



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 164 OF 2014

PAUL MWANGI GACHURU.....PLAINTIFF/APPLICANT

VS

KAMANDE NGUKU.....DEFENDANT/RESPONDENT

RULING

1. This Notice of Motion is brought under Order 40 and 45 of the Civil Procedure Rules sections 1A, 1B, 3A and 99 of the Civil Procedure Act and all other enabling provisions of the law. The Applicant sought the following orders;

a. Spent

b. That the Court do issue a temporary injunction against the Defendant whether by himself or agent and or servants from disposing off or in any manner dealing with the land parcel No. LOC 17/KAMAHUHA/2908 pending the hearing and determination of this application.

c. That the Court do review and /or amend the judgement delivered on the 16/11/17 and the decree issued on the 17/3/18

d. Costs of the application be in the cause.

2. The application is grounded on the premises that judgement was delivered in this case on the 16/11/17 decreeing that the Applicant is entitled to a portion of one acre out of LOC17/KAMAHUHA/2634 through Adverse Possession; upon being served with the decree the Respondent in a bid to defeat the judgement of this Court filed a Misc application No 27 of 2018 at Thika and obtained orders to remove the caution that was filed by the Applicant prior to filing this suit; the suit land was subdivided into three parcel No.s LOC17/KAMAHUHA /2906, 2907 and 2908 and titles were issued on the 11/4/18; Parcel No LOC17/KAMAHUHA /2907 was sold to a third party and parcel LOC17/KAMAHUHA /2908 measuring 1.2 acres happens to be where the Applicant occupies and it is for that reason that the Court should amend its judgement to read one acre out of LOC17/KAMAHUHA /2908 instead of LOC17/KAMAHUHA /2634.

3. The application is supported by the affidavit of the Applicant sworn on the 7th May 2018 wherein he reiterated the grounds in the application. In addition, he states that he is apprehensive that the Respondent will dispose parcel LOC17/KAMAHUHA /2908 rendering him destitute.

4. The application is not opposed. The Respondent was served with the application but he did not file any responses thereto.

5. On the 12/6/19 the Court granted prayer No 2 in the Notice of Motion pending the hearing and determination of the motion.

6. The Applicant submitted that the Respondent obtained the orders to remove the caution irregularly and on ex parte basis, he then proceeded to subdivide the suit land into 3 parcels after the judgement had been delivered in the suit. That the Respondent's actions were geared at defeating the judgment in his favour. He pleaded with the Court to review the judgement so as to substitute the suit land with parcel LOC17/KAMAHUHA /2908 as he claims to be in occupation of the said parcel.

7. The key issue for determination is whether the Applicant is entitled to orders of review.

8. In respect to issue no 1, Order 45 Rule 6(2) 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”.

9. The operative tone of the above Order demands that the application for review must be based on a). the discovery of new and important matter of evidence which after the exercise of due diligence was not within the Applicant’s knowledge or could not be produced by him at the time when the decree was passed or the order made or b). account of some mistake or error apparent on the face of the record or c). any other sufficient reason.

10. When a review is sought on the ground of discovery of new evidence, the evidence must be relevant and of such a character that if it had been given in the suit it might possibly have altered the judgment. In the case of **Brown Vs Dean (1910) AC 373** Lord Loreburn stated that the new evidence must be at least such as is presumably to be believed, and if believed would be conclusive. Before a review is allowed on grounds of a discovery of new evidence, it must be established that the Applicant had acted with due diligence and the existence of the evidence was not within his knowledge. Where a review is sought on the ground of discovery of new evidence but was found that the Applicant had not acted with due diligence, it is not open to the Court to admit evidence on ground of sufficient cause. It is not to be supposed that the discovery of new evidence at any other time is by itself sufficient to entitle a party to a review of judgement. The provision relating to review contemplates grounds which would alter or cancel the decree.

11. A review based on any other sufficient reason means a reason sufficiently analogous to those specified in the rule though cannot be held limited to the first two reasons adduced in para 9 above.

12. In this particular suit judgement was delivered in favour of the Applicant on the 16/11/2017 wherein the Court found that the Applicant had acquired title by way of Adverse Possession and ordered that one acre out of the suit land being LOC17/KAMAHUHA/2634 be transferred to him. It is claimed by the Applicant that upon being served with the decree the Respondent proceeded to subdivide the suit land into three parcels and disposed one of them to a third party. That it would appear that parcel LOC17/KAMAHUHA /2908 is now registered in the name of the Respondent and the Applicant is beseeching this Court to substitute the judgement and order that he is entitled to one acre out of parcel No LOC17/KAMAHUHA/2908.

