



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT EMBU**  
**E.L.C. CASE NO. 71A OF 2014 (O.S.)**  
**(FORMERLY ELC KERUGOYA NO. 47 OF 2012 (O.S.))**  
**(FORMERLY EMBU H.C. CIVIL CASE NO. 36 OF 2007 (O.S.))**  
  
**AND**  
  
**IN THE MATTER OF PARCELS OF LAND**  
  
**MBEERE/MBITA/2088, 2089, 2090, 2094, 2171, 2200,**  
  
**2204, 2205, 2298, 3775 AND 3777**

FAUSTINO NJERU NJOKA.....1<sup>ST</sup> APPLICANT

FRANCIS NJERU NYAGA.....2<sup>ND</sup> APPLICANT

***VERSUS***

RUGANO NTHIGA.....1<sup>ST</sup> RESPONDENT

MWIRECA KIARIRWA.....2<sup>ND</sup> RESPONDENT

NJOKA KONJI.....3<sup>RD</sup> RESPONDENT

NJERU NGICUVA.....4<sup>TH</sup> RESPONDENT

MUGO NYAGA NJERU.....5<sup>TH</sup> RESPONDENT

JUSTUS NJERU NGIRIGACHA.....6<sup>TH</sup> RESPONDENT

SILAS NJIRU NYAGA.....7<sup>TH</sup> RESPONDENT

NJUE MUCENDU NGICUVA.....8<sup>TH</sup> RESPONDENT

GIBSON NJUE NGIRIGACHA.....9<sup>TH</sup> RESPONDENT

JOHN MATI NYAGA.....10<sup>TH</sup> RESPONDENT

JUSTUS NJUKI NYAGA.....11<sup>TH</sup> RESPONDENT

BENJAMIN KITHUMBU KAMBELO.....12<sup>TH</sup> RESPONDENT

PHEANAS KAGANE.....13<sup>TH</sup> RESPONDENT

MUTURI PHENES KAGANE.....14<sup>TH</sup> RESPONDENT

TITUS NJERU KAGANE.....15<sup>TH</sup> RESPONDENT  
NYAGA NGINYIRO.....16<sup>TH</sup> RESPONDENT  
EVANS MATHERI IGOGO (Legal representative of  
STEPHENE IGOGO MATHERI.....17<sup>TH</sup> RESPONDENT  
SAMUEL MUTITU NDUMA.....18<sup>TH</sup> RESPONDENT  
JOB KIBET T. KIMEY.....19<sup>TH</sup> RESPONDENT

AND

STEPHENE IGOGO MATHERI.....1<sup>ST</sup> INTERESTED PARTY  
SOSPETER KITHUMBU MURANGIRI.....2<sup>ND</sup> INTERESTED PARTY  
KIMUNYE TEA FACTORY COMPANY LTD.....3<sup>RD</sup> INTERESTED PARTY

### RULING

1. By a notice of motion dated 7<sup>th</sup> October 2019 brought under **Section 3A of the Civil Procedure Act (Cap. 21), Order 10 Rule 11, Order 45 Rule 1 of the Civil Procedure Rules (hereafter the Rules) and all other enabling provisions of the law**, the 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, & 14<sup>th</sup> Respondents (hereafter the Concerned Respondents) sought a review and setting aside of the judgement of this court dated and delivered on 26<sup>th</sup> September 2019.

2. The said application was based upon the grounds set out on the face of the motion and supported by the affidavit sworn by the 14<sup>th</sup> Respondent on 7<sup>th</sup> October 2019. It was contended that the Applicants had either misrepresented facts or failed to disclose certain crucial facts to the court in the proceedings in consequence whereof judgement was entered in their favour. It was contended that the 1<sup>st</sup> Applicant was no longer the chairman of *Nditi* clan (Mbue House) and that the Applicants had misled the court into believing that some of the Respondents were members of *Ikandi* clan whereas they were, in fact, members of *Nditi* clan.

3. The 3<sup>rd</sup> Interested Party filed a replying affidavit sworn by Stacy Jayo who is the advocate on record on its behalf in opposition to the said application. It was contended that the instant application was designed to derail the conclusion of the matter. It was further contended that the 3<sup>rd</sup> Interested Party's parcel *No. Mbeere/Mbita/2087* was excluded from the proceedings vide the originating summons amended on 2<sup>nd</sup> February 2019 hence it could not be a legitimate subject of litigation herein.

4. The 1<sup>st</sup> Applicant filed a replying affidavit sworn on 12<sup>th</sup> November 2019 in opposition to the said application. It was contended that the said application was frivolous and an abuse of the court process. It was contended that some of the issues raised by the concerned Respondents were canvassed in their replying affidavit to the amended originating summons hence they were considered by the court before delivery of judgement. It was further contended that the concerned Respondents had failed to demonstrate any of the grounds for review set out in **Order 45 Rule 1** of the **Rules**. In particular, it was contended that there was no discovery of any new evidence or matter which could not have been availed to the court before delivery of judgement.

5. When the said application was listed for hearing on 17<sup>th</sup> October 2019, it was directed that the said application be canvassed through oral submissions on 13<sup>th</sup> November 2019. When the application came up for hearing on 13<sup>th</sup> November 2019 the parties requested to canvass it through written submissions. Consequently, the parties were granted 7 days to file and exchange their written submissions. By the time of preparation of the ruling, however, none of the parties had filed their respective submissions.

6. The court has considered the notice of motion dated 7<sup>th</sup> October 2019, the replying affidavits in opposition thereto as well as the material on record. The provisions of **Order 45 Rule 1** of the **Rules** on review stipulate a 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.”

7. The court has considered the entire material on record in light of the grounds set out in **Order 45 Rule 1** of the *Rules*. The court is not

satisfied that the concerned Respondents have demonstrated any of the grounds for review of a decree known to law. The court is far from satisfied that the Respondents have demonstrated discovery of any new or important matter or evidence which could not, with due diligence, have been availed during the pendency of the proceedings. The record shows that they were afforded every opportunity to present their defence to the action. Moreover, they raised some of the issues such as the Applicants' authority to prosecute the action on behalf of their clansmen in their response to the originating summons.

8. The court is also far from satisfied that the concerned Respondents have demonstrated that there is any other "sufficient cause" to warrant a review of the judgement and decree in this matter. The mere fact that some of the Respondents might lose their land cannot be sufficient reason to warrant a review. If the concerned Respondents are of the view that the court was misled by the Applicants and as a result arrived at an erroneous decision, that may well give them a ground of appeal as opposed to a ground for review. The court is aware that the action did not proceed *ex parte* but it was canvassed and determined after all concerned parties were accorded an opportunity of being heard.

9. The upshot of the foregoing is that the court finds no merit in the notice of motion dated 7<sup>th</sup> October 2019. Accordingly, the same is hereby dismissed with costs to the Applicants.

10. It is so ordered.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 21<sup>ST</sup> DAY of NOVEMBER 2019.**

In the presence of Mr. Kamunda for the 2<sup>nd</sup> Interested Party, Mr. Odhiambo for the 3<sup>rd</sup> Interested Party, Mr. Mayaka holding brief for Ms. Rose Migwi for the 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> & 14<sup>th</sup> Respondents and in the absence of the rest of the parties.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**21.11.19**