



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 138 OF 2013

ANNE NALIKA.....1ST PLAINTIFF

EDWARD F. KHAOYA.....2ND PLAINTIFF

COL. TOM WANAMBISI.....3RD PLAINTIFF

DAWSON MUDENYO.....4TH PLAINTIFF

VERSUS

BENSON NYONGESA WAMALWA (Trustee

COVENANT OF HOLINESS MINISTRIES.....DEFENDANT

RULING

1. Benson Nyongesa Wamalwa (*hereinafter referred to as the applicant*) has brought the Notice of Motion dated 5th March 2019 against Anne Naliaka, Edward F. Khaoya, Col. Tom Wanambisi Obiri and Dawson Mudenyio (*hereinafter referred to as the respondents*) praying for the following orders;

(1).....spent

(2) Stay of execution of decree and set aside of the judgement of this honourable court.

(3) Reverse of order for cancellation of the COVENANT OF HOLINESS MINISTRIES to the Hon. Court Registry/ Public trustee.

(4) Declaration that the registered parcel of land KWANZA/ NAMANJALALA BLOCK NO.5 /655 belongs to the COVENANT OF HOLINESS MINISTRIES whose proprietor is BENSON NYONGESA WAMALWA.

(5) Eviction and prohibition of the plaintiff's restraining themselves, their servants or agents from interfering with, encroaching or leasing to other parties of the dispute land.

2. The application is based on the grounds:

(a) That the dispute land was validly acquired by the defendant for the COVENANT OF HOLINESS MINISTRIES on 13/11/2007 and 15/02/2008

(b) That the plaintiffs lacked capacity to claim the trustee for KITALE FAMILY HOUSE OF HOPE

(c) That the plaintiff's evidence is scandalous, ambiguous and frivolous

(d) That the Plaintiffs should prove their lawful acquisition of the suit land and the consequential developments therein

(e) That the defendant's supporting documents are all public and incontrovertible.

(f) That the public documents such as these need the best explanation and degazetment in the court of law before cancellation which case was not applied.

(g) That the dispute land KWANZA /NAMANJALALA BLOCK NO. 5/655 of 2 acres belongs to the defendant for the COVENANT OF HOLINESS MINISTRIES

(h) That the one acre was a local arrangement by the defendant and the original seller, STEPHEN SIMIYU CHEMIATI, of the dispute land for easy facilitation of getting the current title deed for 3 acres then it be reverted back to him.

(i) That the order for prayers (a) and (b) is unfair prejudicial and in merit to the defendant.

(j) That if the same is reversed and the status quo maintained no party will suffer at all.

(k) That this action accrued on 14/11/2018 when the last ruling on a review application by the defendant was delivered.

(l) That this action is within the jurisdiction of this honourable court to determine.

(m) That justice goes with evidence not mere allegations such as the plaintiffs.

(n) That other evidence is as per the supporting affidavit, title deed, and purchase agreements among others.

3. The application is supported by the affidavit of Benson Nyongesa Wamalwa who reiterates the grounds and states that unless the orders sought are granted, he will suffer irreparable loss. That the cancellation of their title deed is totally an abuse of the due court process. That the plaintiffs failed to prove to the trial court how they acquired the suitland before investing developments therein. That the plaintiffs' "ambiguous" acquisition of the suit land makes the court orders ambiguous too. That the best option is the reverse of the judgement and all consequential orders since the status quo merits all parties.

4. I have carefully considered the submissions of the applicant dated 12/2/2019.

5. From the application and the submission on record, I find that the issue for determination is whether the applicant has established grounds for review.

6. **Order 45, Rule 1(b)** is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

“(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

7. From the above section of the law, the laid down rules on the jurisdiction and scope of review limits it to the following grounds;

(a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

(b) on account of some mistake or error apparent on the face of the record, or

(c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without an unreasonable delay.

8. The aforesaid rules are based on **Section 80** of the **Civil Procedure Act, Cap. 21** Laws of Kenya which states 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.

9. From the foregoing, it is apparent the court has unfettered discretion to make such an order for review of its decision as it thinks fit on sufficient reasons being given to warrant the same.

10. However, it is important to distinguish grounds of appeal and grounds for review as was settled in the case of *National Bank of Kenya Ltd vs Ndungu Njau* Civil Appeal No. 2111 of 1996 where the Court of Appeal held:-

“In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue” In my opinion the proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose.”(Emphasis added).

11. In *Abasi Belinda vs Fredrick Kangwamu and another* [1963]E.A 557 the Court held that:-

“...a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal”

12. Upon critically analyzing the application dated 4/12/2018, it is clear that the same is based on the fact that the court did not consider crucial evidence. This is not a ground for review but it is a ground for appeal. The applicant states that the court made a finding on property No. **Kwanza /Namanjalala Block 5/655** without considering his evidence and the documental evidence in support of his claim.

13. To this extent and being guided by the authorities cited above, I am not persuaded that the applicant has offered *grounds* within the meaning of the provisions of Section 80 of the Civil Procedure Act or the Order 45 Rule 1 of the **Civil Procedure Rules, 2010** to warrant a review of the orders sought.

14. Whether the applicant shall suffer irreparable injury or will be highly prejudiced by a judgement is a matter for the Court of Appeal as it is clear that the applicant is dissatisfied with the decision of the court and can only appeal against the decision.

15. The upshot of the above is that the applicant has failed to demonstrate that there is any sufficient reason to enable this court set aside its decision.

16. The application is dismissed with costs.

Dated, signed and delivered at Kitale on this 28th day of March, 2019.

MWANGI NJOROGE

JUDGE

28/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Applicant in person

N/A for the respondents

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

28/03/2019