



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 121 Of 2009

MALINDI MAGAZINE LIMITED.....PLAINTIFF

VERSUS

AISHA OMAR FMAU.....1ST DEFENDANT

YUSUF BURHANI.....2ND DEFENDANT

ALI ABDALLA TWAHA.....3RD DEFENDANT

MWANAISHA MOHAMMED SAID.....4TH DEFENDANT

LUCY KIMANGU.....5TH DEFENDANT

RULING

1. On 2nd May 2018, Messrs Marende Necheza & Company Advocates filed on behalf of the 5th Defendant an application praying for orders that:-

- 1. This Notice of Motion be certified as urgent, service thereof be dispensed with and it be heard ex-parte in the first instance;***
- 2. That leave be granted to the Applicant to apply for review in (this matter).***
- 3. That a stay of Judgment in this matter be granted pending the hearing and determination of this application;***
- 4. That this Court be pleased to review and vary the contents of its Judgment delivered on 19th April 2018 and leave be granted to the Applicant to introduce a new set of facts and evidence;***
- 5. That the Honourable Court be pleased to re-open, re-hear and re-determine this suit afresh; and***
- 6. That the costs of the application be borne by the Respondent.***

2. On 30th May 2018, the 5th Defendant filed a second application through the same Law Firm in which it now sought Orders as follows:-

- 1. That the Honourable Court be pleased to grant leave to the firm of Marende Necheza and Company Advocates to come on record as the 5th Defendant/Applicant's advocate in place of Mwaure & Mwaure Waihiga Advocates;***
- 2. That the Honourable Court be pleased to review its Judgment delivered on the 19th April 2018 on account of a series of new evidence and facts to be introduced before this Court during the hearing of the application for review;***
- 3. That upon review and setting aside of the Judgment entered(herein) on 19th April 2018, leave be granted to the 5th Defendant/Applicant to introduce new set of facts and evidence;***
- 4. That the costs of this application be provided for.***

3. The second application is premised on the grounds:-

a) That the 5th Defendant was hitherto represented by Messrs Mwaure & Mwaure Waihiga Advocates but now wishes to change representation after delivery of Judgment;

b) That the 5th Defendant requires leave of the Court to change the Advocate;

c) That in its Judgment the Court failed to take into consideration evidence of the Registrar of Titles, having told the Court that the title document held by the Plaintiff is suspect;

d) The net effect of the Court's decision is that it shut its eyes to the fact that the 5th Defendant was entitled to the suit property by virtue of having followed all the acquisition procedures; and

e) That the existence of the Judgment in this case is an obstacle to an effectual and complete adjudication and settlement of all questions involved in the suit and the same should be reviewed taking into account the new evidence now attached to the application for review.

4. In a Replying Affidavit filed herein on 27th June 2018 the Plaintiff has through one of its directors Manca Fransesco accused the 5th Defendant of being economical with the truth and urged the Court to dismiss the 5th Defendant's application.

5. It is the Plaintiff's case that the Application dated 2nd May 2018 was filed by a Firm of Advocates who were not on record for the 5th Defendant and that the same cannot stand. It is further the Plaintiff's case that the 5th Defendant is guilty of abuse of the Court process as an application seeking leave to file a notice of change of Advocates was filed on 30th May 2018 yet the notice referred to had been filed on 24th April 2018 without leave of the Court.

6. In any event, the Plaintiff states, much of the correspondence sought to be relied on were authored in the year 2016 before the 5th Defendant testified herein and the Applicant cannot purport that she was not in possession of the said evidence.

7. I have considered the two applications filed by the 5th Defendant as well as the Plaintiff's response thereto. I have equally considered the oral submissions made before me by the Learned Advocates for the parties.

8. Order 9 Rule 9 of the Civil Procedure rules provides as follows:-

"Where there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after Judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court-

a) Upon an application with notice to all the parties; or

b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

9. As per the provisions of the said order, Messrs Marende Necheza & Company Advocates ought to have sought leave of this Court before filing the application dated 2nd May 2018. They did not seek any such leave. They however appear to have realised their folly in good time and before the Plaintiff or any other party raised an objection thereto. That must be the reason they filed the second application dated 30th May 2018.

10. As it were, I would agree with Mr. Otara, Learned Counsel for the Plaintiff that the application dated 2nd May 2018 was not properly on record the same having been filed by a stranger to these proceedings. That application is accordingly struck out and expunged from the Court records.

11. As regards the application dated 30th May 2018, there was evidence as per an Affidavit of Service filed herein on 13th June 2018 that the same had been served upon the former Advocates for the 5th Defendant Messrs Mwaure & Mwaure Waihiga Advocates on 31st May 2018. When the application came up for hearing on 28th June 2018, there was neither appearance nor an objection from the said law firm and I think in the absence of any such objection Messrs Marende Necheza & Company Advocates are now deemed to be properly on record.

12. As regards the other prayers sought in the application dated 30th May 2018, Order 45 of the Civil Procedure Rules, 2010 is very explicit that a Court can only review its orders if the following grounds exist:-

a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

b) There was a mistake or error apparent on the face of the record; or

c) There were other sufficient reasons; and

d) The application must have been made without undue delay.

13. The pertinent issue for determination herein, therefore, is whether the 5th Defendant has established any of the above grounds to warrant an order of review. In her Supporting Affidavit to the Application dated 30th May 2018, the 5th Defendant states at paragraph 7 thereof as follows:-

7. That in a nutshell, the upshot is that I swear this affidavit to humbly request this Honourable Court to allow this application premised upon these brief facts:-

a) Foremost in its Judgment, the net effect of the Court's decision was a consequence of lack of enough evidence on my part but which I have now gathered convincingly.

b) While making the decision, the Honourable Court shut its eyes to the fact that I was the first to be allocated the suit property by Malindi County Council and I also obtained ALL the requisite Approvals from the relevant land government agencies before embarking on any acquisition.

c) That I now have with me a booklet of compelling evidence to challenge the entire process of acquisition of title by the Plaintiff/Respondent that I maintain as fraudulent.”

14. The suit before me was filed in the year 2009 and the 5th Defendant does not explain how the material in the said “booklet” is new evidence and/or why the same was not produced during the trial. There must be material placed before the Court to demonstrate the existence of new evidence which the Applicant could not get even after exercising due diligence. As was stated by the Court of Appeal in **Stephen Githua Kimani –vs- Nancy Wanjira Waruingi T/A Providence Auctioneers (2016)eKLR:-**.

“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or the case afresh in other words.”

15. At any rate from the arguments set out at paragraph 7 of the 5th Defendant's Supporting Affidavit aforesaid, it is clear to me that the 5th Defendant is basing his review application on the failure by the trial Court to apply the law correctly and shutting its eyes from the evidence already adduced by the 5th Defendant. That may certainly be a good ground for appeal but not one for an application for review.

16. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which Court decisions that ought to be examined on appeal would be exposed to attacks in the Courts in which they were made under the guise of review when such Courts are *functus officio* and have no appellate jurisdiction.

17. In the circumstances, I find no merit in the application dated 30th May 2018 in so far as Prayers No. 2 and 3 thereof are concerned, the same is dismissed.

18. The Plaintiff/Respondent shall have the costs of the two applications.

Dated, signed and delivered at Malindi this 21st day of February, 2019.

J.O. OLOLA

JUDGE