



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO.79 OF 2006**

**1. STEPHEN RAPHAEL GARAMA.....PLAINTIFF**

**=VERSUS=**

**1. ROBERT BAYA MRAMBA**

**2. JOHN GONA KALAMA**

**3. SHADRACK JUMA KALU**

**4. CHARO PEPO**

**5. CHRISPUS GONA KALAMA**

**6. FRANKLIN GAMBO MWAGAMBO**

**7. SAMUEL KITSAU LUGHANJE**

**8. LUWALI MWABIRANGI**

**9. HAJIRI MAHENZO YAA**

**10. MARGARET KAZUNGU.....DEFENDANTS**

**RULING**

**Introduction**

1. There are two Applications before me: the one dated 8<sup>th</sup> September, 2015 by the Plaintiff and 11<sup>th</sup> April, 2016 by the Defendant.

2. In the Application dated 8<sup>th</sup> September, 2015, the Plaintiff is asking the court to punish the defendant for contempt of court by way of committal to civil jail.

3. In the Application dated 11<sup>th</sup> April, 2016, the Plaintiff is seeking for a stay of execution of the Judgment and to set aside the said Judgment.

**The Plaintiff's case:**

4. The Plaintiff's Application for contempt is premised on the ground that this court delivered its Judgment on 15<sup>th</sup> April, 2013 in his favour; that the Defendants were aware of the Judgment; that the Defendants have refused to give possession of the suit premises and that the Application should be allowed.

5. In response to the said Application, the 2<sup>nd</sup> Defendant deponed that the Applicant ought to have extracted a decree and thereafter apply for execution; that they have no other home and that they have filed an Application to set aside the said Judgment.

**The Defendant's case:**

6. Other than responding to the Plaintiff's Application for contempt, the Defendants filed an Affidavit in support of their Application to set aside the Judgment of this court.

7. In their Supporting Affidavit, the 2<sup>nd</sup> Defendant deponed that they have since established that the Plaintiff fraudulently acquired the suit property; that the Title Deed should have been issued to Baya Mwandonga Baya in trust for his family and not the Plaintiff and that the new discoveries grants the Applicants the right to review the Judgment.

8. The advocates for the Plaintiff and the Defendants filed brief submissions which I have considered.

**Analysis and findings**

9. I will deal with the Defendants' Application dated 11<sup>th</sup> April, 2016 first.

10. The Defendants are seeking to set aside the Judgment of this court that was delivered by Meoli J on 15<sup>th</sup> April 2013.

11. The Application is premised on the grounds that the Defendants have now obtained evidence to show that the Plaintiff was fraudulently registered as the proprietor of the suit property.

12. According to the Defendants, they have now established that the Title Deed in question should have been issued to Mr. Baya; that Mr. Baya neither signed a sale agreement nor any transfer in favour of the Plaintiff and that the sale agreement and the transfer that the Plaintiff relied on during trial were all forgeries.

13. Indeed, in its Judgment, the court found as a fact that the Plaintiff purchased the suit property from Mr. Baya and that the Defendants trespassed on the land.

14. In the said Judgment, the court observed that the Defendants had alleged that the suit property was fraudulently registered in favour of the Plaintiff.

15. In the Judgment, the court found that the Defendants had not particularised the alleged fraud and further that the Defendants did not adduce evidence of the alleged fraud involving the Plaintiff.

16. The court went on to dismiss the Defendants' claim for having not proved that the Plaintiff acquired the title to the suit property fraudulently.

17. The Defendants now allege that they have come across documents showing that Mr. Baya never sold the suit property to the Plaintiff. The Defendants have annexed on the Supporting Affidavit the alleged forged sale agreement between the late Mr. Baya and the Plaintiff and the Transfer document.

18. It is obvious that the issues being raised by the Defendants in the current Application are the same issues that were before the trial court.

19. Having not proved the allegations of fraud, which were not particularised in their Defence, the Defendants cannot re-open the case on the ground that they are now in possession of the sale agreement and the Transfer documents.

20. Having failed to prove at trial that indeed the Plaintiff was fraudulently registered as the owner of the suit property and having failed to show to this court that they could not have obtained the documents that they have exhibited at trial even after due diligence, I find and hold that the Defendants have not established the grounds upon which the court can review or set aside its Judgment.

21. The Defendants' Application is therefore unmeritorious.

22. The Plaintiff has asked this court to find the Defendants in contempt of a decree of the Judgment of the court.

23. In my view, once a matter has been heard on merit and a Judgment has been delivered, it is for the Plaintiff to proceed with the execution of the Decree pursuant to the provisions of the Civil Procedure Rules.

24. The court cannot be called upon to commit the Defendants for contempt as a way of executing the decree.

25. For those reasons, I dismiss both the Plaintiff's Application dated 8<sup>th</sup> September, 2015 and the Defendant's Application dated 11<sup>th</sup> April, 2016.

26. Each party shall bear his own costs.

Dated, signed and delivered in Malindi this 4<sup>th</sup> day of **November**, 2016.

**O. A. Angote**

**Judge**