



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C CASE NO. 109 OF 2015

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF LAND PARCEL NUMBER NTHAWA/GITIBURI/1826

BETWEEN

JOACHIM NJUGUNA MBUGUA.....1ST PLAINTIFF

JOHN NDUNG’U MBUGUA2ND PLAINTIFF

JOHN NYAGA NJOKA.....3RD PLAINTIFF

VERSUS

SAMUEL NJAGI.....1ST DEFENDANT

NJERU GICHANGU.....2ND DEFENDANT

FAUSTINO NJERU NJOKA.....3RD DEFENDANT

RULING

1. By a notice of motion dated 8th August 2019 brought under **Order 45 of the Civil Procedure Rules 2010** (hereafter *the Rules*), **Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21) and all other enabling provisions of the law**, the Plaintiffs sought a review, setting aside or variation of the judgement and decree of the court dated 30th May 2019.
2. The said application was based upon the grounds set out on the face of the motion and supported by an affidavit sworn by the 3rd Plaintiff on 8th August 2019. The gist of the application was that there was an error on the face of the record in the computation of time for purposes of adverse possession. It was contended that the court had erroneously computed the time from 1996 to 2010 as 4 years instead of 14 years.
3. The Defendants filed a statement of grounds of opposition dated 4th September 2019 in response to the said application. It was contended that the application was frivolous and vexatious; that it was an abuse of the court process; and that time was not the only factor which was considered in the judgement.
4. When the said application was listed for hearing on 11th September 2019 the advocates for the concerned parties agreed to rely on the documents on record without filing any submissions.
5. The court has considered the Plaintiffs’ said application for review, the Defendants’ grounds of opposition as well as the material on record. The material provisions on review of a decree are to be found in **Order 45 Rule 1** of the **Rules** which stipulates as follows:

“(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.”

6. 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.”

7. The court has perused the judgement dated 30th May 2019 in its entirety. It is clear that there is an arithmetical error in the computation of time for purposes of adverse possession. The court erroneously calculated the period from 1996 to 2010 as 4 years instead of 14 years. It is also clear from paragraphs 15 and 17 of the judgement that the Plaintiffs’ suit for adverse possession was dismissed on account of that error. The court does not agree with the Defendants’ contention that the suit was also dismissed on account of other reasons such as interruption of possession.

8. The court is thus satisfied that the Plaintiffs have demonstrated an error apparent on the face of the record within the meaning **of Order 45 Rule 1 of the Rules**. The Plaintiffs are accordingly entitled to a review of the judgement and decree dated 30th May 2019. Since there was some delay in filing the instant application, the Plaintiffs shall not be awarded any costs of the suit or application.

9. The upshot of the foregoing is that the court finds merit in the Plaintiffs’ notice of motion dated 8th August 2019. The same is accordingly allowed in the following terms:

- a) The judgement and decree of the court dated 30th May 2019 is hereby reviewed.
- b) There Plaintiffs’ originating summons dated 7th May 2010 is hereby allowed in terms of prayers (a) (b) and (c) thereof.
- c) Each party shall bear his own costs of the application and suit.

10. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 24TH DAY of OCTOBER, 2019.

In the absence of Plaintiffs and the Defendants.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

24.10.19