



FELISTUS GATHONI NG'ANG'A.....PLAINTIFF

- VERSUS -

ZABLON NGOTHO THIONG'O..... DEFENDANT

MARGARET WAMBUI INTERESTED PARTY

PETER BURUGU MWANGI INTERESTED PARTY

LUCY WANJIRU MBURUGU INTERESTED PARTY

RULING

1. On 28th May 2012 the court allowed Margaret Wambui, Peter Burugu Mwangi and Lucy Wanjiru to be enjoined into this suit as interested parties. It was late in the day because final judgment in the originating summons was made on 30th March 2011. That judgment was in favour of the plaintiff against the defendant. The court had found that the plaintiff was the legal owner of the suit land and entitled to possession. It was decreed that the defendant be evicted within 30 days of the judgment date.
2. The interested parties have now brought a notice of motion dated 26th November 2011 praying for review of that judgment. The applicants pray that the judgment be set aside. The principal grounds are: that the applicants purchased portions of the suit land from the defendant; that they have been in occupation for over 12 years; that they were not parties to the suit and are prejudiced by the decree; and, that they are still in possession, depend on that land and their loved ones are buried there. All those matters are buttressed in their joint affidavit sworn on 26th November 2011.
3. The application is contested. There is filed a replying affidavit by the plaintiff sworn on 5th March 2012. In a synopsis, the plaintiff re-affirms that she is the registered owner of the parcels of land known as Nyandarua/South Kinangop/1630, 1633 and 1634. She is in possession and denies the claims by the applicants or that they have erected structures on the land or buried some relatives there. She says they are strangers and the only person she knows is the defendant who lost the suit. She attacks the application for laches and lacking merit.
4. I have heard the rival submissions. The motion is expressed to be brought under orders 45 and 52 of the Civil Procedure Rules 2010. The parameters within which the court can review its decisions are well settled. The applicant has chosen to come for review under sections 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act reads 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.

Order 45 rule 1(1) is *pari materia* with section 80 and provides;

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 mater 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.

From a plain and natural meaning of the words of the law, an application for review is open to a person aggrieved by a decree of this court and who is entitled to an appeal to the Court of Appeal but has not preferred such appeal or who holds a decree or order from which no appeal is allowed by the Act. It is thus a unique and special power of this court. For an application for review to succeed, it must be brought without delay, it must be on the basis of either new and important evidence not available at the time of trial, or on account of mistake or error on the face of the record, or for other sufficient cause. Those are the parameters set by the authorities. And the authorities abound including *Origo & another Vs Mungala* [2005] 2 KLR 307, *Kisya Investments Ltd Vs Attorney General and another* Civil Appeal No 31 of 1995 (unreported), *Refrigeration Contractors Ltd Vs Lieta* [2005] KLR 506, *Kuria Vs Shah* [1990] KLR 316 and *M'Anthaka M'Mwoga Vs M'Boore* [2006] e KLR.

5. I find that the motion is fraught with serious procedural difficulties. It is not the defendant who seeks review of the judgment and decree. It is new and interested parties who wish to reopen the trial and tender fresh evidence. The plaintiff says they are strangers. The interested parties claim to be in possession. They claim they have buried their relatives on the land. I find it a little odd that the plaintiff would be unaware of such matters. On 18th April 2011, the defendant had filed a motion to set aside the judgment. It was refused. I have formed the clear impression that the interested parties are either not candid or they are surrogates of the defendant who seeks to reopen the litigation through them. This old litigation needs to be brought to a close. The litigation is more than 5 years old. I find it possible but highly improbable that the interested parties who claim to have lived on the suit land would be unaware of that litigation for so long. They claim to be purchasers for good value from the defendant. I would venture to think that their remedy may lie against the defendant, if well advised, for any loss arising out of the judgment. But fundamentally, there is no error on the face of the record and the judgment of the court. There is no new evidence before the court obtained after the judgment or which could not have been obtained with due diligence by the defendant or the interested parties at the hearing. I note that at the hearing of the matter, the defendant did not even attend the trial though served. He would have been the one to tender evidence to show he had sold the land to the interested parties. But even from an evidential standpoint, the interested parties do not have title to the land. There is thus no sufficient cause shown to review the judgment and decree of court dated 30th March 2011. I also note that the motion was presented to court on 30th November 2011 nearly 8 months after the judgment. Applications for review must be brought with expedition. This court is now enjoined by article 159 of the constitution as well as sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. The court should administer justice expeditiously, proportionately and in an affordable manner. I think the plaintiff should be allowed to

enjoy the fruits of her judgment.

6. In the end, I find that the interested parties' notice of motion dated 26th November 2011 lacks merit. I dismiss it with costs to the plaintiff.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 5th day of July 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Felistus Gathoni Nganga (in person) the Plaintiff.
Zablon Ngotho Thiong'o (in person) the Defendant.

Margaret Wambui and the 1st and 2nd interested parties.

Peter Mburugu in person.

No appearance for 3rd interested party.