



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. 24 OF 2017

GEORGE MUSAU MACKENZIE.....1ST PLAINTIFF

ROSE NDANU MACKENZIE.....2ND PLAINTIFF

FRANCISCAH NDUNGE MACKENZIE.....3RD PLAINTIFF

VIRGINIA NTHENYA MACKENZIE.....4TH PLAINTIFF

KEVIN MUSEMBI MACKENZIE.....5TH PLAINTIFF

LAUREEN NDUKU MACKENZIE.....6TH PLAINTIFF

VERSUS

BARRY MANZA MACKENZIE.....1ST DEFENDANT

LAND REGISTRAR - MAKUENI COUNTY.....2ND DEFENDANT

R U L I N G

1. What is before this Court for ruling is the Notice of Motion Application expressed to be brought under Sections 1A, 1B, 3A and 80 of the Civil Procedure Act Chapter 21, Order 45, Rules 1, 2, 3 and 5 of the Civil Procedure Rules 2010 and Section 3 of the Environment and Land Court Act, 2011 for orders,

1) Spent.

2) THAT this Honourable Court be pleased to review, vary and/or set aside Judgment and/or orders made by this Honourable Court on the 20/7/2018 dismissing the Plaintiffs case as against the 1st Defendant.

3) Spent.

4) THAT this Honourable Court be pleased to allow re-hearing of the case and tendering of new evidence by the Plaintiffs and cross-examination of the 1st Defendant on the new evidence.

5) THAT the costs of this application be provided for.

The application is dated 9th August, 2018 and was filed in court on 10th August, 2018. It is predicated on the grounds on its face.

It is supported by the supporting and further affidavits sworn by George Musau Mackenzie, the 1st Plaintiff/Applicant herein. The two affidavits were sworn on 09th August, 2018 at Nairobi and on 03rd December, 2018 at Nairobi.

In their supporting affidavit, the 1st Plaintiff/Applicant has deposed in paragraphs 3, 5, and 7 that on the face of the judgment paragraph 11 and the record it is indicated that their father obtained a loan of Kshs.40,000/= from National Bank in 1976 yet the documents presented to court do not bear that position as shall be demonstrated through evidence of green cards of land parcels MAKUENI/KAKO/67 and MAKUENI/KAKO/392 that no loan was ever advanced to their father in 1976, that it is clear from the record and the judgment that the Defendant told the court that the land was advertised for sale through auction which evidence was not tendered to this Honourable Court either for the auction or for advertisement, that it is clear from the judgment and the record that the 1st Defendant told the court that the two

parcels of land were auctioned in the year 1976 yet land parcel MAKUENI/KAKO/67 was registered in the names of Mutua Musya the first registered owner not even their father as can be shown by the green card. And in their further affidavit, the 1st Plaintiff/Applicant has deposed in paragraphs 2 and 3 that it came to their attention after the judgment delivered by this Honourable court that one Anthony Muyale Mbindyo was the one witnessed the signing of the transfer forms and upon applying for the same from the lands office at Makueni, that one Anthony Muyale Mbindyo informed him that the purpose of their late father in signing the transfers was only for securing a loan with the National Bank of Kenya and was not for transferring the subject parcels of land to the 1st Defendant.

2. The 1st Defendant/Respondent has opposed the application vide his replying affidavit sworn on 18th October, 2018 at Nairobi and filed in court on even date. The 1st Defendant/Respondent has deposed in paragraphs 4, 5 and 8 that the orders sought by the Applicant in the face of the application will not serve any useful purpose being another avenue through which the Applicant introduces particulars of the “alleged” unlawful, irregularly and/or illegally acquisition of the suit properties, the Applicant and himself during the trial relied on their pleadings and the Applicant cannot attempt at this stage to procure and lay evidence before the court to strengthen the weak part of his case which was dismissed, the Applicant and his advocates failed to exercise due diligence to apply for certified copies of the green card and transfer forms at the Land Registry before the trial and at the time the judgment was delivered. In addition, the 1st Defendant/Respondent filed grounds of opposition contemporaneously with his replying affidavit. In his grounds of opposition, the 1st Defendant/Respondent has raised the following grounds:-

1) The notice of change of advocates and notice of motion dated 09th August, 2018 are fatally defective for failure to meet mandatory threshold set out under Order 9 Rule 9 and Order 45 Rule 1 of the Civil Procedure Rules respectively.

2) The notice of change of Advocates should be struck out and the notice of motion dated 09th August, 2018 should be dismissed with costs to the 1st Defendant/Respondent.

3. Parties filed their written submissions pursuant to the Court’s direction on 22nd October, 2018 that the application be disposed off by way of written submissions.

4. Regarding the grounds of opposition filed by the 1st Defendant/Respondent, the Plaintiffs/Applicants’ Counsel submitted that Order 9 Rule 9 of the Civil Procedure Rules, 2010 is a mere procedural technicality which ought not to negate the principle of fairness and justice as contemplated by Article 159(2) of the Constitution. The Counsel added that the court had entertained the application by granting stay of execution of the judgment delivered on 20/07/18 and as such, it would be proper to entertain the whole application and make its final findings rather than to dismiss the same based on the fact that Counsel is not properly on record.

5. Regarding the application dated 09th August, 2018, the Plaintiff/Applicants’ Counsel cited Order 45 of the Civil Procedure Rules, 2010 which provides as hereunder,

“Any person considering himself aggrieved:-

(a) By a Decree or Order 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 of 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 orders 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, apply for a Review of Judgment to the Court which passed the decree or made the Order without unreasonable delay.”

The Counsel further cited Order 45 Rule 5 of the Civil Procedure Rules which provides thus:-

“When an application for Review is granted, a note therefore shall be made in the Register and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.”

6. Arising from the above, the Counsel submitted that the application for review is merited. The Counsel was of the view that the new evidence of the green cards of the two parcels of land was not tendered in court and they will show that the 1st Defendants/Respondent’s father never obtained a loan of Kshs.40,000/= from the National Bank of Kenya Limited in 1976 contrary to the record of the judgment. The Counsel went on to submit that the new evidence of the green cards will also show that the two parcels of land were never auctioned at any given time contrary to the 1st Defendant/Respondent’s allegation during the hearing of the main suit. The Counsel was of the view that if that was the position, the bank ought to have transferred the two parcels of land to the 1st Defendant/Respondent and not his father.

7. It is also the Counsel’s submissions that the affidavit of one Anthony Muyale Mbindyo clearly shows that the 1st Defendant’s/Respondent’s father never transferred the two parcels of land to the 1st Respondent. He added that the same affidavit evidence shows the existence of errors which appeared on the record and judgment of the court. The Counsel submitted that it was not within the Plaintiffs/Applicants’ knowledge that the land was given to the 1st Defendant/Respondent as a gift since no document was exhibited during the hearing of main suit and that the Plaintiffs/Applicants only came to know of the fact upon applying for transfer forms from the Lands Office Makueni. The Counsel added that the affidavit of one Anthony Muyale Mbindyo is another discovery of evidence which was well within the knowledge of the deponent and not the Plaintiffs/Applicants.

8. On the other hand, the Counsel for the 1st Defendant/Respondent submitted that any evidence adduced in a matter must be in consonance

with the pleadings. That any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. To support his proposition, the Counsel cited the case of **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others [2014] eKLR** where the Court of Appeal cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings,

“.....it is now trite law principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....”

.....In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

9. The Counsel also cited the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others [2017] eKLR** where the Supreme Court in its ruling found and held as follows in respect of the essence of pleadings in an election Petition:-

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

10. Arising from the above the Counsel submitted that the evidence that Plaintiffs/Applicants seek to tender does not support the pleadings. The Counsel added that exhibits GMM 1(a) and (b), 2, 3 (a) & (b) and also the affidavit of Anthony Munyale which the Plaintiff/Applicant asserts that it is new and important evidence was all along within their reach and/or could have been easily obtained from the 2nd Defendant/Respondent. The Counsel submitted that Anthony Munyale who the Plaintiff/Applicants intend to call as a witness was well known to them being a son in-law of the deceased person. The Counsel further submitted that any evidence which is not in consonance with the pleadings must be disregarded as it was held in the case of **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002**.

11. The Counsel cited the case of **National Bank of Kenya Ltd. Vs. Ndungu Njau (Civil Appeal No.211 of 1996 (unreported))** where the Court of Appeal held:-

“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. I will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More 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 provision of law cannot be ground for review.”

“... The learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.”