13. My perusal of this file shows that this suit was filed on the 18/6/15. On the 7/7/15 the Applicant filed a caution on the suit land being LOC17/KAMAHUHA/2634 claiming purchasers interest. Judgement was delivered in favour of the Applicant by this honourable Court on the 16/11/17 granting him title to one acre out of the suit land having so established title by way of Adverse Possession. On the 4/4/18 the cautions on the title (including the Applicant’s caution aforesaid) were removed vide orders of the Resident Magistrate Court issued on the 8/3/18. I have perused the supporting affidavit filed by the Respondent in that Court sworn on 21/2/18 which states as follows;

“3.that the 1st 2nd and 3rd Respondents herein in the year 2015 unlawfully and without any reasonable cause or excuse registered a caution against the title to my said parcel of land thereby denying me exclusive rights of proprietorship to my said parcel of land. Attached is a green card marked KN1.

5.That despite demand made and notice of intimation to sue in default given the Respondent has refused to remove the said caution.

6. That the Respondents registered the caution since the year 2015 which is now 2 years back and none of the Respondents has filed any suit to ascertain his claim.”

14. It is on record that he failed to file any defence and the Applicant secured judgement in default against him on the 31/3/16. I find that the Respondent’s averment on para 6 above is misleading when he had knowledge that there existed a case against him filed by the Applicant.

15. Having said that the Court notes that despite the Applicant deponing that he served the Respondent with the decree of the Court, he did not annex any affidavit of service or such other evidence to support the averment. I say so because the suit proceeded by way of formal proof and it is expected that once judgement was rendered the Applicant ought to have served the Respondent to bring to his attention about the judgement and the impending execution. I did not sight any evidence in that regard.

16. I have also seen a mutation form dated the 16/7/15 which is incomplete in the sense that it does not show whether or not the same was registered. However, the Applicant has annexed official searches of two parcels LOC17/KAMAHUHA /2908 and 2907 registered in the names of the Respondent and one Stanley Mwaura Mungai on the 11/2/18 and 25/4/18 respectively. The copy of the green card for parcel LOC17/KAMAHUHA /2634 does not contain any entries on the subdivision. It is difficult for the Court to pin point when the subdivisions were registered or at all.

17. This application seeks to introduce a new cause of action which is whether the Applicant is entitled to parcel No LOC17/KAMAHUHA/2908 by way of Adverse Possession. The suit in which the Court determined through its judgement rendered on the 16/11/17 was in respect to a cause of action relating to a portion of one acre out of Parcel LOC17/KAMAHUHA/2634. The judgment therefore extinguished that cause of action. It is not available for re-litigation through this application. The Applicant is laying claim to one acre out of a new title LOC17/KAMAHUHA /2908 which according to the official search produced in Court measures 1.2 hectares.

18. Review does not affect a cause of action but a decision of the Court. The Applicant’s cause of action was dependent on Adverse Possession in respect to parcel LOC17/KAMAHUHA /2634. In this Notice of Motion the Applicant appears to hinge his claim on a review which is a factor within a cause of action so pleaded and disclosed.

19. The Court finds that the application is introducing a new cause of action in which event it cannot be entertained in this current suit which is now determined and a judgement rendered. I find that the Court is funtus officio.

20. The power to review can be exercised for the correction of a mistake and not to substitute a view or cause of action. Once a review is dismissed no further review can be entertained. Like all discretions the power of review must be exercised judiciously and not capriciously. See **Shah Vs Mbogo (1979) EA 116**.

21. Further there are no grounds for review that have been proffered by the Applicant. The grounds alluded to earlier are matters that took place after the judgement of the Court had been delivered. They are not matters that were present during the life of the suit as to found a ground for review on the basis of discovery of new matters that the Applicant was unable to discover even with the exercise of due diligence. These are extraneous and new matters that occurred post judgement.

22. Fundamentally the orders being sought herein can only be founded in a proper suit grounded on a cause of action which orders cannot be applied or available in a review where the factors for consideration are discovery of new evidence, error on the face of the record or any other sufficient cause.

23. That notwithstanding the subdivisions of the suit land appear to have been done after the judgment in this case and in circumstances that are incompatible with the orders issued by this Court. I leave it at that.

24. The application is without merit. It is dismissed with no orders as to costs.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A, THIS 30TH DAY OF SEPTEMBER 2019.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Gachao HB for Ngaruiya for the Applicant/Plaintiff

Respondent – Absent

Irene and Njeri, Court Assistants