



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO. 257 OF 2015

(FORMERLY ELC KERUGOYA 48 OF 2012)

(FORMERLY EMBU HCA 52 OF 1996)

1. DISHON MAREKO MWA NGINE
2. NYAGA BURANA
3. NAAMAN IRERI SIGANA
4. EZEKIEL NDARA
5. GILBERT KIURA MATHOROKO
6. KIVIVU NAAMAN
7. SAMUEL NJAGI I
8. NJERU NJAGI
9. PATRICK NYAGA ITA
10. NAFTALY NJAGI NDIRICHA
11. DAVID MUNINA KIMANI
12. DANIEL KARIUKI MBUGI
13. MBOGO GIKONO
14. NDEKE NJERU
15. NJUE NJERU
16. KITHUMBU KIMANI
17. JOHN GITAU KIMANI
18. JOSEPH NJERU MUGO
19. MACHAKI MBITI
20. PAUL NJERU NTHIMBU

21. ALOIS NJERU MURAKO

22. FAUSTINO NJERU ZAKAYO

23. NANCY MUTHONI NJAGI

24. SIMON NJERU JONAH

25. KIGONDU NJANGARUKO

26. KAMAU MURIUKI

27. ELIAS MURIUKI GAKUNGI

28. HENRY MURIUKI MWAURA

29. NAZARINO NJAU MWANIKI

30. ALICE NJUGWURI MWANGI.....APPLICANTS

VERSUS

1. FAUSTINO NJERU NJOKA

2. FRANCIS NJERU NJUKI.....RESPONDENTS

RULING

1. By a notice of motion dated 9th July 2018 brought under **Article 159 of the Constitution, Sections 1A and 1B of the Civil Procedure Act (Cap. 21), Order 45 Rule 1 of the Civil Procedure Rules (hereafter the Rules), and all other enabling provisions of the law**, the Applicants sought the following orders:

a) That the order and judgement/decree dated 10th November 1999 be reviewed and set aside.

b) That costs of the application be provided for.

2. The said application was based upon the grounds set out on the face of the motion. It was contended that there were various mistakes and errors on record and that proceedings subsequent to the judgement were incompetent as a result of some mix up of the parties.

3. The said application was supported by an affidavit sworn by the 20th Applicant, Paul Njeru Nthimbu, on 9th July 2018. He swore the said affidavit on his own behalf and on behalf of his co-Applicants. It was contended that the court erred in consolidating HCA No. 52 of 1996 and HCA No. 19 of 1997 since the parties in the two appeals were not exactly the same. The consolidated appeals were heard together before Hon. Justice A.G.A. Etyang and determined vide a judgement dated 10th November 1999. That's the judgement whose review and setting aside is being sought in the instant application.

4. It was further contended that due to some error, some strangers to the suit filed an application for review before this court which was ultimately dismissed. It was further stated that there were lengthy consultations amongst officials of the Ministry of Lands, the Commission of Inquiry into the land law system in Kenya and some concerned clan elders in consequence of which there was a delay in filing the instant application for review.

5. The court has noted from the supporting affidavit that the Applicants are not only aggrieved by the judgement and decree dated 10th November 1999 but also the prior proceedings before the various fora which ultimately resulted in appeals to the Minister for Lands under **Section 29 of the Land Adjudication Act (Cap. 284)**. It was contended that the Minister had mishandled the appeals before him. It was also contended that the Appeals in issue were fundamentally defective as the Appellants had appealed on the facts and not purely on points law.

6. There is no indication on record of the Respondents having filed any response to the said application for review. When the application was listed for hearing on 15th May 2019 it was directed that the same be canvassed through written submissions. The Applicants were granted 45 days to file and serve their written submissions whereas the Respondents were given a similar period to file theirs upon the lapse of the Applicants' period. By the time of preparation of the ruling, however, none of the parties had filed any submissions.

7. The court has considered the Applicants' notice of motion dated 9th July 2018, the affidavit in support thereof as well as the annexures thereto. The relevant provisions on review of a decree or order are to be found in **Order 45** of the Rules. **Order 45 Rule 1** thereof stipulates that:

“(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. 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.”

9. The court is of the view that there are 2 main issues which arise for determination herein. First, whether the Applicants have demonstrated an error of law on the face of the record to warrant a review. Second, whether the application for review was filed without unreasonable delay as required by law.

10. The Applicants have faulted the proceedings leading to the judgement and decree dated 10th November 1999. They have contended that the court erred in consolidating the two appeals whereas the parties in both appeals were not exactly the same. They have challenged the validity or propriety of the proceedings which took place prior to the filing of the appeals. They have also challenged the validity of the proceedings undertaken after the judgement and decree of 10th November 1999.

11. The court has fully considered the material on record and the alleged errors raised by the Applicant. The court is far from satisfied that there are any errors apparent on the face of the record to warrant a review. As indicated before, such errors must be self-evident. The court is unable to agree that the sole factor to be considered in consolidation of suits or appeals is commonality of parties. The parties do not have to be identical in every respect.

12. In the case of **RMG Vs NG & Another [2013] eKLR** it was held, *inter alia*, that;

“The principle is that consolidation of suits will be ordered where common questions of law or fact arise of such importance as to make it desirable that the whole of the matter be disposed of at the same time. This would mean that the suits are brought together for the purpose of disposing of them simultaneously, if the questions of law or fact to be answered in each of them are one or common, and they can conveniently be disposed of simultaneously.”

13. Similarly, in the case of **Nyati Security Guards & Services Ltd Vs Municipal Council of Mombasa [2004] eKLR** it was observed, *inter alia*, that;

“The situations in which consolidation can be ordered include where there are two or more suits pending in the same court where;

i. Some common questions of law and fact arise in both or all of them; or

ii. The right or reliefs claimed in them are in respect of, or arise out of the same transaction or series of transactions; or

iii. For some other reason it is desirable to make an order consolidating them.”

14. The court is thus unable to agree that the High Court erred in consolidating the two appeals for hearing and disposal. Even if it were to be demonstrated through elaborate arguments that the court was wrong in consolidating the two appeals, that would certainly not constitute an error on the face of the record. The remedy for such an error would fall within the province of appeal and not review.

15. The court is not satisfied that the rest of the perceived errors in previous proceedings can be remedied by way of an application for review. If the prior appeals before the Minister under **Section 29 of the Land Adjudication Act** were not properly handled, any anomalies resulting therefrom cannot be remedied by way of review. And if there were any errors of law or fact in the hearing and disposal of the consolidated appeals, they cannot be remedied by way of review if it is intended to alter the outcome of the appeals.

16. The second aspect for consideration is whether the application was filed without unreasonable delay. The material on record indicates that the judgement the subject of the application was delivered on 10th November 1999, that is, about 20 years ago. The application for review was not filed until 17th July 2018, that is, about 19 years after delivery of the judgement. In the absence of a plausible explanation for such delay, any reasonable tribunal would conclude that the delay is unreasonable.

17. So, what is the Applicants' explanation for the delay of 19 years in the filing of the application? It was claimed that they were holding various 'consultations' with clan elders, the Ministry of Lands, and the Commission of Inquiry into the system of land laws in Kenya. It was further claimed that such consultations were concluded when the Ministry of Lands advised them to seek legal redress vide a letter dated 30th April 2003. There is no plausible explanation as why the Applicants delayed for another 15 years before filing the instant application.

18. The court is not satisfied that there is any reasonable explanation for the delay of over 19 years in the filing of the application for review. The law requires expeditious filing of such applications for good reason. An Applicant is not entitled to spring a surprise and re-open a concluded matter after passage of 19 years. The Applicants have thus failed meet the threshold of expeditious filing as required by **Order 45 Rule 1** of the Rules.

19. The upshot of the foregoing is that the court finds no merit in the Applicants' notice of motion dated 9th July 2018 and the same as hereby dismissed in its entirety. Each party shall bear his own costs.

20. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 3RD DAY of OCTOBER, 2019.

Mr. Kioko holding brief for Mr. E.K. Mutua for the Applicants and Mr. Muraguri holding brief for Mr. Okwaro for the Respondents.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

03.10.19