



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

E.L.C. CASE NO. 84 OF 2017

BENJAMIN MWANZIA WAMBUA (Suing as the Legal

Representative of MUKUI WAMBUA MAINGI).....PLAINTIFF/RESPONDENT

VERSUS

STEPHEN KIMEU KIMANGA.....DEFENDANT/APPLICANT

RULING

1) There is before me a Notice of Motion application expressed to be brought under Sections 1A, 1B, 3, 3A, 63(c) & (e) and 80 of The Civil Procedure Act Cap 21, Order 10 Rule 11, Order 21 Rule 22, Order 45 Rules 1, 2, 3 and 5, Order 51 Rules 1, 3 & 10 and Order 53 of The Civil Procedure Rules, 2010, sections 27, 28 and 29 of the Land Adjudication Act, sections 24, 25 & 26 of The Land Registration Act, Section 3(a) of the Judicature Act, the Vacation Rules and all other enabling provisions of the law for orders:-

1. (a) Spent

(b) Spent

2. (a) Spent

(b) Spent

(c) Spent

3. The defence and counter claim hereto annexed be deemed duly filed and served with leave to file and serve list of witnesses, witness statements, list of documents and other documents within such time as may be ordered.

4. Costs of this application be provided for.

2) The application is predicated on the grounds on its face and is supported by the supporting and supplementary affidavits of Stephen Kimeu Kimanga, the Defendant/Applicant herein sworn on 15th August, 2019 and 08th November, 2019 respectively.

3) Benjamin Mwanzia Wambua, the Plaintiff/Respondent herein has opposed the application vide his replying affidavit sworn at Machakos on 08th September, 2019 and filed in court on 30th September, 2019.

4) Directions to dispose off the application by way of written submissions were issued on the 30th September, 2019. The Defendant/Applicant filed his submissions on 11th November, 2019 the same being dated 07th November, 2019. And on the same day the Plaintiff/Respondent filed his submissions which were dated 08th November, 2019 forcing the Defendant/Applicant to file further submissions in response to the Plaintiff's/Respondent's submissions on 27th November, 2019. The latter submissions were undated.

5) The Defendant/Applicant has deposed in paragraphs 4 (i), (ii), (iii), (iv), (v) and (vi), 8, 9 and 11 (i), (ii), (iii) that since the ruling dated 17th July, 2019 dismissing his application to set aside the default judgement and decree he has sought legal advise from his current advocate who after perusing copies of the plaint and documents filed therewith, proceedings, ruling aforesaid, judgement and decree, he has advised and informed him, which advise and information he verily believes to be sound and true that a review of the said judgement and decree is absolutely necessary and warranted as the suit, proceedings, judgement and decree were totally without jurisdiction and in contravention of applicable laws pursuant to fraudulent and material non-disclosure and concealment from the court of material facts and evidence which had they been disclosed the suit would have been dismissed as incompetent *ab initio* and that the court had no jurisdiction in that:-

(i) The suit is *res judicata* by virtue of judgement dated 11th February, 1975 in Uaani DMCC No.L47 of 1974 against which no valid appeal was filed by unsuccessful defendants therein. The Plaintiff deliberately willfully misled the Court on false evidence of a purported appeal No.56 of 1980 which was not a valid appeal against DMCC No.L47 of 1974 and was not filed within time by the defendants who were in any event deceased at the time of that appeal and could not consent as purported and in any event it was incompetent for want of necessary consent of the Land Adjudication Officer,

(ii) that this Court lacks requisite jurisdiction to entertain the suit by virtue of Sections 29 and 30 of the Land Adjudication Act as the suit land was within an adjudication section and its title is subject to a final decision of the Minister dated 23rd March, 2017 in the Appeal No.65 of 1987 (formerly No.1778 of 1986) thus the plaint, proceedings, judgement, decree and consequential orders are a nullity as the court acted without jurisdiction as only the High Court could interfere with the title as ordered by the Minister and only through judicial review order and no such application has been made to the High Court thus the suit, proceedings, judgement and decree are complete legal nullities for want of jurisdiction,

(iii) the suit is incompetent as the Plaintiff lacked legal capacity to institute the suit as he does not hold a valid grant nor is he the personal/legal representative of the deceased Mukui Wambua Maingi for purposes of instituting and prosecuting this suit. The grant issued in the suit is invalid and fraudulent as it was solely issued and expressly limited only for purposes of the Minister's Land Appeal and expired on determination of that appeal on 23rd March, 2017,

(iv) the suit, judgement and decree are premised upon blatant fraudulent and willful non-disclosure and concealment from the court of material facts and evidence of the above stated matters as well as false evidence as to status and validity of the claim for a trust as the alleged Civil Appeal No.56 of 1980 was not a valid appeal against the judgement in Uaani DMCC No.56 of 1980 which purported appeal was not competent as it was filed over 5 years after the said judgement, was not by the defeated defendants in the earlier case, the purported Respondents therein were already dead and could not have consented and it did not reverse the findings and orders of the earlier court case and was in any case found to have been filed without consent of the District Land Adjudication Officer as stated in objection No.153 of 1984 awarding the suit land to the Defendant/Applicant which was confirmed by the Minister's final decision of 23rd March, 2017 aforesaid,

(v) the title to the suitland under all the disputation process resting with the Minister's final decision of 23rd March, 2017 was awarded and vested to the Defendant/Applicant and the claims of a trust in favour of the Plaintiff and beneficiaries of the said Mukui Wambua Maingi is totally unfounded, contrary to the aforesaid court judgement and awards of the District Land adjudication officer and Minister,

(vi) the Plaintiff in light of the foregoing was not competent to institute the suit and was not entitled to the judgement and decree and both he and his family members had no legal and or other interest of whatever nature and the court lacks jurisdiction to entertain the suit and make orders as the title in the suitland as its ownership had been conclusively and finally declared and adjudged in the Defendant's/Applicant's favour as aforesaid and was not questionable or justifiable before this court as per copies of judgement in DMCC No.L47 of 1974, Appeal No.56 of 1980, limited grant in P&A No.1073 of 2012 marked as SKK 2(a), (b), (c) and (d), that the matters and evidence could not be produced by the Defendant/Applicant before the court as the suit proceeded *ex parte* without the Defendant's/Applicant's input and had the court been drawn to their attention, he believes that the court would have dismissed the suit as incompetent, unsustainable and bad in law, *res judicata* and for absence of jurisdiction by virtue of the Minister's final decision under the Land Adjudication Act and the title was not subject to any trust and not liable to subdivision, that he is further advised by his advocate which he verily believes to be sound and true that the court having acted without jurisdiction in the suit by reason of the provisions of the Land Adjudication Act and more particularly the decision of the Minister in appeal No.65 of 1987, as a matter of law the suit, proceedings, judgement, decree and all consequential orders are a nullity and must be reviewed and set aside as same cannot in law be executed or implemented, that he has an arguable defence on merits against the suit and which raises triable issues and also a counterclaim against the Plaintiff/Respondent in relation to the title and ownership of the suit property as can be seen from the annexed copy of draft defence and counterclaim marked SKK-3, that his application dated 12th October, 2018 to set aside the default judgement was principally on non-service of summons but was dismissed *vide* the ruling dated 17th July, 2019 primarily on a finding of service of the summons and on the further fact that his Counsel then on record inadvertently and without his knowledge omitted to annex the draft defence which error should not be visited upon him.

6) On the other hand, the Plaintiff/Respondent has deposed in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14 and 18 of his replying affidavit that he is advised by his advocate on record which he verily believes to be true that the application is an afterthought, full of falsehoods, fatally incompetent, misleading and it is otherwise an abuse of the court process, that he has the capacity to institute the suit as a beneficiary by virtue of the grant issued on 25th October, 2012 and he made a disclosure of all material facts relevant to the suit, that it is not true that the court does not have jurisdiction nor is the present matter *res judicata*, that he is advised by his advocate on record which advise he verily believes to be true that the instant application is *res judicata* as the prayers sought and the application whose ruling was delivered on 17th July, 2019 are identical, that in response to the allegation that the present suit was filed soon after a determination was made in Land Appeal No.65 of 1987 is misleading, unfounded and false particularly that the Plaintiff/Respondent states that he was never a party to the alleged Ministers Land Appeal No.65 of 1987 and he was never involved in any proceedings in the alleged matter, that the only appeal which had been filed before the Minister relating to the subject matter was Minister's Appeal No.1778 of 1986 which was never heard and instead the office of the Deputy County Commissioner, Mbooni East referred the matter to court as can be seen from a copy of the Deputy County Commissioner's letter dated 16th October, 2018 and marked BMM1, that at all times, all correspondence which were previously issued with regard to the appeal which was pending over the subject land all referred to Minister's Land Appeal No.1778 of 1986 as per the annexed correspondence and summons marked BMM 2, that it is not true that the Plaintiff/Respondent did not disclose that there were previous matters relating to the present suit in that paragraph 7 of the plaint clearly discloses the matters which were previously determined conclusively, that the allegation that the Applicant became aware of some of the issues being raised in his application late is unfounded as the Applicant has always had all the relevant information relating to this suit but has always chosen to take the court in circles each time raising flimsy grounds on the purported Minister's determination is actuated by fraudulent intent, that the Applicant has always peddled lies before the court e.g. in an earlier application he lied that he came to know of the judgement after he was served with notice of entry of judgement but he was present in person in court on 04th July, 2018 when the judgment herein was delivered as can be seen from the court's record, that

