REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

MISC. APPLICATION NO. 27 OF 2019

RACHEL ODUMA JUMA .....APPLICANT

VERSUS

LUKE OMOLO OKWIRI ..... 1ST RESPONDENT

MUNICIPAL COUNCIL OF KISUMU .....2ND RESPONDENT

RULING

The Applicant filed a Notice of Motion dated 20th December 2019 seeking orders reviewing the court's ruling delivered on 22nd November 2019 by setting aside the orders therein and hearing the application dated 9th October 2019 *de novo* on merit. The basis of the application is that there are new pieces of evidence that have come to the knowledge of the Applicant, that dispute involved the boundary between two properties namely KISUMU/MANYATTA "A"/3902 and KISUMU/MANYATTA "A"/3903, while the Applicant's parcel is the unsurveyed parcel KISUMU/MANYATTA "A" plot number 3-169-1 . That Parcels 3902 and 3903 do not belong to the Applicant but one Kevin Omondi Odero. Further, that Parcel 3902 was sub-divided in 1998 into Parcels 3911 and 3912.

That in execution of the judgment of the lower court, the 1st Respondent demolished the common fence, pit latrine, bathroom and semi-permanent structure belonging to the Applicant and sitting on Plot 3-169-1, which was not the subject matter of the trial in the lower court. That it is in the interest of both parties for the Applicant's matter to be heard on merit.

In her supporting affidavit, the Applicant deponed that Plot 2-532 was re-sited elsewhere and the plot given the new number 1-36-4, was surveyed and turned into KISUMU/MANYATTA "A"/3903; and that Plot 3-334-2 was surveyed and turned into KISUMU/MANYATTA "A"/3902. The Applicant annexed a copy of a site layout plant showing the positions of the plots.

1st Respondent's Response

The 1st Respondent filed a replying affidavit dated 23rd December 2019. The 1st Respondent stated that there has been inordinate delay by the Applicant in filing the application, that the Applicant has not demonstrated the discovery of a new and important matter or evidence that could not have been adduced during the trial. That, no matter the description of the parcels, the Applicant is the immediate neighbour of the Respondent and had encroached into the Respondent's parcel and constructed a toilet and two buildings thereon. That the Plot number 3-169-1 and 1-36-4 were used by the Municipal Council in the allotment letter but no longer exist. That from the Applicant's own documents, the Municipal Council had cautioned her for encroachment in 1989.

The Respondent stated that Kisumu CM (ELC) No. 36 of 2019, which gave rise to the instant proceedings, was concluded by carrying out a survey to determine whether the Respondent's parcel had been encroached, therefore the Applicant was well aware of the position of her plot vis a vis the Respondent's plot.

Applicant's Submissions

During the hearing of the application, counsel for the Applicant submitted that the basis of the application was that there are sufficient reasons. That the Respondents did not bring it to the court's attention that the parcel KISUMU/MANYATTA "A"/3902 had been subdivided in 1998. That the Respondent misrepresented to the lower court as to the status of KISUMU/MANYATTA "A"/3902.

Counsel for the Applicant stated that the survey report which the court relied upon was erroneous and did not capture the true picture on the ground. That these issues were never raised before Trial Magistrate and the appeal had reasonable chances of success.

Respondent's Submissions

Counsel for the Respondent submitted that there was no important matter or sufficient reason for review. That the 1st Respondent had been the registered proprietor of KISUMU/MANYATTA "A"/3903, but sold the parcel in October 2019. That the application refers to Plot 3-169-1 as belonging to the Applicant but it no longer exists. That the lower court judgment was pursuant to an ordered survey

Issues for Determination

1. Whether the application is merited

Order 45 Rule 1 of the Civil Procedure Rules provides for a review of a decree or order by a party upon:

> **"the discovery of a 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..."**

In ***Touring Cars (K) Ltd v Mukanji*** **[2000] 1 EA 261**, the Court of Appeal held that where a judge finds that new and important evidence has been produced, he is under a duty to consider whether this evidence could not have been discovered after the exercise of due diligence by the party seeking to produce it.

The Applicant asserts that the new and important matter or evidence necessitating a review is that the dispute herein actually involves the boundary between KISUMU/MANYATTA "A"/3903 and KISUMU/MANYATTA "A"/3902, and not her parcel which she refers to as the unsurveyed parcel KISUMU/MANYATTA "A" plot number 3-169-1. However, the pleadings and submissions of the Applicant do not reveal when and how this information came to the knowledge of the Applicant.

Further, it is inconceivable that the Applicant could not have discovered this matter through the exercise of due diligence. The evidence tabled reveals that there have been three separate surveys conducted on the site on 25th July 2007, 30th September 2015 and 4th October 2017. The last two surveys were court-ordered and conducted in the presence of the Applicant, or her Advocate, and the 1st Respondent. In all of the surveys, the parcels owned by the Applicant and 1st Respondent were identified and the Applicant found to have encroached into the 1st Respondent's parcel.

The Applicant being present during the survey exercise, had every opportunity to deny that the parcel identified as KISUMU/MANYATTA "A"/3902 did not belong to her; or alternatively to notify the parties present that her parcel was wrongly identified as KISUMU/MANYATTA "A"/3902. There is no doubt that the Applicant knew the position and number description of her parcel especially since she was allocated her parcel as far back as 1986 and has put up several developments on the parcel including a fence, pit latrine and semi-permanent structure thereon. If the disputed portion was not on the common boundary between Applicant's parcel and the Respondent's parcel but was on a parcel belonging to a different person, it is mind-boggling that the Applicant would continue to canvass her defence as she did, instead of promptly applying to be struck out or substituted as the Defendant.

The most reasonable inference from the above is that, at worst, the Applicant's parcel may have been wrongly identified as KISUMU/MANYATTA "A"/3902 (instead of unsurveyed parcel MANYATTA "A" Plot Number 3-169-1) but her parcel was nonetheless the proper subject matter of the suit brought by the Respondent. This can neither be admitted as a new matter or sufficient reason necessitating a review of the Chief Magistrate's orders and decree to the effect that the Applicant was found to be a trespasser on the Respondent's parcel KISUMU/MANYATTA "A"/3903; and which makes no reference to the parcel KISUMU/MANYATTA "A"/3902.

2. Appropriate Orders

The Applicant has failed to demonstrate a new matter, new evidence or a sufficient reason justifying a review. The application is dismissed.

DATED AND DELIVERED THIS 6th DAY OF FEBRUARY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

M/S Imbaya for applicant

N/A for respondent

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE