REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 55A OF 2016

JOSEPH KAMENJU MWAURA.....PLAINTIFF

VERSUS

SAMMY NGURE MUTHINJI.....DEFENDANT

RULING

(Application for review; principles to be applied; applicant having been an unsuccessful plaintiff; applicant now claiming that he has discovered new evidence; court not persuaded that what the applicant terms to be new evidence could not be available at the hearing; applicant saying that he failed to call crucial witnesses because he was a lay man acting in person; failure to call witnesses not a reason for review; no demonstration of discovery of new evidence that could not be presented at the hearing; no error apparent on the face of the record; no sufficient reason to warrant a review; application dismissed)

1. The application before me is that dated 28 August 2018 filed by the unsuccessful plaintiff. He seeks orders for a review of the judgment of 4 July 2018 pursuant to the provisions of Section 80 of the Civil Procedure Act, Cap 21, and Order 45 of the Civil Procedure Rules, 2010. The application is opposed and before I go to the gist of it I feel it is necessary to give a bit of a background on this suit.

2. This suit was commenced through a plaint which was filed on 23 February 2016. The applicant pleaded that he is the biological son of one Beth Nduta Mwaura (deceased) and that he is administrator of her estate. He averred that she was registered as the owner of the land parcel Naivasha/Maraigushu Block 18/542. He pleaded that when he presented the confirmed grant for purposes of obtaining title he was notified that the defendant/respondent has already taken the title deed in his name. In his suit, he asked for orders that the title of the respondent be revoked and the same be transferred to him. The respondent filed a defence and refuted all the claims of the applicant. He inter alia pleaded that he is the registered owner of the land parcel Naivasha/Maraigushu Block 18/542 (Naivasha Unity) and this land has no relationship whatsoever with the land described as Naivasha/Maraigushu Block 18/542 (without the words "Naivasha Unity"). In his evidence, the applicant inter alia testified that his late mother was a member of Nyonjoro Farmers Group, which bought shares from Naivasha Unity Farmers and that the deceased was allocated the Plot No. 542 after balloting for it. Among the exhibits that he produced were two ballots, one being No. 607 which he claimed the respondent picked, and one being No. 542 A which he said his late mother picked. The respondent in his evidence acknowledged that he picked the ballot No. 607 but explained that the ballot number is not the same as the land title number and that he was entitled to the suit land. From my assessment of the evidence, the applicant's sole connection with the suit land was the ballot which bore the number 542A but I had no evidence that the ballot No. 542A relates to the land parcel Naivasha/Maraigushu Block 18/542. I held that the applicant needed to give evidence to demonstrate a nexus between the two for it is not always the case that the title number will reflect the ballot number. I thought that this could easily have been done by procuring one of the officials of the land buying company to explain but without such critical evidence, I could not dispel the defendant's claim that the ballot that he drew, that is ballot No. 607, was assigned the land parcel Naivasha/Maraigushu Block 18/542 (Naivasha Unity). I therefore proceeded to dismiss the applicant's suit with costs.

3. In this application, the applicant seeks review of the judgment on the following grounds :-

(a) That there is an error apparent on the face of the record and the applicant is aggrieved by the judgment.

(b) That the applicant has discovered new and important matter and evidence which after the exercise of due diligence was not within his knowledge and therefore could not be produced at the time when the judgment and or order was made.

(c) That the respondent will not be prejudiced by granting the orders sought as the matter shall be heard and decided on merits.

(d) That unless the application is heard expeditiously there is real danger that the respondent might execute the orders or sell, lease or charge the property rendering the applicant's claim nugatory.

(e) That the applicant stands to be wrongfully and illegally dispossessed his deceased mother's property.

(f) That it is in the interest of justice and equity that the prayers sought herein are granted.

4. In his supporting affidavit, the applicant has deposed inter alia that there is an error apparent on the face of the record arising out of the two title deeds presented to the honourable court by the respondent. He has annexed two title deeds, one to the parcel number Naivasha/Maraigushu Block 18/654 (Naivasha Unity) bearing the name Hiram Ndirangu Nganga, and another in the name of the respondent for the land parcel Naivasha/Maraigushu Block 18/582 (Naivasha Unity). He has further averred that since delivery of the judgement, he has discovered new and important matter and evidence, and he annexed a ballot No. 729 with no name, and a share certificate of one Hiram Ndirangu Nganga showing that he was allocated the plot No. 654. He has further stated that because he was acting in person, and being a lay man, he inadvertently omitted to call some of the crucial witnesses including the officials of the land buying group to produce the records of the ballots and the land reference numbers to which the ballots and the titles were assigned. He has annexed a letter dated 9 April 2018 from the Chief of Lakeview Location, Naivasha, which inter alia states that the deceased was a member of Nyonjoro Farmers Group and any offer of assistance be given to the applicant.

