



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CIVIL CASE NO. 2003 OF 1994

EXCEL DEVELOPERS LTD.....PLAINTIFF

VERSUS

THE MUNICIPALITY OF NYAHURURU & 69 OTHERS.....DEFENDANTS

RULING

The Defendant filed an application dated **4th November 2013** brought under **Orders 45(1) and 50(1) of the Civil Procedure Rules** seeking orders that Judgment entered on **24th June 2004** and the decree issued on **13th September 2013** be reviewed, and the Court cancels the Certificate of Lease for **L.R. No. Nyandarua/Nyahururu Municipality 6/577** having found its issuance illegal.

The application is premised on grounds outlined in the application and supported by an affidavit sworn by **C. O. Jamba**, the Administrator, Laikipia West Sub-County. It is deposed that the Judgment was in favour of the Defendant wherein the Court found that the title issued to the Plaintiff and the survey plans used to demarcate the suit property were found to have been obtained fraudulently. However, that the Defendant's previous advocate failed to pray for an order of cancellation of the title and survey map though the Court had dealt with the issue of propriety of the allocation and the validity of the Certificate of Lease issued to the Respondent. With the Plaintiff's title not cancelled, it is deposed that the Defendant cannot carry out survey and be issued with new titles. Further, that it was not until **September 2013**, when undertaking the survey process that they became aware of the challenge posed by the Judgment. The deponent stated that the orders sought are not contentious since the issues of ownership and fraud were fully addressed in the said Judgment and no appeal has been preferred.

This application was served by way of substituted service as the Defendants demonstrated their efforts to effect personal service and service vide registered post with no success. An attempt was also made to serve the Plaintiff's advocate **Ms. Gatheru Gathemia & Co. Advocates** which was declined, the said firm stating in a letter dated **25th February 2014**, that they had ceased acting for the Plaintiff over 10 years prior. As directed by the Court, the Plaintiff was served through an advertisement in the **Daily Nation Newspaper of Monday, 13th October 2014**. Despite the service, the Plaintiff did not file any response thereto.

The Defendant filed submissions dated **1st December 2014** in further support of the application. It was submitted that the power to order a review is discretionary and that among the grounds for review of an order was where a party demonstrated that there has been discovery of sufficient reason. Counsel cited the case of ***Ngororo v Ndutha & Another (1994) KLR 402*** where the Court observed that sufficient reason could only be deduced from the facts and circumstances of a particular case. It was submitted that the

averments made by the Defendant fit the criteria for sufficient reason and by the Court ordering a review would serve a useful purpose.

This application has been brought under **Order 45 Rule 1 of the Civil Procedure Rules** which gives any party aggrieved by a decree or order of the Court to apply for review to the Court which passed the decree or made the order. The rule provides for grounds upon which the application can lie, to wit: (1) discovery of new and important matter or evidence which, or (2) on account of some mistake or error apparent on the face of the record, or (3) for any sufficient reason. It is also provided that such an application be made without unreasonable delay.

The Defendant seeks an order that the Judgment of this Court be reviewed to expressly state that the title **L.R. No. Nyandarua/Nyahururu Municipality 6/577** in favour of the Plaintiff be cancelled. It is their case that they are unable to survey the property for purposes of issuance of new a title. In support of the application, the Defendant annexed a copy of the certificate of title and lease granted by the Government in favour of the Plaintiff for a term of 99 years from **1st May 1992**. I have carefully read the Judgment where Ransley J. (as he then was) rendered himself as follows (Pg.8 & 9):

“With regard to the evidence I accept the evidence of the Defendant’s witness that prior to 1999 the suit premises had been designated as a core-development for the purpose of low cost housing. I also find that in 1990 there was placed in the ground beacons delineating the boundaries of these plots some 69 or so and that sewerage was in place. The Plaintiff’s witness said they saw no development on the land but I find that had they carried out investigation, which a prudent purchaser should do, they would have become aware of the infrastructure put in before 1992, when the Plaintiff’s witness saw the land. Had the Plaintiff made inquiries at the council it would become aware of the core scheme and that plots had at that date already been allocated. With regard to allegations of fraud and illegality alleged in the Plaint, I find that the Plaintiff has failed to prove the same. What the 1st Defendant did in allocating the land was in accordance with its duties as a trustee under the constitution. In my view the allocation of land to Pabenest Company was unlawful and outside the power of the Commissioner of Lands...”

The learned Judge proceeded to dismiss the Plaintiff’s claim with costs. It is noteworthy that the Plaintiff’s claim is that it purchased the property in 1992 from Pabenest Ltd, which the Court found that the allocation in its favour was unlawful. I have quoted this entire passage from the Judgment to highlight the trail of thought and finding of the Court. In view of the finding that the allocation to the Plaintiff’s predecessor in title was unlawful, there is no doubt in my mind that it followed therefore that the Plaintiff could not have acquired good title.

There has been considerable delay in making this application noting that Judgment was entered in 2004. However, the application is unopposed as the Plaintiff failed to file a response though served. Consequently, there is no claim of prejudice occasioned as a result of the delay. Further, and more importantly, the Plaintiff has not challenged the Court’s decision.

I am satisfied that the Defendant has shown sufficient reason to warrant the review of the decree emanating from the Judgment of **24th day of June 2004**. The application is hereby allowed on the terms that the Certificate of Lease for **L.R. No. Nyandarua/Nyahururu Municipality 6/577** in favour of the Plaintiff is hereby cancelled.

It is so ordered.

Dated, Signed and Delivered this **10th** day of **July, 2015**

L.GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff/Respondent

M/s Maina holding brief Thiongo for the Defendants/Applicant

Lerionka: Court Clerk

L.GACHERU

JUDGE