



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELC CASE NO. 725 OF 2017 (OS)
(Formerly CIVIL CASE NO. 688 OF 2013(OS))

RAPHAEL MUKURUMA MUKURIA.....PLAINTIFF

VERSUS

YIAMPOYO EME KUYU OGUTU & SILOLE ENE KUYA

(Widow/Legal Representatives of the estate of Kuya Ole

Oguto Liapay – Deceased).....1st DEFENDANT

COUNTY GOVERNMENT OF KAJIADO.....2ND DEFENDANT

RULING

The application for determination is the 1st Defendant's Notice of Motion dated the 27th June, 2018 brought pursuant to order 50 rule 1, Order 45 rules 1 & 2; Order 21 Rule 8 (6) of the Civil Procedure Rules, Sections 1A, 1B and 3A, 80, 98 and 99 of the Civil Procedure Act; Section 78 of the Land Registration Act and all the other enabling provisions of the law. The Applicant seeks the following orders:

1. That the Honourable Court be pleased to review, vary and or amend its Order issued/extracted on 2nd May, 2018 to bring it into conformity with the findings made in its Ruling dated and delivered on 11th April, 2018.
2. That the Honourable Court be pleased to issue an Order directing the removal of an inhibition registered on 9th July, 2014 against L.R No. Kajiado/ Kaputiei – South/ 2199 at the instance of the 1st Respondent.
3. That the Honourable Court be pleased to direct YIAMPOYO ENE KUYA OGUTU and SILOLE ENE KUYA (Widows/ Legal Representatives of the Estate of Kuya Ole Oguto Liapay – Deceased) to execute the transfer and/or any other document that may be required for the subdivision and excision of a portion of eighty (80) acres from parcel L.R. No. Kajiado/ Kaputiei South /2199 failing which, the Deputy Registrar of this Honourable Court be at liberty to execute the same.
4. Costs of the application be in the cause

The application is premised on the summarized grounds that the Court in its Ruling delivered on 11th April, 2018 declined to set aside Consent dated 11th July, 2013 and 12th March, 2014 which was filed in Court on 7th May, 2014. The court directed for the release of any 'title' held by the Applicant's Counsel on behalf of the estate of the deceased. The said Ruling has not been appealed from. The 1st Respondent's Counsel extracted an Order from the said Ruling dated the 11th April, 2018 without adhering to the mandatory procedural requirements prescribed in Order 21 Rule 8 of the Civil Procedure Rules. The Order extracted by the 1st Respondent's Counsel does not reflect a true, accurate and complete position of the findings made in the Ruling delivered on 11th April, 2018, as it does not clearly outline the Plaintiff's right to a portion of 80 acres of land out of LR No. Kajiado/ Kaputiei – South/ 2199. The Order issued on 2nd May, 2018 is subject to be misinterpreted and misunderstood to the prejudice of the Plaintiff. It is necessary for the Order to be corrected. Further, it is necessary of the inhibition registered on 9th July, 2014 at the instance of the 1st Respondent be removed to pave way for the implementation of the Order flowing from the Ruling.

The Application is supported by the affidavit of the Plaintiff RAPHAEL MUKURUMA where he reiterated his claim and contended that the Ruling dated the 11th April, 2018 upheld the Consents under which Kuya Ole Ogutu Liapay – Deceased had agreed to transfer a portion of the 80 acres from LR. No. Kajiado/ Kaputiei South/ 3177 to him, which was not done at the time of his death on 5th May, 2015.

The application is opposed by the 1st Respondent that filed an affidavit sworn by YIAMPOYO ENE OGOTO who avers that the Court's Ruling delivered on 11th April, 2018 was clear and free of errors. She states that the Applicant has not put forth any grounds that would warrant this Honourable Court to review, vary or amend its ruling. She insists the Applicant inordinately delayed in filing this application, which he filed two months after the ruling. Further, that the Applicant is yet to comply with the Orders of the Court. She reiterates that the Order was extracted as per the Ruling and that the Applicant is attempting an Appeal against the Order of the Court by camouflaging it as a review. She contends that the restriction placed on Kajiado/ Kaputiei South/2199 was done so as to protect their interest. Further, that prayer No. 2 of the application cannot be determined at this stage but only after the suit has been set down for hearing. She reiterates that the prayer for the 1st Respondent to execute the transfer documents is unreasonable since the issue in question is substantive and relates to the issue for determination after hearing the main suit. She reaffirms that there were no orders from the Court with regard to the alleged Plaintiff's proprietary rights over the 80 acres claimed by him and thus the same would have been included in the extracted order. Further, that it is imperative that parties do set the main suit down for hearing instead of burdening the Court with multiple applications.

Both the Applicant and the 1st Respondent filed their respective submissions which I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion application dated the 27th June, 2018 including the supporting and replying affidavits as well as submissions filed herein, the following are the issues for determination:

- Whether the Order issued/extracted on 2nd May, 2018 should be reviewed, varied and or amended.
- Who should bear the costs of the application.

I will decline to make any determination on the prayers for removal of the inhibition or the signing of the transfer forms as this did not form part of my ruling dated the 11th April, 2018 which the Plaintiff sought to review. Since these two prayers refer to the implementation of the consent orders, I will direct the Plaintiff to file a separate application on the same or set the suit down for hearing.

On the issue of review of the Order extracted on 2nd May, 2018. The Applicant contends that they were

not involved in extraction of the Order which does not reflect the Ruling of the Court dated the 11th April, 2018. The Respondent insists the Order reflects the Ruling of the Court.

Section 80 of the Civil Procedure Act provides:-**“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.”**

Further, Order 45, rule 1 (1) of the Civil Procedure Rules provides as follows: ‘ **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.**’

In my Ruling, I had declined to set aside the consent orders dated the 11th July, 2013 and 12th March, 2014 where the deceased 1st Defendant had accepted to transfer 60 acres of land out of Kajiado/ Kaputiei South/ 2199 and 20 acres out of Kajiado/ Kaputiei South/ 2200 to the plaintiff. Further, I granted an injunction to restrain the Plaintiff from interfering with Land Parcel Number Kajiado/ Kaputiei South/ 3177, which did not form part of the dispute. I further directed that the Plaintiff’s Counsel to hand over to the legal representatives of the deceased estate, whatever title deed he had in his custody that belonged to the deceased. Now I wish to refer to the Order extracted on the 2nd May, 2018 in respect of ruling dated 11th April, 2018. The Plaintiff contends that the way the order was extracted by the 1st Respondent’s Counsel does not reflect a true, accurate and complete position of the findings made by the Court in its Ruling delivered on 11th April, 2018, as it fails to clearly outline the Plaintiff’s right to a portion of 80 acres of land out of LR No. Kajiado/ Kaputiei – South/ 2199. For a Court to grant an order for review there has to be 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 the Applicant 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. From the materials presented, I hold that there was an error in the way the order was extracted and direct that the same be amended to conform with my ruling dated the 11th, April 2018; I will proceed to review the order extracted on 2nd May 2018 to read as follows:

- i) The terms of the consent orders dated the 11th July, 2013 and 12th March, 2014 where the deceased 1st Defendant had accepted to transfer 60 acres of land out of KAJIADO/ KAPUTIEI SOUTH/ 2199 and 20 acres out of KAJIADO/ KAPUTIEI SOUTH/ 2200 respectively be and is hereby upheld.
- ii) The Plaintiff be and is hereby restrained from interfering with Land Parcel Number KAJIADO/ KAPUTIEI SOUTH/ 3117.
- iii) The Plaintiff’s Advocates be and are hereby directed to hand over to the 1st Defendant original title deeds to land parcel numbers KAJIADO/ KAPUTIEI SOUTH/ 3117 and KAJIADO/ KAPUTIEI SOUTH/ 2199 which are in their custody.
- iv) Costs will be in the cause

Dated signed and delivered in open court at Kajiado this 3rd April, 2019

CHRISTINE OCHIENG

JUDGE