



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 68 OF 2013

RODGERS KINDIA KAIBUNGA.....PLAINTIFF

-VERSUS-

ESTHER KYELI.....DEFENDANT

AND

ESTHER NZINGILI SIM APPLICANT

RULING

(Application for review and for reopening the case; suit having been filed by the registered owner of the suit land against a person in occupation for eviction; the defendant being grandmother to the applicant; applicant claiming that the property was held in her trust or in trust for her late mother; if so, this would be a separate cause of action; applicant having had the opportunity to enter into the suit if she needed to do so but not proceeding to act; no new evidence and no demonstration of a mistake or error apparent on the face of the record; application dismissed with costs)

1. The application before me is that dated 21 March 2019 filed by one Esther Kyeli. She seeks the following substantive orders :-

- i. Spent
- ii. Spent
- iii. That the honourable Court do review its judgment dated 15/2/2019, the proceedings and all consequential orders and the same be set aside.
- iv. That the applicant be enjoined as 2nd defendant herein and be allowed to file a Memorandum of Appearance and Statement of Defence within a stipulated period that the court may order.
- v. That Antony Grahame Sim be enjoined as a party under Order 1 Rule 10 of the Civil Procedure Rules in whatever terms that the court may deem fit and refer him as either 3rd defendant, interested party, or 3rd party.
- vi. That the plaintiff/respondent be ordered to amend his plaint and include the applicant as the 2nd defendant and Antony Grahame Sim as the court may order.
- vii. (an injunction pending suit if the application is allowed)
- viii. (an order for a restriction to remain in the suit land if the application is allowed)

The application is supported by the affidavit of the applicant and is opposed by the plaintiff.

2. To put matters into context, this suit was commenced through a plaint which was filed on 23 April 2013. The plaintiff sued one Esther Kyeli, as sole defendant, claiming that she was illegally in possession of the land described as Plot No. 1468 (Original No. 597/14) North of Mtwapa Creek, registered as CR No. 22432 (the suit land). His claim was that he purchased this land from one Loise Muthoni Mucungu in April 2008, and in his suit, he wanted the defendant to give vacant possession or be evicted from the suit land. The defendant filed defence wherein she pleaded that she lives on the suit land with her grandchildren and that she never gave consent for the sale of the suit land. Issues

having been joined, the matter proceeded for hearing.

3. I have gone through the evidence, and I have gathered that the defendant is the mother to one Naomi Nzisiva who died in January 2005. Naomi Nzisiva was married to Anthony Grahame Sim in the year 1998. The suit land appears to have been purchased and developed while Naomi and Grahame were married. The land was however never transferred into either of their names but was transferred directly into the name of Loise Muthoni in December 2004 following the directions of Grahame to one who sold to them the suit property. At that time, Naomi and Grahame appear to have been having differences and were not living together. After the death of Naomi, the suit land was sold, in the year 2008, to the plaintiff and the plaintiff became registered as its proprietor. There were efforts made by Grahame and the plaintiff to have the defendant move out of the suit land but these efforts did not bear fruit and that is what led the plaintiff to file this suit. The matter proceeded for hearing before Anne Omollo J, my predecessor in the station. Significantly, at the hearing of the suit, Grahame testified in support of the plaintiff's case and asserted that the defendant (who happens to be his mother in law) has no right to be on the land. In her evidence, the defendant seemed to hinge her defence on the assertion that the suit land also belonged to her late daughter (Naomi) and she therefore has a right to remain in the same.

4. Having heard the matter, Omollo J, delivered her judgment on 15 February 2019. She found that the defendant came to live with Naomi before her demise, apparently because she was sick, and thus the defendant came to take care of her. The learned Judge did not believe that the defendant has any interest in the suit land and did not find any fault with the title of Loise Muthoni nor the transfer of the same to the plaintiff. She therefore allowed the plaintiff's suit.

5. It is after the said judgment that this application was filed and it will be noted that it was filed just under 40 days of the judgment.

6. In her application and supporting affidavit, the applicant has stated that she is the daughter of Naomi and Grahame. She avers that the suit property was matrimonial property of Naomi and Grahame, and thus the transfer to Loise, during the lifetime of Naomi, was fraudulent. She argues that Loise therefore had no good title to transfer to the plaintiff. She has averred that the property was sold without there being spousal consent, nor consent from her, as a family member. She has deposed that at the time the property was sold, her mother was very ill and incapable of giving consent. She has contended that Loise got the suit land without any consideration being paid and she was holding the same in trust for her father (Grahame) and late mother (Naomi). She avers that her late mother had a beneficial interest, as spouse, and she herself has a beneficial interest, as her child. She contends that the property could not be sold without the consent of her mother or herself. She has also questioned the sale which she states shows that the selling price was KShs. 700,000/= yet it is valued at KShs. 10 Million and she has annexed a valuation of the same. She has stated that she has been living on the suit land since she was 7 years old and knows no other home. She has deposed that her father deserted the suit property 2 years before the death of her mother and that her father's intention is to disinherit her from the suit property. She has contended that she was not aware of this case until after judgment, and that her interests were never determined, and that she is also facing eviction which will render her destitute. She has averred that there is discovery of new and important party, matter and evidence, which was not placed before the Judge for the court to reach a just judgment. She believes that Grahame is a person of interest in the matter and thus should be included in the suit since adverse orders may be made against him.

