



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 36 OF 2014

EBEI KORODI CLOPRITA.....PLAINTIFF

VERSUS

MARGARET NALIAKA.....1ST DEFENDANT

BONFACE MATERE.....2ND DEFENDANT

BABU NDUNGU.....3RD DEFENDANT

RULING

1. The application dated **22/10/2019** and filed in court on **23/10/2019** has been brought by the plaintiff/applicant seeking the following orders:

(1) ...spent

(2) That the judgment of the court delivered on 11/10/2018 be reviewed and or set aside.

(3) That costs be provided for.

2. The application is brought under **Sections 3, 3A & 80 (a) of the Civil Procedure Act, Order 45 Rule 1(a) of the Civil Procedure Rules.**

3. The grounds on the face of the application are that the judgement was delivered on **11/10/2018**; that there is an error on the face of the record as the applicant has discovered some documents (new evidence) which are quite important; that the new evidence was in the archives; that the suit land was sold fraudulently; that the defendants and 3rd party forged the agreements produced as evidence in the hearing; that the applicant was/is illiterate and elderly and that there was misrepresentation.

4. The application is supported by the affidavit of the plaintiff, sworn on **22/10/2019**. In that affidavit the plaintiff maintains that he is the administrator of the Estate of the late **Korodi Ngichwae** his late brother; that the deceased was illiterate; that one **Ekhai Achalei Todoo** was the caretaker to the deceased's land who sold the same to the defendants without knowledge or consent of the deceased or the applicant. He avers that the said Ekhai filed **Kitale HC P&A No. 64 of 2007** alleging he was the only brother to the deceased which allegation was discovered by the Succession Court to be false. Subsequently the Succession Court Judge issued an order that the said Ekhai be arrested and charged in court. The applicant avers that Ekhai was charged and convicted. He exhibits document "**EKC3**", a copy of a register of criminal cases to demonstrate this fact.

5. The 1st defendant filed a replying affidavit dated **5/11/2019** and filed in court on **6/11/2019**. In her affidavit she states that the reasons advanced for the application are not relevant; that the applicant was aware of the Succession Cause before instituting the instant suit and it does not therefore amount to new evidence and in any event his annexures "**EKC2 (c)**" demonstrate that fact; that if there was any fraud or forgery the deceased should have raised it during his lifetime; that there is no error on the face of record; that there has been undue and inordinate delay and that the application is made in bad faith.

6. In reply to 1st defendant's replying affidavit the plaintiff filed further affidavit dated **19/11/2019**. He deponed that he was aware of **Kitale HC P&A No. 54 of 2007** but did not at the material time have the court's findings, rulings and orders regarding the impersonation by Ekhai and that he did not also have any decision in his possession regarding the criminal case; that the Probate and Administration Cause and Criminal Case files were destroyed. He maintains that those documents could not have been obtained at the time of filing the suit and prosecuting the case and attributes the delay in bringing the instant application to the search for the proceedings and his state of advanced age

and illiteracy.

7. The plaintiff filed his submissions on **20/11/2019**. The 1st defendant filed two submissions one dated **12/11/2019** and another one dated **26/11/2019**.

8. I have considered the application and the response including the filed submissions.

Determination

9. The main issues that arise for determination in the instant application are

(a) Whether this court should review and set aside its judgment delivered on 11/10/2018

(b) Whether the application has been brought expeditiously.

(c) What orders should issue?

(a) Whether this court should review and set aside its judgment delivered on 11/10/2018

10. The grounds upon which the court may review its judgment are set in **Order 45 rule 1(1)** as follows:

(1) Discovery of new and important matter or evidence which after the exercise of due diligence which was not within the applicant's knowledge or could not be produced by him at the time the decree was passed or the order made.

(2) Mistake or error apparent on the face of the record.

(3) Any other sufficient reason.

11. Has the applicant demonstrated any of the three grounds above exist with regard to his application?

12. Regarding discovery of new and important matter the applicant brings forward the evidence of forgery and impersonation by one **Ekhai Achalei Todoo** in **Kitale HC P&A No. 64 of 2007**.

13. Unfortunately for the applicant the facts in this case are that the deceased died in **2004** and the alleged impersonation occurred in **2007**. Besides the alleged sale agreements that transferred the interest in the suit land to the 1st defendant's husband were executed in the year **1991** and **1996** respectively. By the year **2004** therefore the 1st defendant had been on the suit land for a long period. The first agreement spoke of **2 acres** while the second agreement spoke of **1 acre**. Occupation of the suit land by the 1st defendant even during the deceased's lifetime, was not denied during the hearing. The applicant only challenged the agreements that the 1st defendant relied on.

14. With respect I do not find any logical connection between the impersonation for which Ekhai was charged and convicted with the agreements save that Ekhai was said to have been a witness to the agreement dated **21/11/1996**.

15. It is now alleged that the deceased did not execute that agreement. Forgery of that agreement has also not been proved.

16. It may be that Ekhai engaged in impersonation in order to facilitate transfer of the land to the 1st defendant but certainly this impersonation does not in my view have any connection with the validity of the agreements, and the succession court did not state that it had any. There is also a clear time lapse between the execution of the agreements and the acquisition of letters of administration to enable distribution of the deceased's estate.

17. It is averred that the applicant knew of the succession cause even before the judgment. The respondent refers to annexure "**EKC2(c)**" a ruling by Justice Ombija in which the applicant is quoted by the judge as having confirmed on oath to the Succession Court that Ekhai was an impostor. That ruling is dated **27/11/2008**.

18. According to the judgment delivered by this court, the hearing of the applicant's evidence in this suit took place on **5/7/2018** some **10 years** later. It is not reasonable to aver that the evidence of the impersonation by Ekhai was discovered after the suit was heard or that it could not have been presented at the hearing of the suit had the plaintiff committed himself to some greater amount of diligence.

19. In the case of **Stephen Gathua Kimani -vs- Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR** the Court (Matio J.) stated as follows:

"The reason offered by the applicant is that there were orders issued in the various cases he referred to. This is not new evidence. The applicant has not satisfied that the orders in question were not within his knowledge. In fact he says he was an interested party in one of the cases. Alternatively, he has not demonstrated when he came to know about the said court decisions or that he could not obtain them despite due diligence. There is no allegation that there is an error apparent on the face of the record. It has not been shown that there is a sufficient reason to warrant the review.

In other words, I am not persuaded that the reasons offered amounts to ‘sufficient reason’ within the meaning of the rules cited above nor is it analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1.”

20. As to whether it has been established that there is a mistake or error apparent on the face of the record. I have examined the affidavit of the applicant and found that there is no allegation of error on the face of the record. Neither is there any argument based on this ground in the applicant’s submissions.

21. Finally, as it is also clear that there is no other sufficient ground within the armpit of **Order 45 rule 1** to warrant the granting of the orders sought in the instant application, it should fail.

(b) Whether the application has been brought expeditiously

22. The instant application after a hiatus of about one year: the judgment was delivered on **11/10/2018** while the instant application was filed on **22/10/2019**. Clearly there was much delay which, for a review application should be considered inordinate even at first glance. However even where there is an ordinate delay, if there is a good explanation given by the applicant, then the court would go ahead and grant the orders sought subject to satisfaction of other grounds of review. Is there any in the instant application?

23. It is alleged that a search for the document regarding the impersonation by Ekhai was necessary and that it took up much time. Secondly it is said that the applicant is illiterate.

24. It is noteworthy that this court has already found that the applicant had knowledge of the existence of the documents in respect of the succession cause and the fact of impersonation, he having been called upon by the succession court to confirm that Ekhai was not deceased’s brother. There is no good reason why that information was not presented to court in the plaint or in the oral evidence of the applicant at the hearing.

25. What this court gathers from the facts of this case is that the applicant may not have deemed that fact or the evidence to be vital for the success for the instant case, hence their omission. In the circumstances he should not be permitted to turn around and revisit the very evidence which he failed to adduce at the hearing so as to successfully obtain orders setting aside the judgment.

26. In the **Stephen Gathua Kimani (supra)**, the court also observed that :

“Further, no explanation has been offered to enlighten to the court why it took more than one year to file the present application. To order that this case be re-opened where sufficient grounds have not been given would in my view amount to injustice.

One thing is clear in this application. The delay of one year has not been explained. Perhaps, it’s important to recall the last sentence of Order 45 Rule 1 (1) (b) which reads ‘.....may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.’

The logical question that follows is, was the present application made without unreasonable delay? Or is a delay of one year reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal circumstances it should not take an applicant one year to file an application in court. It would require sufficient explanation to justify a delay of one year. To my mind this is a long period, and indeed an unreasonable delay.”

27. As to the applicant’s illiteracy being a factor in contributing to the delay, this court notes that at all times, he had the services of counsel. Illiteracy on the applicant’s part is therefore not a valid ground for the delay.

(c) What orders should issue?

28. In the final analysis the application dated **22/10/2019** lacks merit and the same is hereby dismissed with costs to the 1st respondent.

Dated, signed and delivered at Kitale on this 10th day of February, 2020.

MWANGI NJOROGE

JUDGE

10/2/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Arunga holding brief for Chebii for applicant

N/A for the respondents

COURT

Ruling read in open court.

MWANGI NJORGE

JUDGE

10/2/2020