



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 352 OF 1996

JOHN SENEMA SIRIMANIPLAINTIFF

VERSUS

OKERO OYIENGA1ST DEFENDANT

STEPHEN OKERO2ND DEFENDANT

R U L I N G

1. The present suit by the Plaintiff started way back in 1996. The record shows a Judgment was rendered by Hon. Justice I. C. C. Wambilyangah on 28th March 2003 when he dismissed the Plaintiff's suit holding that the Plaintiff's suit was misconceived. The Judge further held the defendants were the rightful owners of land parcel **Majoge/Bosoti/1731** which they were in occupation of and which apparently was a subdivision from land parcel **Majoge/Bosoti/48** which belonged to the Plaintiff's deceased father. Following the delivery of that judgment the Plaintiff has filed several applications seeking to have the judgment reviewed and/or varied or set aside and the applications have for one reason or the other been unsuccessful.

2. The latest of the applications that the Plaintiff has made is the application dated 17th July 2018 which is the subject of this ruling. The application is expressed to be brought under Orders 45 and 51 of the Civil Procedure Rules and Sections 51 and 63(e) of the Civil Procedure Act Cap 21 Laws of Kenya and seeks the following orders:-

- 1. THAT this application be certified urgent and same be heard ex parte in the 1st instance.**
- 2. THAT the honourable court be pleased to issue orders nullifying the title no. Majoge/Bosoti/1730 and Majoge/Bosoti/1731 and/or revert them back to land parcel no. Majoge/Bosoti/48.**
- 3. THAT the honourable court be pleased to issue orders for eviction against the defendants herein from land parcel no. Majoge/Bosoti/48.**
- 4. THAT any suitable directions and/or orders be made.**
- 5. THAT costs be provide for.**

3. The application is supported on the grounds set out on the face of the application and the affidavit sworn in support of the application by the Plaintiff/Applicant dated 17th July 2018. The grounds the applicant relies on are as hereunder:-

- (a) THAT the applicant is the legally registered absolute owner of all that parcel of land known as Majoge/Bosoti/48.**
- (b) THAT the respondents illegally, irregularly and unlawfully subdivided the applicant's land into land parcel no. Majoge/Bosoti/1730 and Majoge/Bosoti/1731.**
- (c) THAT the Defendants/Respondents have and continue to trespass onto the Plaintiff's/Applicant's parcel of land hence occasioning it irreparable loss and damage.**
- (d) THAT the respondents fraudulently did the subdivision of the land and obtained title deeds illegally and unlawfully.**
- (e) THAT the only remedy for the Applicant is for scrutiny of the documents and order for nullifying of the title deeds thereof made.**

(f) THAT the Applicant is likely to be disposed as the Respondents have already constructed structures on the disputed parcel of land.

4. The Applicant in the affidavit sworn in support of the application avers that he was the registered proprietor of land parcel **Majoge/Bosoti/48** following Kisii HC Succession Cause No. 370 of 1995 where he was awarded the land previously owned by his father who had died on 24th August 1974. He annexed a copy of the certificate of confirmation of the grant to him dated 18th July 1996. The Applicant averred that his late father could not have signed the subdivision and transfer documents that resulted in the purported subdivision of the land parcel **48** to produce land parcels **1730** and **1731** as was alleged by the Respondents since by that time he was dead. The Applicant sought a review of the orders that awarded the Respondents land parcel **1731** so that his land parcel is restored to its original land parcel **Majoge/Bosoti/48**.

5. The Respondents were served with the Applicant's application and indeed the 2nd Defendant attended Court on 24th October 2018 when the Applicant's application had been scheduled for hearing. As the Respondents had not filed a response to the application the Court granted them 21 days leave to file their response. The Respondents did not comply with the Court's directions and did not file any response. On 27th March 2019 the Court reserved a ruling in the matter.

6. The application by the Applicant dated 17th July 2018 though not explicit is an application that is seeking a review of the judgment rendered by Wambilyangah, J. (as he then was) delivered on 28th March 2003. The application is expressed to be brought under Order 45 of the Civil Procedure Rules which substantively deals with review of judgments, decrees and orders of the Court. I will accordingly deem the application to be an application for review and will consider the applicable legal provisions respecting review. Prayer (2) of the Applicant's application invariably invites the Court to consider the earlier judgment rendered by the Court, as it is only if the judgment is reviewed, that the court can grant the order sought. Prayer (2) of the application is in the following terms:-

2. That the honourable court be pleased to issue orders nullifying the title no. Majoge/Bosoti/1730 and Majoge/Bosoti/1731 and/or revert them back to land parcel No. Majoge/Bosoti/48.

7. The Court through the judgment by Wambilyangah, J. had found and held that land parcel no. **Majoge/Bosoti/48** had been validly subdivided into land parcels **1730** and **1731** and that land parcel **1731** had been sold by the Plaintiff's father and properly transferred to the 1st Defendant. **Has the Plaintiff laid any proper basis to review those findings and the decision made by the Court?**

8. To answer the question the Court has to consider the law applicable to review. Order 45 (1) provides as follows:-

45(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 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."