5. In opposing the application, the respondent has sworn a replying affidavit where he has inter alia deposed that the application is an afterthought as it was filed on 28 August 2018 yet judgment was delivered on 4 July 2018. It is his view that this delay is not explained. He has averred that the plaintiff was well aware of the importance of witnesses and cannot seek relief by review on that ground. He has deposed that the applicant has not brought any piece of evidence that was not within his knowledge at the time of the hearing of the case. It is his opinion that what the applicant wants to do is reopen his case and seal the loopholes that made the case collapse.

6. I invited both Mr. Tombe, learned counsel for the applicant and Mr. Kahiga, learned counsel for the respondent to file submissions which they did. I have considered these in arriving at my decision.

7. What the applicant wants is the remedy of review which is addressed under Order 45 Rule 1 of the Civil Procedure Rules. The said rule is drawn as follows :-

1. Application for review of decree or order [Order 45, rule 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.

(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.

8. It will be seen from the above that an application for review can be entertained where –

(a) There is discovery of new matter not available to the applicant when the order was made and could not be available despite the exercise of due diligence.

(b) That there is an error apparent on the face of the record

(c) That there is other sufficient reason.

The application also needs to be filed without unreasonable delay.

9. It is the contention of the applicant that he has discovered new material. What he has displayed as new material is a ballot paper No. 654, a share certificate, and the title deed to the land parcel Naivasha/Maraigushu Block 18/654 Naivasha Unity. The ballot has no name but the share certificate and title deed bear the name Hiram Ndirangu Nganga. Now, I really do not know why the applicant is referring me to this ballot and this title deed which are to the land parcel No. 654 which is not in issue in this case. Neither is the beneficiary of this ballot or title deed, the respondent or any party to this case. He has not in his affidavit explained why he feels these documents are important to this case and I am unable to tell their relevance. But most importantly, even if they were material to this case, the applicant has not told me that these documents were not available to him when the case was heard, or that he could not procure them with some exercise of due diligence. I have not been told by the applicant where he got these documents, when he got the same, and why they could not be availed at the hearing of the case if they were thought to be relevant. I am thus not persuaded that this is new material (assuming that it is relevant) that was never within the reach of the applicant at the time of the hearing of the suit.

10. The applicant has also said that there is an error apparent on the face of the record because there were two title deeds to the suit land that were presented. I addressed myself in my judgment of the presence of the two title deeds. Indeed the respondent explained that when the title deed was first issued, it had no acreage and later the same was inserted. I was persuaded by the explanation of the respondent on this issue.

There is nothing new here and I do not see what error is said to be on the face of the record. On my part I see absolutely no error. If the applicant thought that I had not comprehended very well the import of the two title deeds, his avenue was to appeal the decision and not come back to me for a review. It must be understood that a review is not substitute for an appeal.

11. Neither is a review application aimed at providing the party with an opportunity to simply have the case reheard, or to give the applicant an opportunity to present new evidence to seal the loopholes which led him to fail in his case, when all along this evidence could be made available. The reason that the applicant was a lay man acting in person and that he failed to present crucial evidence from the officials of the group is therefore not a ground for review. The officials of the Group were there and could have been summoned to testify. If the applicant failed to call them he cannot now ask to be given an opportunity to summon them so that he can polish his case.

12. I am thus not persuaded that the applicant has persuaded me that he had any new evidence which was not available to him at the time of hearing and I am also not persuaded that there is any error apparent on the face of the record. Neither am I persuaded that there is any sufficient reason to review the judgment herein. I emphasize that review should not be a substitute for appeal. If the applicant was aggrieved by the judgment he ought to have appealed.

13. For the above reasons, the applicant's application for review fails and it is hereby dismissed with costs.

14. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 12th day of March 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In Presence of : -

Mr Tombe for the applicant.

Ms. Jananga holding brief for Mr. Kibet for the respondent.

Court Assistant :Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU