



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 50 OF 2015

ERICK AKIVAGA.....PLAINTIFF

VERSUS

ALFRED ESHAPAI OMUREFU.....DEFENDANT

RULING

1. This is a ruling on the application dated **29/4/2019** and filed in court on **30/4/2019**. That application has been brought by the defendant who seeks the following orders:-

(a) **This application be certified urgent and the same be heard forthwith *ex parte*.**

(b) **...spent**

(c) **That this court be pleased to review, vary and/or set aside the judgment entered herein in favour of the plaintiff on 30/5/2018 and all consequential orders emanating or arising therefrom.**

(d) **That this court be pleased to enjoin Rachael Nyambura Ndungu, James Muringu Manji and Timothy Kamau Manji as parties to the suit.**

(e) **Any other orders the court shall deem fit to grant.**

(f) **Costs be provided for.**

2. The application is brought under **Section, 1A, 1B, and 63 (e) and 80** of the **Civil Procedure Act, Order 1 Rule 1, 10, Order 51 Rule 1 and Order 45 Rule 1** of the **Civil Procedure Rules** and **Article 159 of the Constitution** and **Section 3 of the Environment and Land Court Act**.

3. The grounds on which the said application is made are that the proceedings herein were done in the absence of counsel for the applicant; that counsel who held brief misrepresented facts to the court; that the defendant could not effectively and adequately proceed in person as his advocate was still on record; that no notice of hearing for 14/3/2018 was served neither were submissions exchanged; that it is necessary to join parties who were involved in the transactions relating to the suit land and also necessary to plead the doctrine of a constructive trust to cater for the interest of the defendant and the court ought to guard the defendant's right to a fair trial.

4. The application is supported by the affidavit of the applicant sworn on **29/4/2019**. That affidavit reiterates the same matters set out in the grounds above.

5. On **21/5/2019** the plaintiff filed a replying affidavit sworn on **17/5/2019**. His response is that the application is an afterthought and an abuse of process devoid of any grounds for review; that an appeal should have been filed; that there has been undue delay; that all along the defendant has had legal representation and participated in the proceedings at all times and has even compromised on some issues relating to taxed costs without faulting the judgment they emanated from; that the hearing of the suit was not *ex-parte* as the defendant was present and proceeded with his defence and that the plaintiff is the registered owner of the property; that that there was no privity of contract between the parties herein and that the defendant is at liberty to file a separate suit against third parties seeking any other relief.

6. The plaintiff filed submissions on **22/7/2019** and the defendant on **6/9/2019**. I have considered those submissions.

Determination

7. The main issue raised by the instant application is whether the judgment of this court delivered on **30/5/2018** in favour of the plaintiff against the defendant should be reviewed. **Order 45 rule 1 (1)** of the **Civil Procedure Rules** provides 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.”

8. The conditions for the grant of orders of review are therefore as follows:-

(a) There is discovery of new and important matter or evidence which after the exercise of due diligence was not within an applicant’s knowledge and which could not be therefore produce at the time the order was made, or

(b) Some mistake or error apparent of the face of the record, or

(c) Any other sufficient reason.

9. The additional ground is that the application for review must be made without delay.

10. Has the applicant satisfied those conditions? The answer to this question lies in the grounds that he advances to support his application.

11. I will start with the issue of delay. The judgment in this suit was delivered on **30/5/2018** while the instant application was filed on **30/4/2019** and therefore the delay amounts to **11 months**.

12. In the present case I must examine the delay of one year as satisfactorily explained, for indeed the discretion of the court in review application is unfettered.

13. In his application the defendant avers that prior to the entry of the judgment he was represented by Walter Wanyonyi & Co. Advocates and on 13/3/2018 when the suit came up for hearing he went to their office and was promised that a counsel would instruct another counsel to appear in court and represent her. However when he went to court the counsel who appeared stated that Mr. Wanyonyi was indisposed and the suit proceeded in his presence. This court has noted that on being questioned by the court the defendant undertook to conduct his own defence on the afternoon of 13/3/2018 and the matter was adjourned to 14/3/2018 for further defence hearing. This court notes that on that date the defendant absented himself from court and the court ordered the defence case closed for that reason. The defendant avers that he came to learn of the judgment in this matter in August, 2018 when Mr. Wanyonyi was served with notice of taxation. He also states that after consulting Mr. Wanyonyi he was informed that he was effectively represented up to the end of the matter. He also states that no submissions were filed on his behalf and no judgment notice was served and judgment was delivered in his absence. In his view his rights to a fair trial has been violated. He asserts he had taken out third party proceedings which were not concluded by the time of judgment and he wishes to enjoin some third parties who disposed of the title he had purchased.

14. The material above does not convince the delay of 11 months has been sufficiently explained. Indeed the very fact that the applicant concedes to having been aware of the judgment by August, 2018 reduces the period of delay to at least 8 months.

15. Can the applicant’s application be said to have been made timeously? In the case of **Stephen Gathua Kimani -vs- Nancy Wanjira Waruingi T/A as Providence Auctioneers [2016] eKLR** the court dealt of question of whether a delay of one year is reasonable and stated as follows:-

“The issue for determination is whether or not the application has unreasonably delayed in filing the present application. Under normal circumstances it should not take an application one year to file an application in court. It would require sufficient explanation to justify a delay of one year. To my mind this is a long period, and indeed unreasonable delay.”

16. In the case of **Abdurahman Adam Hassan -vs- National Bank of Kenya Ltd Kisumu HCCC No. 446 of 2001** a three month delay in lodging of an application was found to be unreasonable.

17. I find that the delay in filing the instant application is unreasonable.

18. All the conditions requisite for review must exist if a review order is to be granted. Where one of them fails the application should not be granted. I have already found the delay in filing this application is unreasonable. In view of that finding it matters not that the other grounds may succeed.

19. This court therefore needs not inquire into whether there is discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicant’s knowledge or error or mistake on the face of the record.

20. For the above reasons I find that the application dated **29/4/2019** must fail and I dismiss it with costs.

Dated, signed and delivered at Kitale on this 9th day of October, 2019.

MWANGI NJOROGE

JUDGE

9/10/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Arunga for the plaintiff/respondent

Mr. Kisenbe for Wanyonyi for defendant/applicant

COURT

Ruling read in open court 12.45 p.m.

MWANGI NJOROGE

JUDGE

9/10/2019