



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 26 OF 2016**

**(FORMERLY KERUGOYA ELC 213 OF 2013)**

**JECKLIA RWAMBA KURINGA.....PLAINTIFF**

**VERSUS**

**MUGO KINYOTHI Alias**

**THOMAS NJIRU MUTURA.....1<sup>ST</sup> DEFENDANT**

**AND**

**THE LAND REGISTRAR, EMBU LANDS REGISTRY.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated 4<sup>th</sup> April 2017 brought under the provisions of **Order 22 Rule 22** and **Order 45 of the Civil Procedure Rules** (hereinafter *the Rules*) and **sections 1A, 1B and 63(e) of the Civil Procedure Act (Cap. 21)** the Defendant sought a review of the judgement and decree of the court dated 09.12.2016. He also sought an order for stay of execution of the said decree pending the hearing and determination of his prayer for review.

2. The said application was based upon the several grounds set out on the face of the motion. The main grounds were, firstly, that there was an error apparent on the face of the record and, secondly, that the Defendant had new and important matters of evidence which he intended to present to the court.

3. The application was supported by the Defendant's own supporting affidavit sworn on 4<sup>th</sup> April 2017. It was contended that in its judgement, the court had heavily relied on *circumstantial* and *presumptive* evidence on the issue of the Defendant's identity. It was also contended that the court had erroneously dismissed or disregarded the Defendant's exhibit No. 3 and as a result arrived at a wrong decision.

4. The Defendant further stated that he intended to produce additional documentary evidence, to wit, copies of the old generation and new generation national identity cards. He also stated that he intended to call his father Njeru Mitambo, who was unable to testify earlier due to ill health, to testify on his behalf.

5. The Plaintiff filed grounds of opposition dated 10<sup>th</sup> April 2017 in opposition to the said application for review. It was contended that the said application was frivolous, vexatious, and an abuse of the court process; that there was no new or important matter which was not within the Defendant's knowledge at the time of trial; and that the application had not been filed without undue delay.

6. By consent of the parties recorded on 12<sup>th</sup> April 2017 it was directed that the said application be canvassed through written submissions. The Defendant was to file and serve his submissions within 14 days whereas the Plaintiff to file and serve hers within 14 days upon service by the Defendant. The record, however, shows that the Defendant filed submissions on 13<sup>th</sup> July 2017 whereas the Plaintiff filed submissions on 22<sup>nd</sup> February 2019.

7. The court has carefully considered the Defendant's said application for review, the grounds of opposition in response thereto as well as the written submissions filed on behalf of the parties. The court is of the opinion that the main question for determination is whether or not the Defendant has demonstrated any of the grounds for review stipulated in **Order 45 of the Rules**.

8. The material provisions of **Order 45 Rule 1 of the Rules** provide that;

**“(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.”**

9. In the case of **Origo & Another V Mungala (2005) 2 KLR 307**, the Court of Appeal reiterated those grounds and considerations as the ones applicable in Kenya to an application for review.

10. The Defendant contended that the court had relied on circumstantial and presumptive evidence at the trial in consequence of which it arrived at an erroneous decision. It was further contended that there was wrongful exclusion of defence evidence by the court to the prejudice of the Defendant. Assuming that the court erred in its evaluation of material evidence at the trial or in excluding defence evidence, can such conduct constitute an error apparent on the face of the record?

11. In the case of **National Bank of Kenya Ltd Vs Ndungu Njau Civil Appeal No. 211 of 1996 (1997) eKLR** the Court of Appeal made the following pronouncement on review;

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review.”**

12. The court is far from satisfied that the alleged errors can constitute an error apparent on the face of the record. The court is of the opinion that the said grievances can only constitute grounds for appeal and not review. If the court evaluated the evidence at the trial and found that the Defendant was a fraudster and imposter who had fraudulently acquired registration of the suit property, the same court cannot be asked to evaluate the same evidence and some other additional evidence in order to come to a contrary conclusion.

13. The other aspect for consideration is whether the Defendant has demonstrated discovery of any new and important matter or evidence which was not within his knowledge or could not be produced at the time of trial. The Defendant has proposed to produce copies of his old and new generation national identity cards. These documents were issued long before the suit was filed and no explanation was given as to why the Defendant did not tender them at the trial. It was not demonstrated that they were ‘discovered’ only after the trial. The court is of the opinion that those documents were at all material times within the knowledge and possession of the Defendant. It was the duty of the Defendant to produce all available evidence at once instead of seeking to produce it by instalments.

14. The Defendant also contended that he wanted to call his father, Njeru Mitambo, as a witness on the basis that he was unable to testify at the trial due to ill health. It is not clear why the Defendant did not seek an adjournment at the opportune time to enable him call his father. The credibility of this ground is, however, put into serious doubt when one considers the remarks of the trial judge on the issue. The Hon. Justice Olao stated as follows in his judgement;

**“Then there is the rather curious and unusual refusal by the defendant to call his own father as a defence witness. A party is not obliged to call any particular witness in support of his case. But surely, where your own identity is in dispute, which better witness can you call than your own father or mother. Although the defendant had filed his father’s statement as a defence witness in this case and although he was present in court when the defendant closed his case on 11<sup>th</sup> May 2016, the defence opted not to call him to testify ...”**

15. The last aspect for consideration is whether the application for review was filed without unreasonable delay. There is no dispute that the decree sought to be reviewed is dated 9<sup>th</sup> December 2016. There is also no dispute that the application dated 4<sup>th</sup> April 2017 was filed on 4<sup>th</sup> April 2017. There was a lapse of about 5 months between the date of the decree and the date of filing the application for review. There was no explanation whatsoever rendered by the Defendant for such delay. The court therefore finds and holds that the application for review was not filed without unreasonable delay.

16. The upshot of the foregoing is that the court finds no merit whatsoever in the Defendant’s Notice of Motion dated 4<sup>th</sup> April 2017. The court agrees with the Plaintiff’s submission that the said application is truly frivolous, vexatious and otherwise an abuse of the court process. The same is consequently dismissed with costs to the Plaintiff.

17. It is so ordered.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **23<sup>RD</sup>** day of **MAY, 2019**

In the presence of Ms Mureithi holding brief for Ms Rose Njeru for the Plaintiff; Mrs. Magara holding brief for Mr. Kenneth Githinji for 1<sup>st</sup> Defendant and in the absence of the 2<sup>nd</sup> Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

23.05.19