REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 120 OF 2004

JEMIMAH BITUTU GAI ……..……1ST PLAINTIFF

ELIJAJAH NYANGAMI GAI ……2ND PLAINTIFF

VERSUS

GECHURE NYABANDO ……..…… 1ST DEFENDANT

ONGUBO OSINDI ……..…… 2ND DEFENDANT

CHRISTOPHER MAUBI OKINDO NYABANDO ……. 3RD DEFENDANT

RULING

1. This suit was brought by the plaintiffs against the defendants on 29th July 2004. The plaintiff sought an order for the eviction of the defendants from all that parcel of land known as **LR No. Central Kitutu/Mwamanwa/558** (hereinafter referred to as "**the suit property"**) and, a permanent injunction to restrain the defendants from entering onto and/or cultivating and/or interfering with the suit property. The plaintiffs' suit was defended by the 2nd defendant. Through his statement of defence filed in court on 27th October, 2004, the 2nd defendant denied the plaintiff's claim in its entirety. The 2nd defendant contended that the portion of the suit property which, he was accused of having trespassed on was his ancestral land in that he had inherited the same from his father. The 2nd defendant contended that during the land adjudication process in the area, the disputed portion of the suit property was adjudicated and demarcated as **LR No. Central Kitutu/Mwamanwa/557** (hereinafter referred to as "**Plot No. 557**"). The 2nd defendant contended further that the plaintiffs had fraudulently and unlawfully caused Plot No. 557 to be merged into the suit property so as to form one parcel of land registered in the names of the plaintiffs.
2. This suit was heard by Makhandia J. (as he then was) who entered judgment for the plaintiffs against the defendants jointly and severally on 17th June 2010 as prayed in the plaint. Makhandia J. found the 2nd defendants claim that Plot No. 557 had been fraudulently and unlawfully merged into the suit property as baseless. Makhandia J. held that there was no evidence that the 2nd defendant's alleged parcel of land known as Plot No. 557 had been merged into the suit property or that the said parcel of land was in existence. The 2nd defendant was aggrieved with the said decision by Makhandia J. and lodged a notice of his intention to appeal against the same to the Court of Appeal on 30th June 2010. It is not clear from the record as to what became of the said appeal.
3. What I now have before me is the 2nd defendant's application dated 7th June 2013 seeking the

review and setting aside of the whole judgment delivered herein by Makhandia J. on 17th June 2010 aforesaid. The 2nd defendant's application was brought under order 45 rule 1 of the Civil Procedure rules. The same was premised on the grounds that; there is a mistake or error apparent on the face of the record of the said judgment, the judgment is an abuse of the process and that there were previous suits on the same subject matter that were heard and finally determined. The application was supported by the affidavit of the 2nd defendant that was sworn on 7th June 2013. In his affidavit, the 2nd defendant reiterated that Plot No. 557 was fraudulently consolidated or merged with the suit property to form one parcel of land which is now registered in the names of the plaintiffs. The 2nd defendant contended further that there was a case between the 2nd defendant's grandfather and the plaintiffs' predecessor in title to the suit property, at the District Officer's office at Manga namely, Land Case No. 9 of 1986 in which an order was made by a panel of elders on 4th February, 1987 allowing the 2nd defendant's said grandfather to "retrieve" Plot No. 557 that had been unlawfully annexed to the suit property. The 2nd defendant contended that the application that was made before the Senior Resident Magistrate's court at Kisii in Misc. No. 21 of 1987 to set aside the said decision by the panel of elders was dismissed on 29th December, 1987.

4. The 2nd defendant contended further that there was an earlier case in the year 1953 between his said grandfather and the plaintiffs' predecessor in title namely, Land Case No. 285 of 1953 in which a finding was made that the 2nd defendant's family had lawfully occupied the disputed property. The 2nd defendant contended that these earlier decisions that concerned the properties in dispute herein were not placed before the court when it delivered the judgment sought to be reviewed. The 2nd defendant contended further that the former area Member of Parliament had also written to the former Minister for Lands concerning the dispute over the suit property and Plot No. 557 and had pointed out that Plot No. 557 was fraudulently merged into the suit property. The 2nd defendant urged the court to consider the earlier cases aforesaid over the suit property and review this court's judgment made on 17th June 2010 which, according to the 2nd defendant, was made contrary to the said earlier decisions.
5. The 2nd defendant's application was opposed by the plaintiffs through grounds of opposition dated 27th June 2013. In their grounds of opposition, the plaintiffs termed the 2nd defendant's application as misconceived and bad in law. The plaintiffs contended that the application had been lodged by a stranger and that the 2nd defendant having lodged a notice of appeal, a remedy of review is not available to him. The plaintiffs contended further that the application has been brought after unreasonable delay and that the issues on which the 2nd defendant's application is founded were all along within the knowledge of the 2nd defendant.
6. On 1st October 2013, the court directed that the 2nd defendant's application be heard by way of written submissions. The 2nd defendant filed his written submissions on 20th March 2014 while the plaintiffs did so on 28th April 2014. I have carefully considered the 2nd defendant's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition that were put forward by the plaintiffs in opposition to the application and the written submissions by the advocates for both parties. The 2nd defendant's application was brought under Order 45 Rule 1 (1) which provides as follows;

"1(1) 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."**

7. From the foregoing, what I need to determine in the application before me is whether the 2nd defendant has satisfied the conditions that would justify the review of the judgment/decree of Makhandia J. made herein on 17th June 2010. The 2nd defendant's application has been brought on two grounds, namely, that the 2nd defendant has since the passing of the said judgment discovered new and important matters of evidence which, were not within his knowledge or could not be produced by him at the trial, and that, there is mistake or error apparent on the face of the record of the said judgment. On the issue of the discovery of new and important matter of evidence, the 2nd defendant has contended that he has since the delivery of the said judgment discovered the following cases which concerned the properties in dispute herein which had been heard and determined in favour of the 2nd defendant, namely:

i. Land Case No. 09 of 1986
ii. CMCC No. 21 of 1987
iii. Land Case No. 285 of 1953.

8. The 2nd defendant has contended that the dispute over the suit property and Plot No. 557 which the 2nd defendant claims to own was resolved in these three (3) previous cases in favour of the 2nd defendant's grandfather who is the 2nd defendant's predecessor in title to Plot No. 557 and if these cases had been brought to the attention of the court, the court would not have reached the decision that it arrived at in the judgment that was delivered on 17th June 2010. My perusal of the record has revealed that the 2nd defendant had knowledge of these previous cases and in fact produced some evidence in relation thereto at the trial. It is not true therefore that the existence of these cases have just been discovered or that the 2nd defendant was not able to produce the evidence in relation thereto at the trial. In his affidavit sworn on 2nd September, 2004 in opposition to the plaintiffs application for interlocutory injunction, the 2nd defendant stated as follows in paragraph 9 thereof:-

"9. THAT I was informed by my late father which information I believe to be verily true that the dispute the subject matter of this suit was arbitrated by the court during the colonial times and just before the adjudication process commenced and a finding was made in favour of my father. Annexed hereto and marked I001 is a Photostat copy of the court judgment in Kisii RMCC No. 285 of 1953."

9. At the trial, the 2nd defendant stated as follows in his evidence in chief:

"Previously there has been a case between my grandfather and Gai Nyachwaya. These are the proceedings D. exh.1 (a) and (b)."

