



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO. 311 OF 2017

PETER WAWERU WAIRI.....1ST APPLICANT

NAHASHON NGUGI WAIRI.....2ND APPLICANT

STEPHEN KIUNA WAIRI.....3RD APPLICANT

VERSUS

PETER KIBUNJA NYAGA.....1ST RESPONDENT

JOHN NDUNGU NYAGA.....2ND RESPONDENT

NYAGA KINYANJUI.....3RD RESPONDENT

AND

PAUL NGIGI NYAGAH.....INTERESTED PARTY

RULING

1. Before me is an Application by way of a Notice of Motion dated 13th February 2019 brought under Order 45, Rule 1 & 2 of the Civil Procedure Rules where the Applicant is seeking for the following orders:

- i. That the Decree issued on 31st July 2018 be reviewed so as to include additional order that:
- ii. Two(2) acres of land parcel Nyandarua/Muruaki/4052 (closed for sub division into Nyandarua/Muruaki/4785) be transferred to the Plaintiff herein even though it is registered in the name of Paul Ngigi Nyagah
- iii. That the Deputy Registrar be directed to execute the transfer forms and all documents necessary to effect this transfer.
- iv. That the cost of this application be provided for.

2. The Applicants have set out 3 grounds on the face of the application which application is supported by the Affidavit sworn by Nahashon Ngugi Wairi sworn on the same date. The said affidavit is further supported by the annexures marked as “NNW1-NNW3”.

3. Neither the Respondents nor the Interested Party herein filed any response despite having been effected as per the Applicants’ Affidavits of service dated 3rd April 2019, 24th July 2019 and 2nd December 2019.

4. The Court, being satisfied that service had been properly effected, proceeded to direct the parties to file their submissions wherein only the Applicant filed submissions on 3rd December 2019.

Applicant’s Submissions

5. The Applicants filed a suit in this Court vide their Originating Summons dated 1st August 2016 seeking ownership of the suit property through land adverse possession. The Court ruled in favour of the Applicants herein and Judgment delivered on 31st July 2018 where Court

ordered as follows:

- i. That the Respondents herein transfer eight (8) acres, six (6) acres and two (2) acres respectively of Land parcels Title No. **Nyandarua/Muruaki/4044** and **Nyandarua/Muruaki/4052** to the Applicants herein.
- ii. That land parcel No. **Nyandarua/Muruaki/4784** and **4785** still accrue from the subdivision of **Nyandarua/Muruaki/4052**.
- iii. In the alternative and without prejudice to the foregoing, the Deputy Registrar is directed to execute transfer forms and all necessary documents pertaining to the land parcels in place of the Respondents herein in the event of the Respondents' failure to transfer the land to the Applicants.
- iv. Costs to the Applicant in lower scale as the suit was undefended.

6. The Applicants were issued with the decree on the 18th September 2018 in the terms above. The Applicant now contends that upon the process of transfer by the Deputy Registrar, they were informed that the land accrued from subdivision that is land parcel No. **Nyandarua/Muruaki/4785** was registered in the name of **Paul Ngigi Nyagah** one of the relatives to the Respondents but not enjoined as a Respondent in the suit. The Deputy Registrar therefore could not effect the transfer. The Applicant contends that at the time of filing the suit they conducted an official search as per the annexure NNW-1 on the land Title No. **Nyandarua/Muruaki/4052** and the name that reflected was that of the 3rd Respondent one **Nyaga Kinyanjui**.

7. It is the Applicant's submission that the transfer to the said Paul Ngigi Nyagah was illegal and fraudulent as there was a caution barring any disposition of land at the time. He also submits that the transfer was only aimed at denying him and his brothers the right to enjoy the fruits of the judgment.

8. The Applicant argues that equity shall suffer no wrong doing without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. He relied on the case of **Olympic Company Trading Ltd & Another v Said Mohamed & 4others [2014] eKLR** and the case of **Macharia Mwangi Muna & 87 Others vs Davidson Mwangi Kagiri [2014]eKLR** where the Court observed that;

“This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.”

9. The Applicant further relies on Order 45 Rule 1(1) of the Civil Procedure Rules and Section 26 of the Land Registration Act.

Analysis & Determination

10. The Applicant is seeking a review of the judgment and decree of this court issued on 18th September 2018.

11. Section 80 of the Civil Procedure Act (Cap.21) Laws of Kenya provides as follows:

“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.”

12. Order 45 of the Civil Procedure Rules sets out the rules for the review of a judgment. The same provides as follows:

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 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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”(emphasis mine)

13. From the record I note that upon the Applicants having had conducted an official search on the disputed land being parcels No. Nyandarua/Muruaki/4044 and Nyandarua/Muruaki/4052, the search for the land in issue being No. Nyandarua/Muruaki/4052 indicated that land was registered to Nyaga Kinyanjui. The land had been subsequently subdivided resulting to parcels No. Nyandarua/Muruaki/4784 and Nyandarua/Muruaki/4785.

14. The parties filed suit wherein after the Plaintiffs/Applicant had proved their case on adverse possession, were entitled to transfer of the

titles in their names. Upon the court having pronounced itself, it automatically precluded any other person from claiming ownership by way of registration.

15. The Defendants had averred that the suit lands belonged to their family and were registered in the name of their late father Nyaga Kinyua Muriuki where upon his death they transferred the land to themselves and stated they were the current proprietors.

16. The Applicant was barred by the Deputy Registrar to transfer title after evidence of the registration presented on the Green Card.

17. I have taken into account the Green Card marked as annexure NNW3, where Paul Ngigi Nyaga had been issued with Title and been registered as proprietor but was not a party to this suit and ought to have been enjoined as a Defendant. In discovery of this new evidence the Applicant has sought that he be enjoined as a Defendant/Respondent in order to allow proper execution of the Judgment and Decree issued.

18. I have carefully analyzed the Application, submission and authorities herein presented before me and find that the Application for review is proper as there is indeed discovery of new evidence which information was not within the Plaintiffs/Applicants' knowledge at the time.

19. It is noted that this Application was unopposed although proper service had been effected. It would be immaterial at this point to go into details on the legality of ownership and registration by the said Paul Ngigi Nyaga.

20. This Court in its judgment of 31st July 2018 had found that indeed the Applicants through adverse possession were entitled to ownership and transfer of the land accrued from subdivision of parcels Nos. Nyandarua/Muruaki/4784 and 4785. In the upshot I allow this application in the following terms;

- i. That the Decree issued on 31st July 2018 be and is hereby reviewed so as to include additional order that:
- ii. Two(2) acres of land parcel Nyandarua/Muruaki/4052 (closed for sub division into Nyandarua/Muruaki/4785) be and is hereby transferred to the Plaintiff herein even though it is registered in the name of Paul Ngigi Nyagah
- iii. That the Deputy Registrar is hereby directed to execute the transfer forms and all documents necessary to effect this transfer.
- iv. Costs at a lower scale since it was undefended.

Dated and delivered at Nyahururu this 10th day of March 2020

M.C OUNDO

ENVIRONMENT & LAND JUDGE