The Counsel further cited the case of **Francis Origo & Another vs. Jacob Kumali Mungala (C.A Civil Appeal No.149 of 2001 (unreported))** where the Court of Appeal held:-

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceedings in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant’s application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.”

The Counsel submitted that the Plaintiffs/Applicants failed to exercise due diligence to apply for certified copies of the green card and transfer forms at the Land Registry before the trial and at the time before judgement was delivered. The Counsel was of the view that the Plaintiffs/Applicants are attempting a second bite at the cherry. The Counsel correctly submitted that an attempt by this court to determine this application would amount to sitting in an appeal which is not permissible in law. The Counsel cited the case of **Abasi Belinda vs. Frederick Kangwamu & Another [1963] EA 557** where Bennett, J held that;

“a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal.”

The Counsel further cited the **Chittaleye & Rao in the code of Civil Procedure (4th Edn) Vol. 3 pg 3227** where the authors in explaining the distinction between a review and an appeal have this to say:-

“a point which may be a good ground of appeal may not be a good ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for appeal.”

12. Lastly, the Counsel submitted that there is nothing which is irregular or so pernicious to invite the setting aside the judgment delivered on 20th July, 2018. The Counsel added that there is no new evidence before this court to warrant setting aside the judgment of this court as the application has not passed the test set out under Order 45 Rule 1 of the Civil Procedure Rules, 2010.

13. As for the Order 9 Rule 9 of the Civil Procedure Rules *vis a vis* Order 9 Rule 5, the Counsel submitted that it is mandatory that the former must be followed to the letter.

14. Having read the application together with the supporting affidavit as well as the replying affidavit by the 1st Defendant/Respondent and having read the submissions that were filed, I am of the view that the issues for determination are whether or not the notice of change of Advocates and the notice of motion application dated 9th August, 2018 are fatally defective for failure to meet mandatory threshold set out in Order 9 Rule 9 and Order 45 Rule 1 of the Civil Procedure Rules.

15. **Order 9 Rule 9 of the Civil Procedure Rules** provides as follows:-

When there is a change of advocate or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court:-

(a) Upon application with notice to all the parties; or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

16. In the case before me, the Plaintiffs/Applicants herein first filed their plaint on 24th February, 2017 in person. The plaint is dated 24th February, 2017. On the 04th April, 2017 the firm of R. M. Mutune & Co. Advocates filed a notice of appointment of advocates dated 03rd April, 2017. Whereas, Messrs Mwangangi & Associates Advocates filed the notice of motion application dated 09th August, 2019 on 10th August, 2018, there was no application for change of advocates with notice to all the parties as is required under Order 9 Rule 9 of the Civil Procedure Rules. It is therefore clear to me that notwithstanding the fact that the court entertained the application on 13th August, 2018, the application is fatally defective for failure to meet the mandatory provisions set out in Order 9 Rule 9 of the Civil Procedure Rules. This case is distinguishable from the case of **John Gitonga Gachuri & 4 others vs. Commissioner of Lands & 5 others [2017] eKLR** in that it is not a Constitutional Petition. Secondly, the firm of Messrs Mwangangi & Associates have not filed any notice of change of advocate and as such there is nothing to regularize.

17. On whether or not the application for review should be allowed, I am in agreement with the Counsel for the 1st Defendant/Respondent that the evidence that the Plaintiffs/Applicants intend to tender was all along within their reach and could have been easily obtained before the Plaintiffs/Applicants prosecuted their case. I further agree with the Counsel that even if the court were to allow the application, the same would not be in consonance with the pleadings that the Plaintiffs/Applicants have filed. It cannot be said that the Plaintiffs/Applicants have placed before this court sufficient cause so as to allow the application. Indeed I agree with the 1st Defendant/Respondent's Counsel that to allow the appeal would be tantamount to the court sitting in appeal over its own decision.

18. The upshot of the foregoing is that the application lacks merit and same is dismissed with costs to the 1st Defendant/Respondent.

Signed, dated and delivered at **Makueni** this 20th day of **May, 2019**.

MBOGO C. G

JUDGE

In the presence of:-

Mr. Kioko holding brief for Mr. Muthiani for the Plaintiffs/Applicants present

Murimi Munango & Co. Advocates for the 1st Defendant/Respondent absent

Ms. C. Nzioka - Court Assistant

MBOGO C.G, JUDGE

20/05/2019