



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 121 OF 2009

RAPHAEL MITAU KING'ALYA1ST PLAINTIFF

RICHARD MUEMA2ND PLAINTIFF

VERSUS

KILONZO KING'ALYA.....1ST DEFENDANT

MUSILI KING'ALYA.....2ND DEFENDANT

AND

MBUSI MULANGA.....INTERESTED PARTY

RULING

1. In the Notice of Motion dated 23rd November, 2007, the Interested Party is seeking for the following orders:

a. That the Honourable Court be pleased to set aside and or review the orders issued on the 11th October, 2007 and or all consequential orders.

b. That costs of this Application be provided for.

2. The Application is premised on the grounds that there is a procedural and substantive irregularity in the determination of the matter herein; that there is an apparent mistake and error on the face of the record and that justice demands that the orders of 11th October, 2007 be reviewed.

3. The Application is supported by the Affidavit of the Interested Party who has deponed that pursuant to the Plaintiffs' Application dated 9th May, 2007, this court issued an eviction order on 11th October, 2007; that having not been a party to the suit, it is unjust, unfair and unlawful for the Judgment of 25th April, 1990 to be used as a basis for his eviction from the suit land and that it is unprocedural and irregular to state that the orders of 20th March, 2007 determined High Court Miscellaneous Application No. 698 of 1986.

4. In reply, the 1st Plaintiff deponed that the Interested Party/Applicant applied to be joined in this suit long after the delivery of the Judgment; that the Appeal by the Defendant was struck out by the Court of Appeal and that no material has been placed before the court to warrant the review of the orders of 11th October, 2009.

5. The 1st Plaintiff deponed that the Applicant has never challenged the Orders of 11th October, 2009 and that the orders of 11th October, 2009 have been fully enforced. Both the Plaintiffs' and the Interested Party's advocate filed submissions which I have considered.

6. This suit was filed in 1985. On 25th April, 1990, Butler-Sloss, J. delivered a Judgment in favour of the Plaintiffs. While the Plaintiffs were in the process of executing the Judgment of the court, the Interested Party applied, vide an Application dated 6th July, 2004, to be enjoined in the suit. In the same Application, the Interested Party applied for the setting aside of the orders of 4th May, 1992 and 1st July, 1997.

7. The ground on which the Interested Party's/Applicant's Application dated 6th July, 2004 was premised on was that the Interested Party had obtained a Judgment in his favour in respect of land known as Kyangwithya/Kaveta/727 in High Court Misc. Civil Application No. 698 of 1986; and that the orders that were issued to the Plaintiffs herein were issued without full disclosure of the orders issued in High Court Miscellaneous Civil Application No. 698 of 1986.

8. Although the Interested Party/Applicant was enjoined in the suit, there is no evidence before me to show that the Judgment of the court was ever set aside. Consequently, vide an Application dated 9th May, 2007, the court (*Ang'awa J.*) ordered for the eviction of the Defendant and the Interested Party/Applicant. In her Ruling of 11th October, 2007, *Ang'awa J.* held as follows:

“8. As to the main Application, I accordingly rule that orders to evict the Defendants and or trespasser including one Mbusi Mulanga from Kyangwithya/Karen/727 be and is hereby allowed by five court bailiffs.”

9. The above orders are what the Applicant is seeking to set aside and or review. The law relating to review of a Decree or order is set out in Order 45 of the Civil Procedure Rules. Order 45 Rule 1 (1) of the Civil Procedure Rules provides as follows:

“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. The record shows that the Applicant did not file a Replying Affidavit in respect to the Notice of Motion dated 9th May, 2007 which gave rise to the impugned Orders of 11th October, 2007. According to the Application, *“if given an opportunity, he is able to explain why the Chamber Summons ought to be allowed”*.

11. The fact that a party never responded to an Application that gave rise to an impugned order cannot be a ground for review. Indeed, having not shown any good reason why he did not respond to the said Application, the order of the court dated 11th October, 2007 cannot be set aside or reviewed.

12. The only option the Applicant had was to Appeal against the Ruling and Order of 11th October, 2007. I say so because the Applicant's complaint is that the order of 11th October, 2007 should never have been made because there was another order that had been made in High Court Miscellaneous Application No. 698 of 1986 giving him the same land.

13. Having failed to respond to the Application of 9th May, 2007, the Applicants have themselves to blame for the orders of 11th October, 2007. The said orders cannot be reviewed or set aside by this court.

14. For those reasons, the Application dated 23rd November, 2007 is dismissed but with no order as to costs. For avoidance of doubt, this suit is marked as having been finalized.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE