



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL CASE NO. 97 OF 2005**

MOTOKAA NTHAUTHO & 19 OTHERS..... PLAINTIFFS/APPLICANTS

VERSUS

ATTORNEY GENERAL (*Sued on behalf of*

*District Land Adjudication Officer Mbeere District*

*and District Land Registrar Embu District)*..... DEFENDANT

MUCHIRI KOMBO & 19 OTHERS ..... INTERESTED PARTIES/RESPONDENTS

**R U L I N G**

This is the application by way of Notice of Motion dated 28<sup>th</sup> June 2013 filed by the Plaintiffs/Applicants herein. It seeks the following prayers;

1. ***That the Ruling of the Honourable Court delivered herein on 25<sup>th</sup> June 2013 be reviewed and or set aside.***
2. ***That the Interested Parties' application and the Plaintiffs' Preliminary objection be reinstated and fixed for hearing interpartes.***
3. ***That such further orders and/or directions be given to the intent that the specifics of the orders affecting the new title issued in favour of the Plaintiffs be made.***

There are several grounds which have been listed by the Applicants and are on the face of the application.

The Interested Parties/Respondents were served but there was no appearance by them or their advocate. I allowed Mr. Mungai to proceed because there was no reason why Mr. Okwaro had not sent anybody to hold his brief given that he was appearing before the Principal Magistrate's Court Runyenjes as is shown on the affidavit of service. Secondly the application before the Court is based on a said error on the face of the record. I would however wish to correct the impression created by Mr. Mungai that this Court ignored facts that were pleaded to by the Plaintiffs in their Replying affidavit in respect of the application the subject of the Ruling delivered on 25<sup>th</sup> June 2013. The truth of the matter even as was evidenced in Court yesterday is that the said replying affidavit (MNBB) was not in the court file. The only copy available is what the Applicants have annexed to the present application. This Court did not therefore have the opportunity of reading the said replying affidavit (MNBB). And in view of what was before me as I wrote the Ruling delivered on 25<sup>th</sup> June 2013, I find no contradiction in what is at page 6 of the Ruling. Administratively I am directing the Deputy Register incharge of High Court Civil Registry to have a meeting with the staff in that registry and

agree on modalities on ensuring that;

1. ***Files are easily retrieved when called for.***
2. ***Pleadings/documents are promptly filed in their respective files***
3. ***No pleadings/documents (paid for) should be found hanging in any cabinet or drawer.***

I am issuing these directions based on the fact that on several occasions Ruling and Judgment dates have had to be deferred due to missing documents in the Court file.

Having stated the above I now wish to deal with the application dated 28<sup>th</sup> June 2013. Review under Order 45 Civil Procedure Rules is allowed under any of the following conditions;

- i. ***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 the decree was passed.***

- ii. ***There being a mistake or error apparent on the face of the record.***
- iii. ***Any other sufficient reason.***

In the case of ***LAXMANHABAI M. PATEL & OTHERS –V- NORLAKE INVESTMENTS LTD & OTHERS KISUMU H.C.C.C. NO.264/97 (UNREPORTED)*** Justice Tanui stated this on an error on the face of the record;

***“An error on the face of the record should be obvious and capable of being seen by one who runs and reads, that there is an obvious mistake and not something that can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions”.***

It is clear that a replying affidavit (MNBB) by the 1<sup>st</sup> Plaintiff/Applicant dated 28<sup>th</sup> March 2013 though filed was not in the Court file at the time this Court was writing its Ruling. It is therefore obvious that the contents thereof not being within the knowledge of the Court were not considered in the said Ruling. The Applicant’s counsel has now kindly availed to the Court a copy of the said replying affidavit annexed to the present application. This error/omission alone is sufficient to dispose of this application.

I will however go further to cover the element of new facts/evidence which has been availed. This is that the Plaintiffs/Applicants have new titles, as a result of the Judgment/Decree that was issued by this Court on 19<sup>th</sup> December 2012. This is also another important condition for the Court’s consideration when dealing with review under Order 45 Civil Procedure Rules. The application for review by the Plaintiffs/Applicants was made within three (3) days of the delivery of the orders complained of. I therefore find that the application has merit and made without undue delay. I therefore allow prayer Number 1 for review of this Court’s Ruling of 25<sup>th</sup> June 2013.

- i. ***The orders granting stay of execution is set aside***
- ii. ***The order barring the Interested Parties from transferring and/or disposing of any of the affected lands is also set aside.***

Prayer (2) is however not allowed for the reason that the issues raised in the preliminary objection have been addressed in the Ruling of 25<sup>th</sup> June 2013. Secondly the Court heard the application interpartes save for the omission of the replying affidavit (MNBB).

Prayer (3) will be covered at the end of this Ruling. There shall be no order as to costs in this application dated 28<sup>th</sup> June 2013.

From the facts deponed to in the replying affidavit (MNBB) dated 28<sup>th</sup> March 2013 it’s clear that Plaintiffs/Applicants embarked on the execution of the decree herein soon after the Judgment as there had

been no order stopping them from doing so. Further to the replying affidavit there is filed an extract of Kenya Gazette Notice number 2320 of 26<sup>th</sup> April 2013 ((MNAA) showing that the Land Registrar Mbeere District has acted on this Court's Judgment. All these facts were not within the knowledge of the Plaintiffs/Applicants as at 28<sup>th</sup> March 2013 when the Replying affidavit was drawn and as at 25<sup>th</sup> June 2013 when the Ruling was delivered. Had I been aware of the contents of the replying affidavit (MNBB) of 28<sup>th</sup> March 2013 and of the facts in "MNAA" I would not have made the orders I did make on 25<sup>th</sup> June 2013 as there was no decree to stay at the time. The said orders which I have already set aside above shall be substituted with the following order;

1. ***The application for stay of execution dated 13/2/2013 is disallowed. The order on costs remains.***

The Deputy Registrar incharge High Court Civil Registry to be given a copy of this Ruling for his necessary action.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 10<sup>TH</sup> DAY OF JULY 2013.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of;**

Mr. Momanyi for Mungai for Applicants

N/A by or for Respondents

Parties