



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KISII**

**CASE NO. 1244 OF 2016**

**(FORMERLY HCC NO. 31 OF 2008)**

**EVANS NYACHIENGA.....PLAINTIFF**

**VERSUS**

**JACKSON NYANGAU KIAGE.....1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR NYAMIRA.....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The court after hearing the parties rendered a judgment in this matter on 28<sup>th</sup> day of September 2018. The court declared the plaintiff the owner of LR No. Central Kitutu/Mwabosire/452 and further decreed the subdivision of the said parcel of land into land parcels Central Kitutu/Mwabosire 1360 and 1361 unlawful. The court ordered cancelled the titles issued in respect of the two subdivisions and further ordered the 1<sup>st</sup> defendant to vacate from the portion of land parcel Central Kitutu/ Mwabosire/452 within 30 days of the date of judgment failing which an eviction order was to issue on application by the plaintiff.

2. The 1<sup>st</sup> defendant being aggrieved by the judgment and decree issued by the court filed the notice of motion dated 31<sup>st</sup> January 2019 filed in court on 1<sup>st</sup> February 2019 predicated on Sections 1A, 1B, 3A, 63(e) and 80 of the Civil Procedure Act and Order 45 and Order 51 rule 1 of the Civil Procedure Rules. The applicant sought the following orders:-

**1. Spent**

**2. Spent**

**3. THAT pending the hearing and determination of this application this Honourable Court be pleased to grant stay of execution of its judgment delivered on 28<sup>th</sup> September 2018 and the subsequent decree emanating therefrom and all the consequential orders.**

**4. THAT the officer commanding Manga Police Station to ensure compliance with orders 2 and 3 above.**

**5. THAT the court file in the matter KISII PMCC No. 88 of 1980 be availed to this Honourable Court by the Executive Officer for perusal and reference by this Honourable Court when hearing and making a determination of the present application.**

**6. THAT this Honourable Court be pleased review, vary and or upset the judgment delivered by Justice J. M. Mutungi on 28<sup>th</sup> day of September 2019 and make an order that the 1<sup>st</sup> defendant/applicant is the duly registered owner of land parcel title number Central Kitutu/ Mwabosire/1361 having purchased the same from the plaintiff and acquired its registration pursuant to a court order in the matter Kisii PMCC No. 88 of 1980.**

**7. THAT the costs of this application be provided for.**

3. The application was supported on the grounds set out on the body of the application and on the annexed supporting affidavit sworn by the

1<sup>st</sup> defendant/applicant dated 31<sup>st</sup> January 2019. The principal ground upon which the applicant seeks review of the judgment is that there was a previous suit namely Kisii PMCC No. 88 of 1980 that had dealt with the subject matter of this suit in which the plaintiff and the 1<sup>st</sup> defendant participated and where it was determined that the disputed property be transferred to the 1<sup>st</sup> defendant upon him paying a sum of kshs. 400/= to the plaintiff in the present suit.

4. The 1<sup>st</sup> defendant contended that the plaintiff was aware of the proceedings in the said previous suit as set out under paragraph 11 of the grounds in support of the application. The 1<sup>st</sup> defendant under paragraphs 12 and 13 of the grounds in support of the application stated as follows:-

**12. From the totality the evidence indicated in paragraph 11 above it cannot be possibly stated that the plaintiff/respondent was not aware of the proceedings in the matter KISII PMCC NO. 88 of 1980.**

**13. The matter stated above constitute discovery of new and important matter or 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 of the hearing, or a sufficient reason, that is sufficient enough to tilt the scales of justice and allow this Honourable court to exercise its own power to review its judgment delivered on 28<sup>th</sup> September 2018.**

5. The applicant averred that had the court taken account of the determination in Kisii PMCC No. 88 of 1980 the court may as well have reached a different decision. Further the applicant contended that the proceedings in the instant matter were at any rate *res judicata* by reason of the said previous suit.

6. The plaintiff/respondent filed a replying affidavit dated 13<sup>th</sup> March 2019 in opposition to the 1<sup>st</sup> defendant's application for review. The plaintiff/respondent denied that the applicant had made out any case to justify the review of the court's judgment/decree herein. The respondent contended that the court had properly made the judgment after duly evaluating all the evidence adduced before it. He averred the court had become *functus officio* in the matter and that the applicant's application amounted to inviting the court to sit on appeal on its own judgment.

7. The application was canvassed by the parties by way of written submissions. The 1<sup>st</sup> defendant/applicant filed his written submissions on 11<sup>th</sup> July 2019 while the plaintiff/respondent filed his submissions on 17<sup>th</sup> June 2019. The 1<sup>st</sup> defendant in his submissions has outlined the proceedings in Kisii CMCC No. 88 of 1980 which on 9<sup>th</sup> July 1991 culminated with the court ordering the executive officer of the court to execute the necessary documents to effect transfer of the land. The plaintiff herein was ordered to transfer the land to the 1<sup>st</sup> defendant herein and after the order was effected the 1<sup>st</sup> defendant was registered as owner of land parcel Central Kitutu/Mwabosire/1361. The 1<sup>st</sup> defendant submitted the court order from the Chief Magistrate's Court was never appealed from, was not cancelled, varied or reviewed and therefore contended that was an appropriate ground to seek a review of this court's judgment that had ordered the 1<sup>st</sup> defendant's title to be cancelled in the face of the earlier court's order awarding the suit land to him. The applicant maintained that he obtained title to the disputed land through a valid court process and that any failure on the part of his advocate in the instant suit to avail the pleadings and/or proceedings in the earlier suit ought not to be visited on him as he was an innocent litigant.

8. The plaintiff/respondent submitted that the 1<sup>st</sup> defendant/ applicant had not established any ground to warrant a review of the court's judgment. The respondent submitted that the applicant did not satisfy any of the conditions upon which a review may be granted as provided under Order 45 Rule 1 of the Civil Procedure Rules. Order 45 Rule 1 of the Civil Procedure Rules provides as follows:-

**45.(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.**

Order 45 Rule 3 provides as follows:

**(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.**

**(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:**

**Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.**

9. Thus it is clear from the reading of Order 45 Rules 1 and 3 that for an application for review to succeed the applicant must demonstrate and/or prove:-

**(i) There has been a discovery of a new and important matter of evidence which after the exercise of due diligence, was not within the knowledge of the applicant and/or could not be produced by him at the time when the decree was passed or the**

order was made; or

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

(iii) There was some other sufficient reason; and

(iv) The application had been made without undue delay.

10. In the instant application the applicant has pleaded that there was Kisii PMCC No. 88 of 1980 that had dealt with the same issue relating to the land in dispute. The applicant however has not explained why he did not introduce and/or seek the introduction of the proceedings in the said case during the hearing of the present suit. In the statement of defence filed by the 1<sup>st</sup> defendant dated 18<sup>th</sup> December 2008, under paragraphs 6 and 7, the 1<sup>st</sup> defendant made reference to the said suit. Under paragraph 6 the 1<sup>st</sup> defendant pleaded as follows:-

**“6. That after the said subdivision stated in paragraph 5 above, the plaintiff refused to execute a transfer form to transfer LR Central Kitutu/Mwabosire/1361 to the 1<sup>st</sup> defendant filed civil case no. 88 of 1980 at the Principal Magistrate’s Court at Kisii against the plaintiff.”**

11. The 1<sup>st</sup> defendant therefore had knowledge of Kisii PMCC No. 88 of 1980 as at the time of the trial of the present suit and could easily have obtained the proceedings and/or records in the case which he now seeks to have admitted as evidence vide the instant application. The 1<sup>st</sup> defendant by exercise of due diligence could have had this evidence presented before the court at the hearing. In relation to the earlier suit the 1<sup>st</sup> defendant only produced a copy of the court order dated 12<sup>th</sup> November 1991 as “DEx.7” and nothing else.

12. In analysis the evidence adduced the court in its judgment at paragraphs 20 and 21 stated as follows:-

**20. The 1<sup>st</sup> defendant in his pleadings states that he filed a suit in Kisii Principal Magistrate’s Court Civil Case No. 88 of 1980 but in his evidence he stated he filed the suit in 1990. The court order he produced that allowed the executive officer to execute the transfer in place of the plaintiff dated 12<sup>th</sup> November, 1991 indicates the case as Kisii PMCC No. 88 of 1990. The 1<sup>st</sup> defendant did not produce any copies of the pleadings but the court order indicates Nyachienga Bosire to have been the defendant in the suit. The plaintiff denied he was also known as Nyachienga Bosire (Bosire) and on the basis of the evidence on record, I cannot hold that it was established that he was also known by that name. The court order in my view was at variance with the other documents produced by 1<sup>st</sup> defendant. The letter of consent dated 17<sup>th</sup> June 1975, the application to the Land Control Board dated 12<sup>th</sup> June 1975, the mutation form dated 2<sup>nd</sup> February 1976 and the transfer dated 12<sup>th</sup> June 1975 all bear the name Nyabanga Mbusire attributed to be the plaintiff while the court order issued on 12<sup>th</sup> November 1991 in Kisii PMCC No. 88 of 1990 indicate the name of Nyachienga Bosire. The court order did not relate to Nyabanga Mbusire who had on 5<sup>th</sup> February 1976 subdivided land parcel 452 to create parcels 1360 and 1361. Who was Nyachienga Bosire? It was not the plaintiff who in any event denied having been aware of the suit.**

**21. In the premises therefore, I find it more probable that the plaintiff had merely allowed the 1<sup>st</sup> defendant to use a portion of his (plaintiff’s) land to plant trees and there was no intention to sell and transfer. It is my view that the defendant after having been let into occupation and possession of a portion of the suit property hatched the idea to wrestle the land from the plaintiff and that explains how the various documents I have discussed hereinabove came about. It is possible that a person describing himself as Nyabanga Mbusire may have held himself out as the plaintiff and caused the “manufacture” of the various documents that have been presented before this court in support of the 1<sup>st</sup> defendant’s case. The court in the exercise of its mandate is guided by evidence and the law and in the present case I am not satisfied the 1<sup>st</sup> defendant acquired title to land parcel Central Kitutu/Mwabosire/1361 lawfully and validly. It is my holding and finding that the subdivision of land parcel Central Kitutu/ Mwabosire/452 to create land parcels 1360 and 1361 was not validly and lawfully done. It follows therefore that the transfer of land parcel LR No. Central Kitutu/Mwabosire/1361 to the 1<sup>st</sup> defendant was null and void.**

13. The court as evidenced above did not ignore the evidence relating to the previous suit. The court was not satisfied the plaintiff was a party in that previous suit and was of the view that a stranger may have held himself out as the plaintiff and caused the plaintiff’s land parcel 452 to be transferred to himself. Even if I was to admit and consider the proceedings in the said previous case, I am not persuaded that would alter the decision that I arrived at in the judgment sought to be reviewed.

14. The applicant in the present application has alluded to the suit having been *res judicata* in view of the earlier suit. That was not an issue that was canvassed during the hearing and further, in view of what I have said that there was no proof that the plaintiff was a party in Kisii PMCC No. 88 of 1990, the doctrine of *res judicata* would be inapplicable.

15. On evaluation and consideration of the applicant’s application and the submission by the parties, I am not satisfied that the 1<sup>st</sup> applicant’s application has any merit. There is no demonstration of discovery of any new important matter of evidence that was not available as at the time the judgment was rendered or any error or mistake apparent on the face of the record to justify a review of the judgment. Equally, it has not been shown there is any other sufficient reason to warrant a review of the judgment.

16. I accordingly order the 1<sup>st</sup> defendant’s application dated 31<sup>st</sup> January 2019 dismissed with costs to the plaintiff.

17. Orders accordingly.

**RULING DATED AND SIGNED AT NAKURU THIS 9<sup>th</sup> DAY OF OCTOBER 2019.**

**J. M. MUTUNGI**

**JUDGE**

**RULING DELIVERED AT KISII THIS 23<sup>rd</sup> DAY OF OCTOBER 2019.**

**J ONYANGO**

**JUDGE**