9. From the foregoing provisions in regard to review applications, it is clear that for an Applicant for review to succeed he/she must demonstrate the following:

(i) There has been discovery of new and important matter or evidence that was unavailable and/or could not after exercise of due diligence be available at the time the decree/order was made; or

(ii) There was a mistake and/or error apparent on the face of the record; or

(iii) There was sufficient cause to warrant a review, and

(iv) In any event the application for review has been made without unreasonable delay.

10. The Plaintiff's application for review was primarily premised on the fact that he was registered as the sole owner of land parcel **Majoge/Bosoti/48** in 1996 following succession proceedings relating to his late father's estate and he held the title and further on the fact that his father died in 1974 whereas the subdivision and transfer of a portion of land parcel **48** was supposedly effected in 1992 long after his father had died. He alleged the subdivision and transfer of parcel of **1731** to the 1st Defendant were fraudulently executed. **Does this constitute discovery of new and important matter or evidence, mistake or error apparent on the face of the record or does it constitute sufficient cause to warrant a review?** That is what the Court requires to determine/

11. A review of the judgment and the record of evidence is essential in order to determine whether any of the conditions upon which a review can be granted has been satisfied.

12. The record shows the plaintiff testified before Wambilyangah J. on 30th November 2000 and it was his evidence that he came back from Tanzania in 1974 where he was working and he found the Defendants occupying his land which was then in his father's name. He stated, he held the title to land parcel **Majoge/Bosoti/48** and did not know anything about parcels **1730** and **1731**. The 1st Defendant testified that he purchased 2½ acres from the Plaintiff's father in 1968 for 16 heads of cattle. He testified that land parcel **48** was subdivided to create land

parcels 1730 and 1731 and that he was in occupation of parcel 1731. One Elvis Mulanda Chunguli an Assistant Land Registrar, Kisii testified as DW4 and produced various documents e.g application for Consent of Land Board for subdivision of **Bosoti/48**, transfer to Okero s/o Ayienda for kshs.2,000 and boundary and identity certification (mutation form). I have carefully perused these exhibits. The application for consent for subdivision of **Majoge/Bosoti/48** was dated 21st September 1971 and indicated the subdivision was for 2 portions (2.23Ha and 0.80Ha). Consent was accordingly given vide a letter dated 15th December 1971. A transfer for land parcel **Majoge/ Bosoti/1731** dated 15th December 1971 is shown to have been signed by Silimani Okundi and Senema Selimani in favour of Okero s/o Ayienda. A boundary certificate for plot nos. 1730 and 1731 dated 21st December 1971 is shown to have been signed by the parties. A survey map produced in evidence by the Land Registrar shows that the Registry Index Map was amended in December 1977 to incorporate parcels 1730 and 1731 and the access road to parcel 1731. On the basis of these documents, it is apparent the transaction relating to the subdivision of parcel 48 took place before the death of the Plaintiff's father in 1974.

13. The judge in his judgment properly evaluated the evidence that was adduced before him by the parties. Having considered the documents I have referred to above, the judge stated as follows:-

“All these documents unequivocally showed that after parcel no. 48 was subdivided into 1730 and 1731 the then proprietor of 48 transferred the title in 1731 to the 1st Defendant for the stated consideration of kshs. 2,000/=. The land registrar admitted the register in respect of Plot No. 48 was inadvertently not closed. It was left intact and that is why there is an entry showing the Plaintiff having become registered owner. He said that the Plaintiff is taking advantage of that mistake in a bid to recover the land which his father properly sold to the 1st Defendant.”

The Judge in concluding the judgment stated:-

“I have carefully examined these documents and I find them to be authentic and valid. It is the Plaintiff who was misled by the register into thinking and believing that Plot No. 48 was still intact. Otherwise he should have inherited Plot No. 1730 which remained in his late father's name. The suit by the Plaintiff was based on an error by the Land Registry when it failed to close the register to Plot No. 48.”

14. On the basis of my evaluation of the proceedings and the judgment delivered by Hon. Justice Wambilyangah, I am not persuaded the Applicant has satisfied any of the conditions necessary to warrant a review. I am mindful that I cannot sit on appeal on the judgment delivered by Wambilyangah, J. as he was presiding a court with equal jurisdiction with the court I preside. I am however persuaded on the basis of the evidence adduced before him he reached the correct decision. The Plaintiff had hinged his application for review principally on the fact that his father had died in 1974 while the transactions he complained of were executed in 1992. I have hopefully disabused the Plaintiff/ Applicant of that notion. The documents I have referred to earlier in this ruling have shown the application for subdivision was made in 1971, was consented to in the same year and the transfer executed in the same year. These events all took place before the Plaintiff's father died.

15. The Plaintiff's father died in 1974 after the occurrence of these events. The transfer was executed before the death of the Plaintiff's father and that being the case, the same could be presented for registration even after the death had occurred. A transfer takes effect from the date of execution and the registration is merely to vest the interest transferred on the transferee but otherwise a transferor transfers his interest as soon as he executes the transfer instrument.

16. The upshot is that I find no merit in the Plaintiff's application dated 17th July 2018 and I accordingly order the same dismissed. As the Respondents did not make any response to the application, I make no order for costs for the application.

17. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KISII THIS 31ST DAY OF MAY 2019.

J. M. MUTUNGI

JUDGE