



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 103 OF 2018**

**EDWIN KIPKURGAT KENDUIYWO.....PLAINTIFF**

**VERSUS**

**MARK KIPCHUMBA MARITIM.....1<sup>ST</sup> DEFENDANT**

**DANIEL KIPKOECH KURGAT.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The applicant in the application dated 5/5/2020 is the plaintiff. He has brought the application under the provisions of sections 1A, 1B, 3A and 63(e) of the **Civil Procedure Act** and **Order 22 Rule 6** of the **Civil Procedure Rules**.
2. He is not satisfied with the ruling of this court dated 28<sup>th</sup> March 2019 hence the instant application, seeking orders of review and or setting aside of that ruling and order.
3. The ruling and order he seeks to have reviewed emanates from his application dated 4/2/2019 seeking a temporary injunction restraining the 1<sup>st</sup> defendant from interfering with the suit land known as **LR Chepsiro/Kibuswa Block 1/Kelchinet/238** pending the hearing and determination of the main suit.
4. During the hearing of that earlier application it transpired that the 1<sup>st</sup> defendant allegedly without the plaintiff's consent entered into a land sale agreement with the 2<sup>nd</sup> defendant, who is the plaintiff's biological son, over the suit land pursuant to which agreement the 1<sup>st</sup> defendant occupied the suit land and conducted some developments thereon.
5. That earlier application was dismissed with costs. Some of this court's findings on that application were that the land is registered in the plaintiff's name; that the 1<sup>st</sup> defendant is in occupation of the suit land; that the 1<sup>st</sup> defendant believed that the plaintiff knew of his dealings with his son regarding the land and that the son was only disposing of what the father had given him; that the agreements between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant were witnessed by the plaintiff; that a plausible explanation had therefore been given by the 1<sup>st</sup> defendant as to why he was in occupation of the suit land; that an order of temporary injunction in the circumstances would have the effect of a mandatory injunction which should only issue in a very limited number of cases; that in the earlier application the plaintiff did not attempt to injunct his son and so he remained free to dispose of portions of the same land to other third parties; that the plaintiff had therefore failed to establish that he has a prima facie case or that he would suffer any loss that can not be compensated for by way of damages.
6. The conditions for the grant of an order of review are set out in order 45 rule 1 of the **Civil Procedure Rules** which the plaintiff has failed to rely on. However that is merely a technicality and this court is inclined to overlook it in favour of disposing of the application on its merits.
7. The main issue for determination in the instant application is whether the judgment of this court should be reviewed and set aside on the basis of the grounds advanced by the applicant.
8. **Section 80** of the **Civil Procedure Act** 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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”**

9. **Order 45 rule 1** of the **Civil Procedure Rules** states as follows:

**“(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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”**

10. According to the above provisions review of a judgment decree or order is therefore possible only where there is:

**(a) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant’s knowledge or could not be produced by him at the time when the decree was passed or the order made;**

**(b) Some mistake or error apparent on the face of the record, or**

**(c) any other sufficient reason.**

11. Has the applicant brought himself within the purview of the provisions of the law set out above to warrant a grant of the orders of review in his favour?

12. An examination of the instant application and the affidavit reveal that the grounds the plaintiff relies on are as follows:

**(a) That the court’s verdict in the application was biased and unfair;**

**(b) That the defendants would not suffer any prejudice;**

**(c) That the plaintiff ought to be granted a fair hearing.**

**(d) That the defendants are not the valid owners of the suit land;**

**(e) That the court did not consider the plaintiff’s issues of law and fact at all.**

#### **DETERMINATION**

13. The plaintiff filed his submissions on **12<sup>th</sup> June 2020**. I have perused the court file and found no submissions filed on behalf of the defendants.

14. Regarding the first and third grounds of bias and unfairness of the court’s ruling and order and failure to be granted a fair hearing, it would be contrary to procedure and good sense to have the instant application lodged before the same court that is alleged to have been biased and unfair. The moment bias and lack of a fair hearing are alleged by a litigant and the impugned decision has already issued, that *per se* renders the matter to be fit for an appeal to a higher court and can not be dealt with by the court that gave the ruling or order.

15. Concerning the ground that the defendants would not suffer prejudice the plaintiff has failed to demonstrate that that would be the case if the orders sought in the application of **4/2/2019** had been granted. It is not possible for this court to see how the **1<sup>st</sup>** defendant would not be inconvenienced if he is already in possession of the land. This court relied on that fact of possession to rule that a grant of the orders of injunction in the application would result in a mandatory injunction which the plaintiff had not justified. That ground is not a proper ground in this application.

16. As to whether or not the defendants are the owners of the suit land the court considered this issue and made findings that supported its decision that the application for injunction against the **1<sup>st</sup>** defendant alone lacked merit. The court’s reasoning is contained in the impugned ruling. It is clear that the **2<sup>nd</sup>** defendant being the plaintiff’s son would not be affected by any order of injunction sought since the plaintiff had crafted the prayers in that way. If the defendants are truly on the same footing in this matter this court finds no reason why one of them should be spared the effects of an order of injunction as in the earlier application. The discrimination exhibited by the plaintiff thus reeked of some kind of injustice, for the point of commencement of his dispute with both defendants should have been whether the act of sale by his son to the **1<sup>st</sup>** defendant was proper. It also seemed to lend credence to the allegation that the plaintiff had already granted the **2<sup>nd</sup>** defendant the land in which case his *locus standi* in this suit becomes a triable issue.

17. In this court’s view there appears to be no ground in the application that falls under the first two categories set out in **Order 45 Rule 1** of the **Civil Procedure Rules**, that is, discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant’s knowledge or could not be produced by him at the time when the decree was passed or the order made or a mistake or

error apparent on the face of the record.

18. Under the last category of “*any other sufficient ground*”, this court notes that for such ground to warrant the grant of an order of review it must be analogous or *ejusdem generis* to the first two grounds. (See the persuasive decision in **Stephen Gathua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR.**)

19. I have examined the grounds set out in the application and found none of them to be so closely connected with the first two set out in **Order 45 Rule 1**, that is, discovery of new and important matter or evidence error or mistake on the face of the record.

20. The last factor that must be considered in the instant application is the issue of delay. A review application has to be filed without unreasonable delay. The impugned ruling was read on the **28<sup>th</sup> March 2019** and the application for review was filed on **14/5/2020**, a period of more than one year later. In **Stephen Gathua Kimani case (supra)** the court, citing other earlier decisions, observed that a delay of three (3) months in filing a review application was inordinate. The delay in filing the instant application is also inordinate.

21. Consequently I find that the application dated 5/5/2020 has no merit and the same is hereby dismissed with costs to the respondents.

**Dated signed and delivered at Kitale via electronic mail on this 2<sup>nd</sup> day of July, 2020.**

**MWANGI NJOROGE,**

**JUDGE, ELC KITALE.**