



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 419 OF 2017(O.S)

SAMSON KAMANDE NJORA..... PLAINTIFF

VS

BENARD KANGETHE NJAU.....DEFENDANT

RULING

1. The Plaintiff moved this Court vide a Motion dated 2nd May 2019 filed same day seeking the following orders:-

That judgment of this court dated 31.07.2018 be reviewed, vacated and set aside and there be an order therefore allowing the Plaintiff's suit as prayed in the originating summons.

That costs of the Application be borne by the Defendant.

2. The application is premised on the following grounds:-

The Plaintiff felt dissatisfied with the judgment of this court.

There is an error apparent on the face of the record which necessitates a review.

The ingredients of the principle of adverse possession were sufficiently proved.

It is just to so order.

3. The Plaintiff swore a supporting affidavit to the application in which he posits that he entered into an agreement for sale of 0.5 acres out of land parcel number LOC.20/KAMBIRWA/5327 with the Defendant as per the annexed copy of the sale agreement. He claims to have been put in vacant possession in the year 1996 and started cultivating the land and has remained in continuous, uninterrupted possession and use of the defined portion of 0.5 acres to date. He is convinced that he has satisfied the stringent requirements of the principle of adverse possession. He avers that there is an error apparent on the face of the record that necessitates a review.

4. The application was opposed through a replying affidavit dated 07.05.2019 by the Defendant who contends that; the application was made by the new advocates for the Plaintiff without leave to come on record after judgment; that there was excessive unexplained delay of 8 months before bringing the present application; that the application seeks to challenge the court's perception of evidence which speaks into an appeal as opposed to a review; the application is frivolous and misconceived and must be dismissed with costs.

5. In the submissions, the Defendant faults the Plaintiff for failing to specify the rules under which the application are urged. He sets the grounds for seeking for review and contends that in the instant case there is no error apparent on the face of the record. He insists that the applicants ought to have filed an appeal instead.

6. In respect to the issue of whether the new firm was properly on record at time of making the application I note that there is a consent on record dated 26.04.2019 and filed on 02.05.2019 along with the application for review. This action effectively cures the Defendant's contention.

7. Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist:-

(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

(b) There was a mistake or error apparent on the face of the record; or

(c) There were other sufficient reasons; and

(d) The application must have been made without undue delay

8. It is the finding of the court that the error alluded to by the applicant on the face of the record is not specified. The application on the face of it seems to be an attempt to relitigate the matter a second time.

9. It is to be noted that the applicant too agrees that the original entry was lawful and or permissible. See para 4 of the supporting affidavit.

10. Nevertheless, I have looked at paragraph 17 of the judgment delivered on 31.07.2018. It reads;

“17. It is a fact that the Plaintiff entered into the land through purchase and was put in possession in 1996. Did adverse possession start running then? If yes against whom? The registered owner Wanjiku Njau had died way back in 1986. The Defendant sold land that he had no registrable interest. The Purchase price was paid in 1997. It is clear that entry into the land was permissible. Then the question would be when did time start running for purposes of adversity of claim. Did time start running from 1997 when he completed paying the purchase price?. If that be the case, the suit was filed in 2017, 10 years later. That is less than 12 years mandatory period. The agreement was contingent to the transfer being undertaken once the succession cause was concluded. The grant was issued in 2013 in the name of the Defendant. Even if this is taken to be date upon which time started running, then the period would only be 4 years and way below that the statutory period.”

11. My review of the said judgement reveals an arithmetical error in the computation of the period alleged to prove adverse possession. Section 99 of the Civil Procedure Act empowers the court to correct such errors. The section states as follows;

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties”.

12. Guided by the above section of the law, the Judgment dated 31st July 2018 is corrected in the following manner:-

a. Paragraph 17 - In the tenth sentence by replacing the number “10” immediately before the word “years” with the number “20”. In the eleventh sentence, by deleting the word “less” immediately appearing before the word “is” and replacing the same with the word “more”.

b. Paragraph 17 as corrected to be read in the following manner - “It is a fact that the Plaintiff entered into the land through purchase and was put in possession in 1996. Did adverse possession start running then? If yes against whom? The registered owner Wanjiku Njau had died way back in 1986. The Defendant sold land that he had no registrable interest. The Purchase price was paid in 1997. It is clear that entry into the land was permissible subject to succession proceedings. Then the question would be when did time start running for purposes of adversity of claim. Did time start running from 1997 when he completed paying the purchase price?. If that be the case, the suit was filed in 2017, 20 years later. That is more than 12 years mandatory period. However the agreement was contingent to the transfer being undertaken once the succession cause was concluded, meaning that for the duration the possession was permissible. The grant was issued in 2013 in the name of the Defendant. Even if this is taken to be the date upon which time started running, then the period would only be 4 years and way below the statutory period”.

13. The upshot is that even with the correction of the arithmetic error the final decision of the court remains as determined on the 31/7/18

14. The application has no merit. It is dismissed.

15. Each party to bear its own costs.

16. Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 31ST OCTOBER 2019

J. G. KEMEI

JUDGE

In the presence of:

Plaintiff – Absent

Defendant - Wachira HB Mbuthia

Mr Kuyiki and Ms Njeri, Court Assistants.