



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANGA**

**ELC NO 51 OF 2018**

**PETER THUO MURUGAH.....PLAINTIFF/APPLICANT**

**VS**

**GITHINJI WAWERU.....DEFENDANT/RESPONDENT**

**RULING**

1. The Applicant has brought an application under section 80 of the Civil Procedure Act, Order 45 Rule 1 and 2 and Order 51 of the Civil Procedure Rules and other enabling provisions of the law for prayers that the Court be pleased to review its judgement dated the 28/11/19.
2. The application is supported by the grounds thereto as well as the supporting affidavit of Peter Thuo Murugah, the Applicant herein. In it he deponed that he is the brother of the Respondent. That the Court delivered a judgement in his favour on the 28/11/19, that is to say that the Respondent held the suit land in trust for the Applicant and his siblings, however prayer b) of the Plaint was inadvertently left out which prayer was intended to order for the determination of the customary trust, cancellation of the Respondent's title and subsequent sub division of the suit land into 8 portions for the benefit of the beneficiaries who are his siblings (the two parties included) in equal shares.
3. That without prayer b) being granted the judgement is incapable of execution so that each sibling gets a share of the suit land. That the Respondent has never preferred an Appeal against the said judgement and therefore no prejudice shall be occasioned on the Defendant if the said prayer is granted.
4. That the Court has inherent powers to grant the orders sought.
5. The application is opposed by the Respondent through a Replying Affidavit sworn by Maina Murugah. He termed the application mischievous, bad in law and an abuse of the process of the Court. That the judgement of the Court was clear and unequivocal that the Plaintiffs suit succeeds to the extent of the proven customary trust. Further that the application does not meet the criteria set out in Order 45 of the Civil Procedure Rules and the same is for dismissal with costs.
6. The parties represented by learned Counsels; Mr Kanyi for the Applicant and Ms Wamboi for the Respondent made oral submissions in support of their positions.
7. Mr Kanyi, learned Counsel for the Applicant reiterated the contents of the application and the affidavit of the Applicant and added that the Applicant succeeded in his claim based on customary trust. That the Applicant had sought orders that upon establishing customary trust, the Court should order the subdivision of the suit land into 8 portions. That the judgment of the Court fell short on what would happen to the suit land where trust was established and that this application is meant to address this gap. That the Respondent is utilizing the land to the exclusion of the Applicant and the other siblings. That he believes that this was an error/oversight on the part of the Court by failing to order prayers b in the plaint. That the judgement fell short of resolving the dispute that the Court was to adjudicate.
8. In conclusion, he submitted that the Respondent has acknowledged the judgement and has not appealed the decision of the Court. That he stands to suffer no prejudice if prayer b) is granted.
9. In opposing the motion, Ms Wamboi, learned Counsel for the Respondent submitted that the judgement of the Court was conclusive and self-explanatory in its tenor. That the Applicant ought to have appealed against the decision of the Honourable Court if he was aggrieved by the judgement. That there is no error apparent on the face of the record and the application is unmerited. Placing reliance on section 28 of the Land Registration Act, she submitted that trust being an overriding interest need not be noted on the register. She opined that prayer b) was deemed dismissed in the judgment.
10. In a rejoinder, Mr Kanyi argued that it is just for the Court to grant prayer b) in the plaint to actualize the customary trust by ordering the subdivision of the suit land. On Appeal he stated that the judgment was in the Applicant's favour and therefore there was no necessity of Appeal in the circumstances. That the Court has jurisdiction to bring the litigation to an end by correcting the error on the face of the record in line with the provisions of order 45 of the Civil Procedure Rules.

11. 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 judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”

12. In this case the judgement of the Court in respect to determining the right of the parties has not been appealed, albeit being Appealable. The object of the above section is to empower this Court to review its own judgments on application by an Applicant. The operational provisions are to be found in Order 45 of the Civil Procedure Rules. The Court may review an order either on discovery of new and important matter or evidence, or on account of some mistake or error apparent on the face of the record or for any sufficient reason.

13. The power to review is a creature of statute. It must be conferred by law either specifically or by necessary implication. Review is not an Appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules of procedures or technicalities of the law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review was under mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration had resulted in miscarriage of justice, nothing would preclude the Court from rectifying the error. The power to review can be exercised for the correction of a mistake and not to substitute a view.

14. I have reviewed the prayers sought by the Applicant in the plaint. I have also reviewed the judgement and under para 44 and 45 where upon analysis the Court found that the Applicant had proven customary trust. Having so held then the natural flow of this finding is to grant prayer b in the plaint.

15. To correct the error on the face of the record and to meet the justice of the case the Court grants prayer a and b in the plaint as follows;

a. A declaration that the Defendant’s registration of land parcel No LOC3/KARIUA/783 was done in trust for the Plaintiff as a son to the late Francis Muruga Muthee.

b. That the Land Registrar be ordered to cancel the Defendant’s title and cause the subdivision of the suit land into 8 equal portions and issue titles to the 8 children of the late Francis Muruga Muthee (deceased) namely John Maina Murugah, Zachary Mugo Muruga, Lucy Njeri Mwangi, Rose Wanjiku Njogu, Charity Waithira Muruga, Thomas Nduati Muruga, Julia Nyagithii Kariuki and Peter Thuo Murugah.

c. The parties are related. I order that each to meet the cost of their suit.

16. I make no orders as to costs of this application.

17. **It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 17<sup>TH</sup> DAY OF SEPTEMBER 2020.**

**J G KEMEI**

**JUDGE**

Delivered in open Court in the presence of:

Mugo for Plaintiff/Applicant

Defendant/Respondent – Absent

Mwangi and Njeri, Court Assistants