in the application dated 12th October, 2018 the Applicant sought similar orders as the application herein, that he is informed by his advocate on record which information he verily believes to be true that the Applicant at all times when the matter was scheduled to be in court, the Applicant was duly informed and that explains the reason he attended court on various dates as can be seen in the court proceedings, that the allegation by the Applicant that he was not aware of what was happening, the Plaintiff/Respondent is advised by his advocate on record that the Applicant was granted ample time by the court to file his pleadings but contemptuously ignored the court's orders and that from a quick perusal of the pleadings on record, it is evident that the Defendant/Applicant has not raised any defence with triable issues to be considered by the Court.

7) In his supplementary affidavit, the Defendant/Applicant has deposed in paragraphs 2 and 4 that having read and understood the replying affidavit dated 08th August, 2019 and in response thereto, he reiterated the contents of his application and supporting affidavit save to correct paragraph 2(a) & (b) of the application and all references therein and supporting affidavit and annexures SKK (e) to the Minister's Appeal as No.65 of 1987 which is an editing/typographical error in the typed record of the proceedings and verdict in annexure SKK 1(b) whereas the correct appeal case number is 1778 of 1986 as per the verification by the Deputy County Commissioner vide the letter dated 23rd October, 2019 and other documents thereto attached including summons to witness, work schedule for appeals to the Cabinet Secretary cases for 2017 and handwritten record of the proceedings and verdict confirming the appeal number as 1778 of 1986 and not 65 of 1987 marked as SK-"A" and that the Plaintiff/Respondent in his evidence before the Minister (Deputy County Commissioner) admitted that he knows nothing about the land and its history neither did he claim to be in possession. The Plaintiff has never been in possession or occupation contrary to his false allegations in this suit and his home and works are only on his father's land far from the suit land where the court in the judgement in Tawa (Uaani) CMCC No. L47 of 1974 {annexture SKK 2(c)} made findings of fact that his father Maingi Wambua, the 1st Defendant in that case was settled on a different parcel and so was the 2nd Defendant, all who had no interest in the suit land thus same fate befell the Plaintiff/Respondent.

8) It was submitted on behalf of the Defendant/Applicant that four (4) main issues arise in respect of competency, validity of the judgement and decree. These are capacity to sue, jurisdiction, *res judicata* and review. As for capacity to sue, the Defendant's/Applicant's Counsel submitted that the Plaintiff/Respondent does not hold a valid grant of letters of administration to the estate of the deceased and thus lacks legal capacity to institute and prosecute the suit as he did. The Counsel pointed out that the grant *ad litem* issued on 25th October, 2012 used by the Plaintiff/Respondent was strictly expressed on its face as limited for the purpose of proceeding with the Minister's Land Appeal Case No.1778 of 1986 and was not valid for instituting and prosecuting this or any other suit. The Counsel added that the grant lapsed and ceased to be of any legal effect after the appeal was heard and determined as per the record of appeal proceedings and verdict as corrected under annexure SK-A under the Defendant's/Applicant's supplementary affidavit. In support of his submissions, the Counsel relied on the case of **Trouistik Union International & Another vs. Mrs. Jane Mbeyu** in Court of Appeal at Nairobi in Civil Appeal number 145 of 1990.

9) As for jurisdiction, the Counsel submitted that the suitland is within an adjudication section by virtue of a long standing appeal to the Minister which was only determined on 23rd February, 2017 and the record forwarded to the Director of Land Adjudication on 23rd March, 2017. The Defendant/Applicant contends that the suit was filed within days of that determination while the adjudication record for the area has not been gazetted as complete in all respects and the area outside of the adjudication process. The Counsel added that this Court has no jurisdiction over the suitland that was the subject of appeal to the Minister under Sections 29 and 30 of the Land Adjudication Act. The Defendant/Applicant contends that the court was misled into acting without jurisdiction by the Plaintiff's/Respondents willful misrepresentation, concealment and non-disclosure of the foregoing relevant material facts affecting the title.

