



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION 588 OF 2012

BETWEEN

MIRIAM WAIRIMU.....1ST PETITIONER

ERASTUS NDUNG’U NJOROGE.....2ND PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

JOSPHAT MBURU WAINAINA.....2ND RESPONDENT

SIMON KIUNA KARANJA.....3RD RESPONDENT

RULING

The Application

1. The petitioners have brought the Notice of Motion dated 5th February 2014 seeking an order that the court, “*be pleased to review its decree delivered on 26th July 2013.*” The basis of the application is to be found in the affidavit of Erastus Ndungu Njoroge sworn on 5th February 2014 together with the grounds set out on the face of the Motion as follows;
- b. *The petitioners/applicants are aggrieved by the decree of this Honourable Court dated 26th July 2013.*
- c. *The petitioners/applicants have not preferred an appeal from the said decree.*
- d. *There is an error apparent on the face of the record in that the Honourable Court did not sufficiently inquire into the history of the Land titles in question. If it did the court would have most probably reached a different verdict.*
- e. *This application has been brought without undue delay and the slight delay has been due to factors beyond the control of the petitioners.*
- f. *The petitioners will suffer irreparable loss and damage unless the decree is reviewed.*

2. Erastus Ndungu Njoroge depones that the reason for seeking review is that the Court did not inquire into the history of the two land parcels, how the parties came to be in possession, how titles were obtained and the actual situation on the ground. The deposition proceeds to set out the history of the land and how the petitioners have resided on the suit property for the last 40 years and invested in it and that enforcement of the decree would cause substantial injustice to them.
3. The application is opposed by the respondents on the basis of the grounds of opposition dated 17th February 2014. The respondents argue that the application is bad in law, unmeritorious and no plausible grounds have been argued to warrant review of the decree.

The Petition and Judgment

4. Before I consider the matter, it would be proper to recap the facts as set out in my judgment. The petition concerned two properties, GATAMAIYU/GACHOIRE/119 and 129 (referred to as “Plot 119” and “Plot 129” respectively) which have been subject of court disputes since the year 1977. The two plots are adjacent to each other. Plot 129 was later subdivided in Plot 1645 and Plot 1646. Plot 1646 was further subdivided into Plots 1660, 1661 and 1662.
5. Miriam Wairimu (“Wairimu”), the 1st petitioner, is the wife of Munji Karanja (deceased) while the 2nd petitioner, Erastus Ndungu Njoroge (“Njoroge”) is the son of Munji and Wairimu. They are both administrators of the estate of the deceased. The 2nd respondent is the son and administrator of the estate of Wainaina Karanja (deceased).
6. In 1977 Munji Karanja sued Wainaina Karanja (deceased) and Simon Kiuna Karanja (“Kiuna”) to declare the transfer of Plot 129 null and void on the ground that it was fraudulently obtained. The matter was heard by a Panel of Elders and the decision adopted by the court which issued a decree in ***Nairobi HCCC No. 2555 of 1977 Munji Karanja v Wainaina Karanja and Simon Kiuna Karanja*** on the following terms;
 - i. *Judgment be and is hereby entered in accordance with the elders award.*
 - ii. *That the plaintiff’s application to set aside the award be and is hereby dismissed with costs to the defendant.*
 - iii. *That the Plaintiff Munji should remain on Parcel Number 119 (4.8 acres).*
 - iv. *That Kiuna and Wainaina should remain on parcel number 129, Kiuna to have 2 acres out of parcel 129.*
7. As beneficiaries of the judgment in and in order to enforce the decree in ***HCCC No. 2555 of 1977***, Kiuna and Wainaina (personal representative of Wainaina Karanja) filed suit against Mariam and Njoroge being ***Githunguri SRMCC No. 11 of 2006*** and in the suit, they sought an order for, “*Eviction of the Defendant and their families from L R No. Gatamaiyu/Gachoire/129.*” The ground for the suit was that Munji never appealed against the decree and his children, the defendants had declined to vacate the suit property despite notice to do so.
8. ***Githunguri SRMCC No. 11 of 2006*** was heard and by a judgment delivered on 5th March 2009, the learned magistrate held that the suit was an attempt to enforce a decree of the High Court. The court concluded that the decree could not be enforced as it was statute barred under the ***Limitation of Actions Act (Chapter 22 of the Laws of Kenya)***. The court also held that the decree could only be enforced by the court that issued it and as a result it dismissed the suit.
9. In the meantime, Wairimu filed a case at the Kiambu West Land Dispute Tribunal being ***Case Number KW/LND/9/6/28/2008*** against Wainaina and Kiuna. Wairimu asserted that Josephat and Kiuna had no claim to Plot 129. After hearing the matter, the Tribunal gave its decision on 14th August 2008. It ordered the District Land Registrar to “*revoke Title Deed for GATAMAIYU/GACHOIRE/1660, 1661, 1662 in the names of Josephat Mburu Wainaina and revert to the original number 1646.*” *The same to be registered under the claimant’s name –*

Mariam Wairimu Munyi. The Tribunal Court also orders the District Land Surveyor to visit the suit land and excise two acres at the extreme end of Gatamaiyu/Gachoire/119 to be registered in the names of Josephat Mburu Wainaina. Simon Kiuna Karanja's boundaries should remain intact."

10. After the award was issued in her favour, Wairimu filed the award in Limuru **SPMCC Land Case No. 12 of 2008, Miriam Wairimu Munyi v Joseph Mburu Wainaina and Simon Karanja**. The award was read on 9th October 2008 by the Court. It appears that no other step was taken in this regard.

11. In the meantime, Wainaina and Kiuna appealed the decision of the Land Disputes Tribunal to the Provincial Appeal Committee (Central) and by an award dated 29th September 2011 in **Claim No. KIAMBU WEST 8 OF 2008** the Committee ruled as follows;

- i. *Josephat Mburu Wainaina to remain on Plot No. 1660, 1661 and 1662.*
- ii. *Mariam Wairimu Munyi to retain her 119 Gatamaiyu Gachoiri.*
- iii. *Simon Kiuna Garanja to retain his title 1645 Gatamaiyu Gachoiri.*

In effect the Committee set aside the Kiambu West Land District Tribunal decision in favour of Wairimu and determined the matter in accordance with the High Court decree in **HCCC 2555 of 1977**.

12. After the appeal was dealt with by the Provincial Committee, Wainaina and Kiuna went back to Limuru Magistrates Court and filed the Provincial Committee award. The award was read over to the parties on 30th August 2011.

13. On or about 18th December 2012, after the Provincial Committee award was adopted, Wainaina and Kiuna filed an application in the court seeking the following orders;

1. *The Honorable Court be pleased to order for reinstatement of the boundaries in LR Nos GATAMAIYU/GACHOIRE/1660, 1661, 1662 and 119 by a qualified surveyor.*
2. *The claimant/respondent, her servants, agents and/or assignees be restrained by injunction from cultivating tilling or howsoever occupying and or dealing with LR Nos GATAMAIYU/GACHOIRE/1660, 16661 and 1662 and be evicted there from with immediate effect and the status be maintained in accordance with the Decree herein.*
3. *Costs of the application be provided for.*

14. Wainaina, in the affidavit sworn in support of the application stated that Wairimu had persistently refused to stop cultivating Plots 1660, 1661 and 1662 which has been awarded to Wainaina. From the record, the learned magistrate granted the orders on 18th December 2012 as the application was not opposed. On 21st December 2012 the applicants returned to court with order seeking enforcement of the injunction orders and also seeking police assistance to enforce the orders. The magistrate duly obliged and granted the orders sought. It is these orders of injunction that precipitated the filing of the petition that is under consideration.

15. After analysing the facts, I concluded as follows;

[21] The decree issued in HCCC NO. 2555 of 1977 must be read in the context of a dispute between Munji, Wainaina and Kiuna. What Munji sought in the suit was to set aside a transaction where Munji had transferred Plot 129 to Wainaina and Kiuna. The attempt to set aside that transaction failed and the effect of the decree issued was to confirm the transaction that had already taken effect. It is for this reason that Plot 129 was subdivided into Plot 1645 belonging to Kiuna and Plot 1646 belonging to Wainaina.

[22] Since there was no change in the status of the land there was no need to execute the

decree as the judgment merely recognised the transition between the parties that had already taken effect. The effect of the elders' award and decree of the high court was to recognise and confirm the transaction which Munji tried to disown. It follows that the Githunguri suit was not well founded in so far as it was conceived to execute the decree of the High Court when in fact what the plaintiff's in that case sought was to evict Wairimu from the part of Plot 129 she was cultivating.

16. The petition in this matter was heard and determined by a judgment dated 26th July 2013 where I made the following orders;

- a. *The decision in Kiambu West Land Dispute Tribunal Case Number KW/LND/9/6/2008 be and is hereby quashed.*
- b. *The judgment in Githungri SRMCC No. 11 of 2006 be and is hereby set aside.*
- c. *The orders in Limuru SPM Land Case No. 12 of 2008 be and is hereby quashed and the suit be and is hereby struck out.*
- d. *The Kiambu District Land Registrar is directed, within three (3) months of the date of this judgment to assist the parties to mark the boundaries of the Gatamaiyu/Gachoire/119 and 129 and the resultant subdivisions.*
- e. *Thereafter and in the event Wairimu and Njoroge decline to vacate the Gatamaiyu/Gachoire/129 and its subdivisions, Simon Kiuna Karanja and Josphat Mburu Wainaina shall be at liberty to prosecute Githungri SRMCC No. 11 of 2006.*
- f. *There shall be no order as to costs.*

Determination

17. The applicants now seek to review the judgment primarily on the ground that the Court did not consider the history of the matter or in fact inquire into the history of the land title. The grounds for review are now well settled. **Order 45 Rule 1(1)** of the **Civil Procedure Rules, 2010** provides the grounds for review of a decree or order as follows:-

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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

18. The scope for review of a decree or order is therefore limited to a situation where an applicant has discovered new and important evidence which was not available at the time the decree was passed or where there is a mistake or error apparent on the face of the record or for any other sufficient reason. The Court of Appeal in this case of **National Bank of Kenya v Ndung'u Njau Civil Appeal No. 211 of 1996** stated that, "A review will be granted whenever the court considers it is necessary to correct an error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law."

19. Mr Muthama, counsel for the applicant, readily conceded that there was no error of apparent on

the face of the record. He submitted that the applicant's case is that the court should consider the history of the titles and probably come to a different conclusion regarding the ownership of the land. In essence, the applicant requires the Court to re-evaluate the evidence. As I have outlined elsewhere in the judgment, I analysed the evidence and concluded with the order now sought to be reviewed. If indeed I misapprehended the evidence, then such a matter is one for appeal and not review.

Disposition

20. The Notice of Motion dated 5th February 2014 is dismissed with costs to the 2nd and 3rd respondents.

DATED and DELIVERED at NAIROBI this 3rd March 2014

D.S. MAJANJA

JUDGE

Mr Muthama instructed by Robert Muthama and Associates Advocates for the petitioners.

Ms Fundi instructed by Beth Gathoni Mwangi and Company Advocates for the 2nd and 3rd respondents.