chairman of the 1<sup>st</sup> Defendant.

The Plaintiff contended that Simon Njuguna Njoroge and Michael M. Kamau had misrepresented themselves as the chairman and treasurer of the 1<sup>st</sup> Defendant respectively when they entered into the sale agreement over Nairobi/Block 117/412 (“the Suit Property”) with the 3<sup>rd</sup> and 4<sup>th</sup> Defendant.

The Plaintiff added that the 1<sup>st</sup> Defendant was not served and did not therefore participate in the proceedings. He added that the 1<sup>st</sup> Defendant did not participate in the transfer of the Suit Property to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The application was supported by the Plaintiff’s affidavit to which he annexed a copy of the judgement on the directions given by Gacheru J. in **ELC No. 300 of 2013** together with a letter on the notepaper of the 1<sup>st</sup> Defendant dated 3/4/2019 which the court notes was not signed.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants opposed the application through the grounds filed in court on 31/7/2019. They contended that there was no discovery of new and important evidence to warrant a review of the judgement delivered by this court. They added that the issue as to who were the 1<sup>st</sup> Defendant’s directors was not a new issue for the reason that had the Plaintiff exercised due diligence before the suit was heard and determined he would have had that information. In any event they urged that the directions given by Lady Justice Gacheru was not conclusive evidence as to who the 1<sup>st</sup> Defendant’s directors were.

The Plaintiff filed a supplementary affidavit on 22/11/2019 attaching a copy of the search conducted at the Registrar of Companies in 2011 which gave the names for the chairman and treasurer of the 1<sup>st</sup> Defendant as Mbugua Kariuki and Esther Njeri respectively. The court notes that the letter from the Registrar of Companies give the names of the directors following the annual general meeting of the company held on 23/3/2011.

Parties filed submissions which the court has considered. The Plaintiff relied on Section 80 of the Civil Procedure Rules and Order 45 Rule 1 of the Civil Procedure Rules. The Plaintiff submitted that the court can review its orders where there is discovery of new or important matter or evidence if an applicant satisfies the court that the new and important matter or evidence was not within his knowledge or could not be produced at the time the order sought to be reviewed was made. The Plaintiff contended that according to the directions given by Gacheru J, Mbugua Kariuki was the chairman of the 1<sup>st</sup> Defendant. He submitted that the evidence proving that Simon Njuguna Njoroge and Michael

M. Kamau were not the chairman and treasurer of the 1<sup>st</sup> Defendant respectively was a good ground for the court to review and set aside its judgement. The Plaintiff added that he filed the application on discovery of the new evidence.

The 2<sup>nd</sup> to 4<sup>th</sup> Defendants submitted that the new evidence contemplated under Order 45 Rule 1 of the Civil Procedure Rules was the kind of evidence that an applicant could not have come across after exercising due diligence. They contended that the evidence the Plaintiff seeks to introduce was available even before this suit was heard and determined. They added that it was incumbent upon the Plaintiff to investigate whether all the documents that led to the acquisition of the Suit Property by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were genuine and properly executed before his suit was heard and determined. In their view this would have extended to investigating the *bona fide* directors of the 1<sup>st</sup> Defendant. They contended that the sale agreement executed between the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants over the Suit Property was executed in January 1997 and no evidence had been placed before the court to show who the office bearers of the 1<sup>st</sup> Defendant were at that time. They argued that the Plaintiff had not given any explanation as to how he made the discovery after the judgment was delivered and not before. They urged the court to dismiss the application.

The issue for determination is whether the court should grant the orders sought in the application. Order 45 of the Civil Procedure Rules gives the court discretion to review its judgement where there is discovery of new and important or evidence which with the exercise of due diligence was not within the applicants knowledge or could not be produced when the decree was passed. There are other grounds set out for review. In this case, the Plaintiff seeks to rely on the persons said to have been the 1<sup>st</sup> Defendant's office bearers in 2011 but has not placed any material before the court to show who the office bearers of the 1<sup>st</sup> Defendant were in 1997 when the 1<sup>st</sup> Defendant sold the Suit Property to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. On service, it was the Plaintiff's duty to serve the 1<sup>st</sup> Defendant with the suit papers.

The court is not satisfied that the Plaintiff has demonstrated the discovery of new or important matter or evidence to warrant review of its judgement delivered on 13/11/2018. The application dated 23/5/2019 is dismissed with costs to the 2<sup>nd</sup> to 4<sup>th</sup> Defendants.

**Dated and delivered at Nairobi this 12<sup>th</sup> day of February 2020**

**K.BOR**

**JUDGE**

**In the presence of:-**

Ms. R. Nyonje holding brief for A. Mate for the Plaintiff

Mr. A. Kimani holding brief for J. Gichachi for the 2<sup>nd</sup> to 4<sup>th</sup> Defendants

Mr. V. Owuor- Court Assistant