To the affidavit referred to above, the 2nd defendant had annexed a copy of the judgment that was made in Land Case No. 285 of 1953 and at the trial the 2nd defendant produced as exhibits, a copy of the judgment in Land Case No. 285 of 1953 and a copy of a letter dated 20th July 1981 addressed to the Resident Magistrate's Court at Kisii by the District Officer, Manga Division inquiring whether the decision in Land Case No. 285 of 1953 aforesaid was reversed and what the 2nd defendant herein and his siblings could do to get the land in dispute herein back. There is no doubt from the foregoing that the existence of the aforesaid previous cases was within the knowledge of the 2nd defendant and that he placed in evidence information that he had in relation thereto which the judge must have considered in his judgment of 17th June 2010. The 2nd defendant's application to the extent that it is based on the discovery of new and important matter of evidence has no merit. Even if I am wrong in my finding above, I doubt if the outcome of this case would have been different even if the 2nd defendant had placed evidence relating to all the previous three (3) cases which he claims to have been made in favour of his grandfather and father before the court.

10. I have looked at the decision in Land Case No. 9 of 1986 that was heard by the panel of elders

under the chairmanship of the District Officer Manga division under the Magistrate's Jurisdiction (amendment) Act, 1981 (now repealed). In their award, the elders ordered that the 2nd defendant's grandfather do *"retrieve"* Plot No. 557 from Plot No. 558 ("the suit property") where it had been annexed. This decision was made on 4th February 1987. The said award was confirmed by the court in Kisii SRMCC Misc. No 21 of 1987 on 29th December 1987. Under section 4 (4) of the Limitation of Actions act, Cap 22 Laws of Kenya, no action can be taken on a judgment after the expiry of 12 years. The 2nd defendant or his father or grandfather ought therefore to have executed the said award by the elders and the judgment of the court that confirmed it by the year 1999. The effect of the said award and judgment got extinguished after the expiry of 12 years as aforesaid and could not avail the 2nd defendant any defence at the trial of this suit in the year 2010. It is no wonder therefore that the court in its judgment of 17th June 2010 did not accord any weight to the judgment in Land Case No. 285 of 1953 that was delivered on 8th July 1957 that was produced in evidence by the 2nd defendant. It follows from the foregoing that the discovery of the said previous cases cannot justify the review of the judgment entered herein on 17th June 2010.

11. The other ground on which the 2nd defendant has sought a review of the judgment aforesaid is the alleged mistake or error apparent on the record of the judgment of 17th June 2010. In the case of **National Bank of Kenya Ltd –vs- Ndungu Njau, Court of Appeal Civil Appeal No. 211 of 1996(unreported)** the court stated that:

"A review may be granted whenever the court considers that it is necessary to correct an apparent 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."

The 2nd defendant has not pointed out any error or mistake apparent on the face of the judgment of this court that was delivered on 17th June 2010 and I have not come across any. This ground is therefore baseless and does not warrant a review of the judgment of 17th June 2010.

12. Apart from the grounds of, discovery of new and important matter of evidence and error or mistake apparent on the face of record, a decree or order can also be reviewed for any other sufficient reason. As I have stated above, the 2nd defendant sought the review of the judgment that was entered herein on specific grounds which I have considered above. The 2nd defendant did not urge the court to consider reviewing the said judgment/decree on any other ground. On my part, I have not come across any other sufficient reason that would justify the review of the judgment/decree entered herein on 17th June 2010. Due to the foregoing, it is my finding that the 2nd defendant has failed to establish the grounds that would warrant the disturbing of the judgment entered herein on 17th June 2010 and as such, the application for review must fail.
13. The 2nd defendant application would have failed also for another reason namely, inordinate delay. The judgment sought to be reviewed was entered on 17th June 2010. The present application was filed on 12th June 2013 which is about three (3) years after the date of the judgment. The 2nd defendant came for review after the judgment had been executed. This delay of three (3) years in bringing of the application has not been explained by the 2nd defendant. The 2nd defendant is guilty of laches and as such is not entitled to the exercise of this court's discretion.
14. The upshot of the foregoing is that the 2nd defendant's application dated 7th June 2013 is not for granting. The same is accordingly dismissed with costs to the plaintiffs.

Delivered, signed and **dated** at **KISII** this **14th** of **November, 2014.**

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ochwang'i for the 1st and 2nd plaintiffs

N/A for the 1st, 2nd, 3rd and 4th defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE