



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 24 OF 2017

ANTHONIE KWENA ANYIMU..... PLAINTIFF/APPLICANT

= VERSUS =

GABRIEL MUKELE..... 1ST DEFENDANT/RESPONDENT

WALLACE WESONGA.....2ND DEFENDANT/RESPONDENT

R U L I N G

1. For determination is the notice of motion application dated 4/2/2020 and premised on the provisions of Section 1A, 1B & 3 of Cap 21; Order 45 of the Civil Procedure Rules and article 159 of the Constitution of Kenya. The Plaintiff/applicant prayed for orders that;

a) Spent

b) That this Honourable court be pleased to review and set aside its orders issued in the ruling delivered in court on 30th October, 2018.

c) That this Honourable court be pleased to issue an order barring the respondents from developing land parcels number Marachi/Esikoma/1151, 1195 and 1233 pending the hearing and determination of this suit.

d) That this Honourable court be pleased to order that the thump prints in the defendants documents number 2, 3, 5 and 7 be submitted to a Government forensic science expert for verification.

e) That upon the thump prints in the defendants documents' number 2, 3, 5 and 7 being verified by a Government forensic science expert, he be allowed to file a report in this Honourable court about his findings.

f) That the applicant be allowed to file a further list of documents and call other witnesses.

g) That the cost of this application be provided for by the respondent.

2. The application is premised on several grounds that;

(i) The hearing of the main suit started and is scheduled don continue on 27th April 2020.

(ii) The applicants have started developing land parcels number Marachi/Esikoma/1151, 1195 and 1233 to the detriment of the applicant.

(iii) There is new and important evidence that has come to the knowledge of the applicant that was initially not available to him after he conducted proper due diligence.

(iv) That on the face of it, the applicant has since discovered that the thump prints in the defendant's documents No. 2, 3, 5 and 7 do not match.

(v) The said thump prints are alleged to be of one for ANYIMU KWENA (now deceased) yet they are not the same hence this goes a long way to confirm a case of fraud on the part of the defendants.

(vi) Only a Government forensic science expert can verify the same with certainty.

(vii) *The application will not prejudice the respondents in any way.*

(viii) *In the interest of justice it is only fair that the application be allowed to file further list of documents and call other witnesses in support of his case.*

3. The application is further supported by the affidavit sworn or 5th February 2020 by the applicant. He deposed that immediately the hearing started, the 1st respondent started developing the land parcel numbers 1151, 1195 and 1233. Secondly that while preparing for hearing, the applicant's counsel discovered that the thumb prints on the defendant's documents No. 2, 3, 5 and 7 are not the same. That since the case is about fraud, the disparity in the documents goes a long way in confirming the fraud and the confirmation can be made with certainty by a government forensic science expert. He urged the court to allow the application.

4. The application is opposed by the replying affidavit sworn by Gabriel Mukele and filed on 25/2/2020. Mr. Mukele deposed that it is common ground that he has had exclusive possession and use of the suit titles since purchase in 1975, 1978 and 1981. That this application is *res judicata* the application dated 17/3/2017 which was dismissed on 30/10/2018.

5. The 1st Respondent deposes that the applicant has not exhibited sufficient reason to warrant a review of the orders given in the application dated 17/3/2017. Further that the documents complained of have been on record since when they were filed by the defendant on 13/3/2017 and served on the plaintiff's counsel on the same date. Thus discovery of the thumb prints cannot be treated as new and important matter. That the impugned documents are certified copies supplied to the defendants by the Lands Office hence they (defendants) do not hold original copies. It is their case that the application is a waste of time and should be dismissed.

6. The Respondents supported their pleadings by citing and annexing copies of judgment in the following cases;

(a) **National Bank of Kenya Ltd Vs Ndungu Njau (1997) eKLR** which spelt the principles of review.

(b) **KCB Ltd Vs Stage Coach Management Ltd (2014) eKLR.**

(c) **R Vs A.G. & Another exparte Derek Gydei Mango (2016) eKLR** (on the provisions of article 159 of the Constitution not a panacea to trash procedural technicalities).

7. The parties agreed to argue the application by way of written submissions. The applicant filed theirs on 6/7/2020. There is none filed for the respondents. The applicant cited the provisions of section 80 of Civil Procedure Act and the holding in the Case of **Mayodi Vs Industrial & Commercial Development Corporation & Another (2006) I.E.A 243** which stated thus;

"...In Nyamogo & Nyamogo Vs Kogo (2001) EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law shares one in face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out."

8. The provisions of order 45(b) of Civil Procedure Rules summaries the grounds upon which an order or decree can be reviewed to be;

"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."

9. The applicant pleaded that there has been discovery of new and important matter after the delivery of the ruling made on 30/10/2018. The copy of that ruling was annexed to the affidavit in support of the application. Prayer 4 of the application of 17/3/2017 sought for orders of temporary injunction restraining the respondents from encroaching, trespassing, alienating or in any manner dealing with title numbers Marachi/Esikoma/1195, 1151 and 1233. After hearing the application inter parties, the trial judge found that the applicant had not established a *prima facie* case to warrant the grant of a temporary order of injunction and proceeded to dismiss the application.

10. In the present application, the applicant has not elaborated on what has changed to warrant the review and or setting aside the earlier orders given. The discovery of discrepancies in the thumb prints was not for determination in the previous application (dated 17.3.2017) hence it cannot be a new and important matter. In my opinion and I so hold that the documents referred to goes to the root of dispute and which dispute is yet to be determined. The applicant has not created a nexus between the impugned thumb prints and the encroachment and or trespass on the suit titles that would warrant the issuing of an injunctive relief at this interlocutory stage when there is no expert report filed yet to confirm that indeed there is a discrepancy in the thumb prints on the impugned documents. The photographs annexed to the application are also not showing any ongoing developments. I find no basis laid to warrant the review and or setting aside this court's orders issued on 30/10/2018.

11. In respect to prayer 3, 4 and 5 of the application, it is a rule of evidence that he who alleges a fact has a duty to prove its existence (sections 107 to 109 of the Evidence Act Cap 80 of the Laws of Kenya). The plaintiff has not told the court why upon discovery of the disparity on the thumb prints on the stated documents he has not presented the same for examination by the relevant authorities. In my view, the applicant does not need the order of the court to do so since the Respondent already disclosed the source of the impugned documents for purposes of investigation. The investigating wing of Government exercises their authority in accordance with the Acts of Parliament that set them up. Consequently, I decline to grant the order asking me to direct the Government forensic science expert to carry out the verification.

12. In respect to the prayer seeking to file additional witnesses' statements and or documents, what is to be filed has not been disclosed. However, since the hearing of the suit has not commenced and in the interest of justice, I will give the plaintiff permission to so file the intended documents and witnesses' statements. The same shall be filed and served at least 30 days before the date set for first hearing.

13. In conclusion, I find that the application failed to meet the grounds for review and or issuance of injunctive reliefs but is partially allowed in so far as leave to file additional documents/statements is granted. The documents to be filed and served before the first date of hearing. The costs of the application is awarded to the Respondents in the cause.

Ruling dated, signed & delivered at BUSIA this 21st day of September, 2020.

A. OMOLLO

JUDGE