



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.587 OF 2013**

**DAVID KURIA KIMANI .....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**JOHN MWAURA WANYOIKE.....2<sup>ND</sup> DEFENDANT**

**SALIM KIMARU NJAU.....INTERESTED PARTY**

**RULING**

*(Application for review; principles to be applied; applicant having filed an application to be enjoined as interested party ; suit being over land claimed by plaintiff and defendant; applicant alleging that the same land was granted to his late grandmother; court not persuaded that what the applicant has presented refers to the same land under dispute and dismissing the application for joinder as interested party; applicant now seeking a review of that order; no new material presented that is radically different from that earlier presented; even if new, such material could have been presented at the hearing of the first application; no error apparent on the face of the record or good reason to review the order; application dismissed with costs)*

1. The application before me is that dated 23 March 2016 filed by Salim Kimaru Njau who proposed to join this case as an interested party but which application I rejected through a ruling delivered in 15 September 2015. In this application, Mr. Njau is seeking orders that I review and/or vary the orders of 14 September 2015 (sic) (there is actually no ruling of 14 September 2015 and the applicant must have meant my ruling of 9 March 2016). He has contended that if this application is not allowed, he stands to suffer irreparable loss.

2. To put matters into context, this suit was instituted on 8 November 2013 by way of a plaint. In the plaint, the plaintiff pleaded that he is the legal owner of the land parcel Gilgil Township/Block 2/220. He averred that this land was allocated to him by the County Council of Nakuru through the Commissioner of Lands on 12 February 1992. He sought to obtain a title deed but realized that the 1<sup>st</sup> defendant had become registered as proprietor on 28 November 2008. The title of the 1<sup>st</sup> defendant has since been transferred to the 2<sup>nd</sup> defendant. In the plaint the plaintiff sought prayers inter alia that he be declared the rightful owner of the suit land.

3. The 1<sup>st</sup> defendant filed defence vide which she pleaded that this land was allotted to her by the Commissioner of Lands on 18 December 1995. She was issued with a title which was sold to the 2<sup>nd</sup> defendant. The plaintiff was thus put to strict proof of his claims. The 2<sup>nd</sup> defendant has also filed a defence vide which he has pleaded that he is an innocent purchaser for value and has good title to the suit land.

4. Through an application dated 10 October 2014 the applicant sought orders that he be enjoined to this suit as an interested party. He averred in his application that he is the administrator of one Hannah Muthoni Njau (deceased). He claimed that this land was allotted to the deceased and he attached a letter of allotment and a receipt for payment of rates which he claimed were for the suit land. I heard the application and dismissed it in my ruling of 9 March 2016 in my ruling, I stated as follows :-

*“I have carefully looked at the application by the intended interested party. He has in his supporting affidavit stated that he is the administrator of the estate of Hannah Muthoni Njau (deceased). He has annexed a confirmed grant of letters of administration. He has averred that the suit property was allocated on 13 July 2004 by the then County Council of Nakuru and that he has been paying rates over the same land. He has annexed some receipts for these. He has further deposed that the County Council of Nakuru issued him with a clearance certificate to the subject land, which copy is annexed.*

*I have perused these documents. The confirmed grant of letters of administration does not contain the suit property as part of the distributed estate of Hannah Muthoni Njau. What I can see is a parcel of land described as Soitot Settlement Scheme Plot No. 35. I have also seen what the applicant has termed to be an allotment letter to the suit property. It is dated 13 July 2004. From what I*

can discern, it is seemingly an allotment letter of a plot described as Plot No. 1317 G/Township situated in Gilgil. The payment receipts annexed by the applicant are said to be for Plot Rents issued by the County Council of Nakuru. What I can see is that they refer to land described as Block 3/330 Plot No. 283 and in some documents Block 3/330 Gilgil. The Land/Plot Rates Clearance Certificate shows the land Gilgil Town Block 3/330. There are other receipts issued in the year 1983 and which are annexed but they do not show any plot number.

The suit property is Gilgil Township Block 2/220. The applicant has not demonstrated to me the connection between the plot Gilgil Town Block 3/330, which his documents show, and the suit property herein which is Gilgil Township Block 2/220. I am unable to tell from the material presented by the applicant that the reference is to the same land.

I am afraid that the applicant has not revealed to me any interest that he may have over the land described as Gilgil Township Block 2/220...”.

5. I have opted to copy what I held in the said ruling so that it may be clear why I dismissed the application of the applicant to be enjoined to this suit as an interested party. It is this ruling which the applicant now wants reviewed.

6. In this application, the applicant has more or less repeated the allegation that the suit land was owned by his late mother and that he has an interest in it. He has also more or less annexed to his affidavit the same documents that he annexed in his application to be enjoined as interested party. He has claimed that he has been living on the suit land until he was evicted by the County Council of Nakuru in the year 2000 which led him to institute a suit for adverse possession but which suit was dismissed. He has annexed a copy of the ruling dismissing his suit. He has also annexed other documents from the Council of Nakuru being minutes related to land within the Council. He has further annexed a letter of allotment to Hannah Muthoni Njau for the plot Block 3/330 Gilgil Township and another allotment letter to the 1<sup>st</sup> defendant for the same plot Block 3/330 dated 28 November 2008.

7. In opposing the application, the 1<sup>st</sup> respondent filed a replying affidavit sworn by one Paul Chelang’a. He has inter alia deposed that the annexed allotment letter to the plot Block 3/330 is strange to them.

8. I have assessed the application.

9. What the applicant wants is a review of my ruling refusing his prayers to be enjoined to this suit as interested party. An application for review is covered under the provisions of Order 45 of the Civil Procedure Rules which provides 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.*

10. It will therefore be seen that a court may entertain an application for review where :-

(i) There is discovery of new and important matter or evidence which was not within the knowledge of the applicant when the order was made despite exercise of due diligence; or

(ii) That there is a mistake or error apparent on the face of the record; and/or

(iii) That there is other sufficient reason to warrant a review.

11. The application herein does not disclose whether the applicant has discovered any new evidence which was not available at the time the application was made, and neither does it say that there is any error apparent on the face of the record. The applicant simply states that if the prayer that he be enjoined in this case as interested party is not allowed, he stands to suffer irreparable loss.

12. Nonetheless, I will assess the application based on the parameters laid down in Order 45 Rule 1. Firstly, on whether there is any new matter, there is actually none that is new, or if new, could not be exhibited within the application of the applicant where he sought to be enjoined as interested party. The applicant does not state that these fresh documents that he has displayed could not be tabled when he made the application for joinder. A review application is not meant to give a party who failed to disclose critical evidence which was all along in his possession a second bite at the cherry. For the reason that there has not been a demonstration of any new evidence that was not within the knowledge of the applicant when the application for joinder was argued, this application would fail.

13. But even assuming that the documents he has now added to those he had earlier exhibited were not within his knowledge, they change nothing, for to me, they are for the plot No. Block 3/330 which is not the property in dispute. What is in contention in this case is the property Block 2/220. I have yet to be convinced of any nexus between these two plots. All that the applicant states is that there was confusion in the manner these two plots are described but I have not seen any document which can bring me to the inescapable conclusion

that these two plots are the same. I therefore do not see any error or mistake apparent on the face of the record.

14. I honestly do not see any merit in this application and it is pointless for me to say more. I have no option but to dismiss it with costs.

15. If the applicant still feels that he has a cause of action, nothing bars him from filing his own suit and he can very well proceed to do so and such case will be considered on its merits. He is so advised.

16. Orders accordingly.

**Dated, signed and delivered in open court at Nakuru this 7<sup>th</sup> day of March 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In Presence of : -**

Applicant present acting in person.

Ms. Amulabu holding brief for Mr. Otieno for the plaintiff.

No appearance for M/s. Rachuonyo & Rachuonyo for 1<sup>st</sup> defendant .

No appearance for M/s Rubua Ngure & Co. for 2<sup>nd</sup> defendant.

No appearance for State Law Office for 3<sup>rd</sup> & 4<sup>th</sup> defendants.

Court Assistant :Nelima Janepher .

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**