10) As for *res judicata*, the Defendant/Applicant submitted that by virtue of the final judgement dated 11th February, 1975 in Uaani DMCC No/L47 of 1974 over which there was no valid appeal within 28 days by any of the two defendants in the suit, this suit is *res judicata*. The Defendant's/Applicant's Counsel pointed out that the purported appeal No.56 of 1980 by a stranger was over six (6) years outside the appeal period. The Counsel added that the subsequent adjudication process was declared null and void by the District Adjudication Officer vide the decision of 15th March, 1985 in objection No.153 of 1984 from which the stranger filed appeal No.1778 of 1986 both of which were dismissed in favour of the Defendant/Applicant who retained ownership as previously determined in DMCC No. L47 of 1974.

11) As for review, the Counsel for the Defendant/Applicant submitted that there are sufficient grounds set out in the application to warrant review and setting aside of the *ex parte* judgement and decree.

12) On the other hand, the Counsel for the Plaintiff/Respondent submitted that from the averments by both parties, four (4) key issues arise for determination. These are: -

(a) Whether or not the instant application is fatally incompetent.

(b) Whether or not the instant application is *res judicata*.

(c) Whether or not the instant application meets the threshold for grant of orders for review.

(d) Whether or not the orders sought should issues.

13) On whether or not the instant application is fatally incompetent, the Counsel cited **Order 9 Rule 9 of the Civil Procedure Rules** which provides as follows: -

“when there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, such change or intention to act in person shall not be effected without an order of the court-

(a) Upon an application with notice to all the parties; or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

Arising from the above, the Counsel submitted that the Applicant is represented by the firm of Mwanja Mbithi & Company Advocates who came on record by way of notice of appointment of Advocates dated 15th August, 2019 without leave of the court or even consent by the outgoing advocate. The Counsel termed the process as blatant disregard of the law which is couched in mandatory terms and consequently, the firm remains improperly in the matter as any pleading they have filed is inconsequential. The Counsel relied on the case of **Stephen Mwangi Kimote vs. Mutata Sacco Society [2018] eKLR** where the Court ruled thus: -

“As per Order 9 Rule 9 the correct procedure to be followed in case of a dismissed suit was to seek leave to come on record, then file and serve the notice of change of Advocates and then file the application to set aside the orders of the Court. In the present case the Applicant’s Counsel filed a notice of change of Advocates dated 04/04/2018 without leave of the Court, together with an application dated 04/04/2018 to set aside the dismissal orders of the Court then later on 09/04/2018 Counsel for the Applicant filed an application to seek leave to come on record. This clearly offends the express provisions of Order 9 rule 9. The application for leave to come on record having been filed much later than the one for seeking to set aside the orders cannot be heard together as per order 9 rule 10. The procedure set out above is mandatory and thus cannot be termed as a mere technicality.

The application has merit and is hereby granted. Consequently, the Notice of Change of Advocate dated the 4th April 2018 together with the Notice of Motion of even date are struck out with costs to the Respondent.”

14) On whether or not the instant application is *res judicata* the Counsel submitted that the orders sought herein are identical to the ones in the application dated 12th October, 2018 which was determined on 17th July, 2019. Consequently, the instant application is *res judicata*. The Counsel relied on the case of **Abdullahi Mohamed Sheikh vs. Gulf African Bank Ltd [2018] eKLR** where the Court ruled that: -

“I have given due consideration to the Preliminary Objection and the arguments made herein in respect thereof. In Section 7 of the Civil Procedure Act, the res judicata principle is set out thus:

“No Court shall try any suit or issue in which the matter in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title...and has been heard and finally decided by such Court.”

[24] In an explication of this provision in Bernard Mugo Ndegwa vs James Nderitu Githae and 2 others [2010] eKLR the Court distilled the applicable considerations to be as follows:

[a] The matter in issue must be identical in both suits

[b] The parties in the suit must be substantially the same.

[c] There is concurrence of jurisdiction of the Court.

[d] That the subject matter is the same and finally,

[e] That there is a final determination as far as the previous decision is concerned.

[25] In the instant matter, the issue is not in connection with two suits; but applications in the same suit; and since it is trite that res judicata applies to applications in the same manner it does to substantive suits, the same considerations apply. Thus, it goes without saying that all the four applications herein are between the same parties and that there is concurrence of jurisdiction of the Court. The only issue that requires consideration is whether the subject matter is the same, and whether a final determination has been made in connection therewith.”

15) On whether or not the instant application meets the threshold for grant of the orders for review, the Counsel cited **Order 45 Rule 1 of the Civil Procedure Rules** which provides: -

“(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 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.”

The Counsel pointed out that the Plaintiff/Respondent asserts that the Ministers Appeal No.1778 of 1986 was referred to court by the then Deputy County Commissioner as per the letter dated 16th October, 2018 marked as BMM1 in paragraphs 7(ii) of the replying affidavit. The Counsel added that the Adjudication Tribunal was divested of jurisdiction in the year 2002 after the Defendant/Applicant caused the land to be registered in his name while the matter was still pending and this explains why the Deputy County Commissioner referred the matter.

16) The Respondent contends that he has locus standi by virtue of the grant ad litem issued on 25th October, 2012. The Counsel pointed out that although the grant states that it is limited for purpose of proceeding with the appeal, as shown, the said appeal was not determined with finality but was instead referred to court thus the Plaintiff/Respondent rightfully brought the present suit.

17) It was also submitted that the Defendant/Applicant is the one who is misleading the court as he has always stated in previous pleadings that he was not aware of the proceedings leading to the judgement on record whereas it is clear that he was all aware of these proceedings.

18) In reply to the Plaintiff's/Applicant's submissions, the Counsel for the Defendant/Applicant reiterated that M/s Mwangangi & Associates coming on record for the Defendant after the default judgment to set aside did not need leave or consent as there was no previous advocate when judgement was entered. The Counsel added that the same applies to Mwanja Mbithi & Company Advocates coming to replace Mwangangi & Associates in that the former Advocates had not been on record before or at the entry of the judgement so as to be entitled to protection under Order 9 Rule 9 of the Civil Procedure Rules. The Counsel termed the case of Stephen Mwangi Kinute vs. Murata Sacco Society as distinguishable and not applicable to this case.

19) It was further submitted that this application is not *res judicata* and does not fall under Section 7 of the Civil Procedure Act since it is brought under totally different grounds, reasons and issues that have not been before the court nor were they the subject of the previous application and ruling. The Counsel pointed out that the dismissed application did not pronounce the final respective rights of the parties to the suit property and thus cannot be termed as a final judgement.

20) As for review of the judgement, the Defendant's/Applicant's Counsel submitted that it is mandatory whenever it is pointed out to the court after judgement, the suit was incompetent and void that the court lacked the requisite jurisdiction.

21) Having read the submissions that were filed by the Counsel on record for the parties herein, I would agree with the Defendant's/Applicant's Counsel that the application has raised the issue of whether or not the Plaintiff/Respondent had the capacity to sue since the letters of administration ad litem that he used to file this suit were limited for purposes of the proceedings in the Minister's Land Appeal case number 1778 of 1986. Whether or not the said appeal was not determined with finality as the Plaintiff/Respondent contend, I hold that it was upon him to obtain the necessary letters of administration ad litem to enable him file this suit.

22) The Defendant/Applicant contends that the aforementioned Minister's appeal was determined on 23rd February, 2017 while the Plaintiff/Respondent disputes this fact. The Defendant/Applicant further contends that the suit herein is *res judicata* in view of the judgment dated 11th February, 1975 in Uaani DMCC No.L47 of 1974. He further contends that the appeal number 56 of 1980 which the Plaintiff relies on was filed by a stranger over a period of 6 years outside the appeal period and in my file. It is necessary to give the Defendant/Applicant a chance to file his defence and counterclaim so that the issues raised can be determined with finality.

23) I would agree with the Defendant's/Applicant's Counsel that orders 9 Rule 9 of the Civil Procedure Rules does not apply herein since there was no advocate on record when the judgement sought to be set aside was entered. Thus it was not necessary for M/s Mwangangi & Associates nor Mwanja Mbithi & Co. Advocates to seek leave on consent before filing their respective applications.

24) From the foregoing, it is clear to me the application herein raises sufficient grounds to warrant review and setting aside of the judgement dated 04th July, 2018. In the circumstances, I hereby proceed to allow the application in terms of prayers 2(c), 3 and 4.

Signed, dated and delivered at Makeni via email this 29th day of April, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi

MBOGO C.G, JUDGE,

29/04/2020.