



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**MALINDI ELC CASE NO. 76 OF 2018**

**KAHASO MWAROME CHIBO.....PLAINTIFF**

**VERSUS**

**KATANA RIBA KAI**

**ALFRED SIFA DENA**

**FLORENCE TABU BIRYA..... DEFENDANTS**

**RULING**

1. For determination before me is the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Notice of Motion dated and filed herein on 17<sup>th</sup> July 2019. By the said application the two Defendants urge this Court to set aside, vary and or discharge the ruling delivered herein on 26<sup>th</sup> June 2019 and to instead proceed to dismiss the suit for want of prosecution.

2. The application which is supported by an affidavit sworn by the 2<sup>nd</sup> Defendant Alfred Sifa Dena is premised on the grounds that: -

*i) The 1<sup>st</sup> Defendant is not the owner of Plot No. Kijipwa Settlement Scheme and as such, the Plaintiff has no spousal rights;*

*ii) The registered owner of the said Plot is James Mbandi Kinyungu and the Plaintiff therefore obtained the orders issued herein on 26<sup>th</sup> June 2019 through fraud and misrepresentation;*

*iii) The Court lacks jurisdiction on the grounds of locus standi, sub judice, res judicata and or by virtue of Section 30 of the Land Adjudication Act; and*

*iv) Unless the orders are set aside, varied, discharged and or reviewed, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants shall suffer prejudice which cannot be compensated by way of monetary damages.*

3. The application is however opposed. In a Replying Affidavit filed herein on 20<sup>th</sup> August 2019, Kahaso Mwarome Chibo (the Plaintiff) avers that the present application is hopelessly incompetent, misconceived and amounts to an abuse of the Court process.

4. The Plaintiff avers further that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein fully participated in the proceedings leading to the hearing of the Plaintiff's Motion dated 6<sup>th</sup> April 2018 that led to the Ruling they want to have reviewed or set aside and their application fails to meet the threshold for granting the orders sought.

5. The Plaintiff further accuses the 2<sup>nd</sup> Defendant of perjury for having sworn two totally different affidavits under oath on the same subject matter and urge the Court to punish him by dismissing the present application.

6. I have perused the application by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the response thereto by the Plaintiff. Order 45 of the Civil Procedure Rules is explicit that a Court can only review its orders if the following grounds exists: -

*a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or*

*b) There was a mistake or error apparent on the face of the record; or*

*c) There were other sufficient reason to warrant a review.*

7. Arising from the foregoing, it is clear that the Court's power to review its orders can only be exercised on 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 order was made.

8. The main reason that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein apply for a review of the orders issued herein on 26<sup>th</sup> June 2019 is their contention that the 1<sup>st</sup> Defendant is not the owner of the suit property and that the Plaintiff cannot therefor have spousal rights over the suit property. The 2<sup>nd</sup> Defendant who has sworn the affidavit in support of the said application does not however explain anywhere in the 17-paragraph affidavit how and when they came to learn that the suit property is instead registered in the name of one James Mbandi Kinyungu.

9. It is noteworthy that the two Defendants did participate in the proceedings leading to the issuance of the impugned orders. In a Replying Affidavit sworn by the same 2<sup>nd</sup> Defendant and filed herein on 28<sup>th</sup> May 2018 in response to the Plaintiff's application for injunction, he swears that the suit property belongs to the 1<sup>st</sup> Defendant and that it is the 1<sup>st</sup> Defendant who agreed to sell him one acre of the suit property.

10. The 2<sup>nd</sup> Defendant/Applicant goes ahead to enumerate various actions taken with the 1<sup>st</sup> Defendant as the owner of the property to ensure that the transfer of the property to his name met the legal requirements and castigates the Plaintiff for turning up some four years down the line to claim ownership of the property as the 1<sup>st</sup> Defendant's spouse.

11. It is therefore surprising that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants now purport that the 1<sup>st</sup> Defendant from whom they had acquired the property is not the owner thereof. I think that is what is called double-speak. From one side of the mouth, the Applicants tell the Court one story while from the other side and without bothering to reconcile the former position, they seek to tell a different story.

12. As it is were an application for review will only be allowed on strong grounds, more so, if its effect is to re-open the application or case afresh. In the instant matter, no sufficient cause has been shown to warrant a review of the orders sought.

13. Accordingly, the application dated 17<sup>th</sup> July 2019 is without substance. It is dismissed with costs.

**Dated, signed and delivered at Malindi this 25<sup>th</sup> day of September, 2020.**

**J.O. OLOLA**

**JUDGE**