7. The plaintiff has filed a replying affidavit to oppose the motion and there is also an affidavit filed by Grahame. In his affidavit, the plaintiff has argued inter alia that there is no discovery of any new facts as all the facts referred to by the applicant were brought out in evidence. He has pointed out that the learned Judge found that the suit property was never matrimonial property while the deceased (Naomi) was alive. He has averred that the suit property never formed part of the estate of Naomi and the applicant does not enjoy any overriding interest nor has she demonstrated a constructive trust. On his part, Grahame has deposed inter alia that he does not wish to be enjoined to this case and pointed out that he testified in the case. He deposed that the suit was filed when the applicant was 22 years old and she never bothered to apply to be enjoined in the case.

8. Nothing was filed by the defendant, either in support of, or in opposition, to the application. Counsel were invited to file written submissions but only counsel for the applicant and counsel for the plaintiff filed submissions. I have taken these submissions into account before arriving at my decision.

9. The application before me is brought pursuant inter alia to the provisions of Order 45 Rule 1(b) and 2, and Order 1 Rule 9 and 10. Order 45 applies in applications for review, whereas Order 1 Rule 9 and 10, are provisions for joinder of parties to a suit where their presence is deemed to be necessary. Order 45 provides for the requirements needed in order for one to successfully apply for review. It provides as follows :-

1. Application for review of decree or order [Order 45, rule 1.]

(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 a 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

10. It will be seen from the above, that a person can apply for review, if :-

- i. he discovers new and important matter or evidence, not available when the order was made; or
- ii. there is some mistake or error apparent on the face of record; or
- iii. for any sufficient reason.

11. I have carefully gone through the application and even the submissions of counsel for the applicant. I do not see any new evidence that the applicant proclaims was not presented to court or was not available to the court at the time the judgment was made. All that the applicant has done is to rehash the evidence that was presented. She has of course referred to the relationship between Grahame and her late mother, and how the defendant came to be in possession of the suit land. She has questioned the transfer of the land to Loise and the subsequent sale to the plaintiff. She has asserted that the property was matrimonial property between Naomi and Grahame. What is new here ? I do not see anything new. All these were facts/ evidence and/or arguments presented by both the plaintiff and defendant during trial, and from the same, the court made a determination. There is absolutely no new evidence that the applicant is trying to present. If there is anything new, I am also not persuaded that this is evidence that was not available to the defendant, and could not be presented by her during trial of the suit, and further, I do not see how such evidence would change the course of the matter.

12. The applicant appears to suggest that because she is a child of Grahame and Naomi, then her consent to the sale was required. If the applicant feels that this property was held in her trust, nothing stops her from filing a separate suit to claim as much, for that would be a separate cause of action. From the pleadings, evidence, and judgment, and what has been presented before me in this application, I am not persuaded that the applicant has established any mistake apparent on the face of the record. If there is any mistake, which the applicant feels that the learned trial Judge may have made, that is a mistake that can be raised on appeal. I am aware that counsel for the applicant relied on the case of *Jane Wanjiru Kiarie & Another vs Maria Wanjiku & Another (2008) eKIR*, where the court allowed a suit by two daughters against their parents for entitlement to land. The defendant in this case was not a daughter to the plaintiff and the authority referred to me therefore cannot apply. If the applicant is of the view that this authority applies to her situation, as I have said, nothing stops her from filing suit, which can be determined on its merits.

13. On the application to have the case reopened and for the applicant and Grahame to be enjoined in the suit, I observe that this is partly based on the claim that the applicant did not know of the suit until judgment. I don't believe her. The defendant is her grandmother, and if at all she lives with her as she alleges, I do not see how the fact of this case could have escaped her. If she wanted to become a litigant in the matter, she had all the time and liberty to do so while the case was on going. I further do not see the place of Grahame in the suit. He is not the current owner of the suit land. Even assuming that he was enjoined in the matter, I wonder what rights and obligations are supposed to be granted or imposed upon him. Let us not forget that this was a suit by the current owner of the suit property specifically aimed at having an order of eviction against Esther Kyeli. As I have said, if the applicant felt that it was necessary for her to be enjoined, she had all the time to do so and did not have to wait until judgment has been delivered.

14. The applicant argued that Grahame neglected her when she was young. The applicant is now a fully grown adult. From my calculation, if she was 7 years in the year 1997, she is now about 30 years and she filed this application when she was 29 years old. She cannot claim that Grahame still has a legal obligation to now fend for her and she cannot claim that she is entitled to the property of Grahame, while Grahame is still alive. Does she want this case reopened so that she can argue a case of maintenance against Grahame ? If that is her intention, then this would be the wrong case within which to make those assertions. If she wants to argue that the suit property was also property that was in the trust of Naomi, that to me would be a distinct cause of action, that is if it has not already been determined by the judgment herein. In any event, the applicant cannot sue on behalf of Naomi, without her first being a legal representative of her estate, and she has not claimed to be so within this application. There is really nothing, which would entitle this court to reopen this suit. What the applicant now wants to present to court is a completely different cause of action, and as I have said a couple of times before, nothing stops her from filing suit.

15. From the above discourse, it will be seen that I am not persuaded that there is any substance in this application. But before I close, I need to say one last word. The applicant is daughter to Grahame. I am always saddened when I see children fighting their parents in court. These are the sort of matters that are best resolved amicably within a family setting. I would advise the applicant to go and make peace with her father. The defendant should also try and make peace with her in law (Grahame).

16. As for this application, it is hereby dismissed with costs to the plaintiff. There were interim orders granted pending hearing of this application. The same are hereby vacated.

17. Orders accordingly.

DATED AND DELIVERED THIS 26TH DAY OF MAY 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA