



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 1029 OF 2012**

**GECY SYSTEMS LIMITED.....PLANITIFF**

**VERSUS**

**TOM ADAGO OPIYO.....1<sup>ST</sup> DEFENDANT**

**MAANGI OTIENO & CO. ADVOCATES .....<sup>ND</sup> DEFENDANT**

**REGISTRAR OF TITLES.....3<sup>RD</sup> DEFENDANT**

**AND**

**OFFICIAL RECEIVER AND LIQUIDATOR OF**

**CREDIT FINANCE LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**KISAUNI PROPERTIES LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**TERRAZZO ENTERPRISES LIMITED...3<sup>RD</sup> INTERESTED PARTY/APPLICANT**

**RULING**

1. This is the Notice of Motion dated 25<sup>th</sup> March 2015 brought under Section 3A and 80 of the Civil procedure Act, Article 159 (2) (d) of the Constitution and order 45(1) of the Civil Procedure Rules.

2. It seeks orders

1. *Spent.*

2. *Spent.*

3. *Spent.*

4. *That any judgment, order or decree passed herein be reviewed and set aside.*

3. The grounds are on the face of the application and are :-

(i) *There are mistakes and errors apparent on the face of the record in that:-*

(a) *The applicant herein, Terrezzo Enterprises Ltd is the registered owner of LR NO. 4242/47.*

(b) *Terrezzo Enterprises Ltd was not made a party to this suit and therefore no order should have been made adverse to it.*

(c) *Terrazzo Enterprises Ltd was not heard before judgment was given effecting its property.*

(ii) *The fact of Terrazzo Enterprises Ltd being the registered owner/proprietor of LR NO. 4242/47 was not brought to the attention of the court before delivery of the judgment.*

(iii) *There is sufficient reasons to review and set aside the judgment herein.*

(iv) *Terrazzo Enterprises Ltd was registered proprietor well before the alleged plaintiff's transaction herein took place.*

(v) *There is no evidence that the plaintiffs herein conducted due diligence before transacting with the suit property.*

(vi) *The affidavit of Gopal D Patel sworn herein.*

4. The application is supported by the affidavit of Gopal D Patel, a director of the 3<sup>rd</sup> Interested Party/Applicant, sworn on the 25<sup>th</sup> March 2015 and a supplementary affidavit sworn on the 6<sup>th</sup> May 2015.

5. The application is opposed. There are grounds of opposition filed by the plaintiff dated 15<sup>th</sup> April 2015 and a preliminary objection dated 21<sup>st</sup> September 2016. There is also a replying affidavit sworn by Patrick Thoithi Kanyuira, Senior Principal State Counsel in the office of the 1<sup>st</sup> Interested Party on 11<sup>th</sup> April 2015. There is also a notice of preliminary objection dated 21<sup>st</sup> September 2016 and filed by the plaintiff/respondent on the same date.

6. On the 13<sup>th</sup> March 2017, the court directed that the notice of motion dated 25<sup>th</sup> March 2015 and the preliminary objection dated 21<sup>st</sup> September 2016 be heard and determined together. It also directed that they be canvassed by way of written submissions. It appears only the plaintiff/respondent and the 3<sup>rd</sup> interested party/applicant have filed their written submissions.

#### **The 3<sup>rd</sup> Interested Party's/Applicant's Submissions**

7. Under Order 1 rule 10(2) of the Civil Procedure Rules, the Applicant need not apply to be enjoined in this matter. This Honourable court possesses the power and discretion to join the applicant in this suit *suo moto* where it determines the applicant ought to have been joined in the first place or that its presence before the court may be necessary.

8. It is not in dispute that the applicant is the duly registered owner/proprietor of the suit property having purchased the same on 18<sup>th</sup> May 2011 from the 2<sup>nd</sup> interested party, four months before the plaintiff herein purportedly purchased the same property from the 1<sup>st</sup> defendant. Prior to purchasing the suit property, the applicant conducted due diligence including obtaining a search of the suit property at the land registry and also ascertaining the validity of the vesting order issued in HCCC No 3462/1995. The application is similarly an innocent and bona fide purchaser for value without any notice of any defect in the title at the time of purchase and whose title ought to be equally protected by this honourable court.

9. The question is whether the applicant's title to the suit property is bona fide and valid as against the plaintiff's having been obtained over four months before the plaintiff's and pursuant to a valid vesting order of the high court issued in HCCC No. 3462 of 1995. This question cannot be effectually and completely adjudicated upon without the applicant's presence in this suit. It has put forward the cases of **Mary Mbula Mukuvi vs David Mwase Mwaluko [2014] eKLR; Delgreen Limited vs Odindo & Others, HCCC 55 of 2008.**

10. The outcome of the suit filed herein will greatly affect the applicant, which is also a bonafide purchaser of the suit property pursuant to a valid order of the high court issued in HCCC 3462 of 1995. The applicant is not only a necessary party under Order 1, Rule 10 (2) of the Civil Procedure Rules, but also a proper party to be joined under order 1 rule 3 of the said rules.

11. The applicant has sufficient reason and new and important matter or evidence that would warrant the review of the judgment delivered by this honourable court on 24<sup>th</sup> October 2014. Section 80 of the Civil Procedure Act confers unfettered right to apply for review. It has put forward the cases of **Sarder Mohamed vs Charan Singh Nand Singh & Another [1959] EA 793; Shanzu Investments Ltd vs Commissioner for Lands CA Civil Appeal No. 100 of 1993; Tokesi Mambili & Others vs Simion Litsanga.**

12. It is clear that a person aggrieved by a judgment made by the court from whose decision the appeal has not or cannot be preferred like in the instance case, is allowed to apply to the same court to have such judgement reviewed and/or set aside. Such an application is brought under order 45 rule 1 cannot be caught up by the doctrine of *res judicata*, as contended by counsel for the plaintiff. It has put forward the case of **Winfred Mutheu Kiamuka & Another vs Samuel Braki Islam & 2 Others [2016] Eklr.**

13. Whether to review its judgment is part of this court's duty and in this case it can only be *factus officio* once it has discharged that duty. Indeed the doctrine of *factus officio* does not prevent a judicial change of mind even when a decision has been communicated to the parties.

14. Section 80 of the Civil Procedure act, and order 45 rule 1 of the Civil procedure rules allow the applicant herein to apply for a review and setting aside of the impugned judgment despite the applicant not being a party to the proceedings from the beginning. It prays that the application be allowed to allow it to be heard and put forth the new and important matter or evidence for consideration by the court before the court finally gives its decision.

#### **The plaintiff's submissions**

15. The application dated 25<sup>th</sup> March 2015 does not have a prayer for joinder of the applicant as the 3<sup>rd</sup> interested party in the suit. The applicant did not obtain leave of court before coming on record, the court having become *fuctus officio* since pronouncement of judgement on 24<sup>th</sup> October 2014 and no appeal preferred. The pleadings filed on behalf of the applicant ought to be expunged from the record.

16. The applicant was never a party to the proceedings on this matter. Order 45 rule 1 of the Civil Procedure Rules apply only to a party who has participated on the proceedings from the beginning and as such the applicant cannot invoke the said provision. It has put forward the case of **Fredrick Ngari Muchira & 99 Others vs Pyrethrum Board of Kenya [2013] eKLR**.

17. This court is *fuctus officio* having discharged its duty. It has put forward the cases of **Enock Muhanji vs Hamid Abdalla High Court Civil Case No. 58 of 2012; Raila Odinga & Others vs IEBC & Others [2013] eKLR**.

18. The applicant is a stranger to the suit. It has not preferred an appeal or applied for judicial review hence it is barred from seeking orders for stay in this honourable court. There is no valid basis legal or judicial upon which the applicant may rely on the provisions of order 45 rule 1 of the Civil Procedure Rules. The applicant failed to satisfy the requirements under order 42 rule 6 of the Civil procedure Rules. The plaintiff prays that this application be dismissed with costs.

19. I have considered the notice of motion, the affidavits in support and the annexures. I have also considered the affidavits in reply and the grounds of opposition. I have considered the written submissions of counsel and the authorities cited. The issue for determination are:-

*(i) Whether the applicant's notice of motion dated 25<sup>th</sup> March 2015 is properly before court.*

*(ii) Whether this court has jurisdiction to entertain this application.*

*(iii) Whether the application is merited*

20. I have gone through the said notice of motion. I note that the applicant has not sought leave to be enjoined in these proceedings. Order 1 rule 10(2) provides that:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

In the instant application the applicant has not sought leave to be enjoined in these proceedings. In any case there are no pending proceedings before this court as judgement was delivered on 24<sup>th</sup> October 2014. I find that this application is not proper before the court.

21. **Order 45 rule 1** of the Civil Procedure Rules provides that:-

**1. (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.

**(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”**

The applicant brings this application under order 45 rule 1. It is not in doubt that the applicant was never a party to the proceedings in this matter. In the case of **Fredric Ngari Machira & Howard Kipkoech Korir & 98 Others vs Pyrethrum Board of Kenya [2013] eKLR** the court held that:-

**“.....allowing an alleged interested party claiming substantive remedies long after judgment would culminate into irregularly allowing a new cause of action, a new or fresh suit for which the original parties in the suit would not be able to have a fair chance to state their respective cases”.**

22. In the case of **Dhanji Jadra Ramji vs Commissioner of Prisons & Another [2014] eKLR** Anyara Emukule J held that:-

**“The doctrine is therefore that once the court has pronounced itself on the matter before it, it cannot determine the issues on their merit or alter its decision whatsoever. However, its decision must be perfected and final so that it is permitted to correct clerical mistakes or errors in the expression of its intention in the judgment.....”**

The applicant in this case has not alleged any clerical arithmetic mistake, or any error in the judgment. Instead it seeks substantive prayers.

23. I find that this court is *functus officio*. In the case **Enock Muhanji vs Hamid Abdalla High Court Civil Case No. 58 of 2012**, it was held that:-

***“Inviting the court to decide a matter it has already substantially adjudicated upon is a waste of the court’s time as the matter is res judicata. The courts is functus officio”.***

Also in the case of **Telkom Kenya Limited vs John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited [2014] eKLR** the court held that:-

***“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19<sup>th</sup> century. In the Canadian case of Chandler vs Alberta Association of Architects [1989] 2SCR 848 Sopinka J traced the origins of the doctrine as follows (at p.860);***

***“The general rule that a final decision of a court cannot be re-opened derives from the decision of the English court of appeal in re St.Nazaire Co [1879] 12 Ch D 88. The bases for it was that the power to rehear was transferred by the judicature Act to the Appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered and was subject to two exceptions:-***

***1. Where there had been a slip in drawing it up, and,***

***2. Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd vs J. O Rose Engineering Corp [1934] SCR 186”.***

The applicant’s application does not fall within the two exceptions mentioned in the above case.

24. I also agree with the plaintiff’s/respondent’s counsel that the applicant has failed to satisfy the requirements for grant of stay of execution under order 42 rule 6 of the Civil Procedure Rules.

25. In conclusion, I find no merit in this application and the same is dismissed with costs to the plaintiff/respondent.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 9<sup>th</sup> day of October 2019.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant