



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT & LAND CASE NO. 164 OF 2014(O.S)

KOMBO NAMURWE RASHID (Suing as the Administrator

to the Estate of RASHID MASHAURI NAMURWE

– DECEASED).....PLAINTIFF

VERSUS

DAVID FABIAN MUKAWA.....DEFENDANT

R U L I N G

This ruling is in respect to the plaintiff's Notice of Motion dated 4th December 2018 and filed herein on 17th December 2018 in which he seeks the following orders: -

(a) Spent

(b) The Honourable Court be pleased to review and/or vary the Judgment made on 15th November 2018.

(c) The Honourable Court make further and such orders as it deems fit upon granting prayer (b) above.

(d) That costs be provided for.

The application is premised on the grounds set out therein and is also supported by the plaintiff's affidavit also dated 4th December 2018.

The gist of the application is that whereas this Court by its Judgment dated 15th November 2018 dismissed the plaintiff's suit by way of an Originating Summons, the Court erroneously referred to the land in dispute as **WEST BUKUSU/SOUTH MATEKA/3502** instead of land parcel **NOWEST BUKUSU/SOUTH MATEKA/3503**. That from the pleadings and affidavits by both the plaintiff and the defendant, the land in dispute is parcel **NOWEST BUKUSU/SOUTH MATEKA/3503** which is registered in the names of the defendant and the allegation by the plaintiff's counsel that the land in dispute was parcel **NOWEST BUKUSU/SOUTH MATEKA/3502** was a mistake which went against the pleadings and witness statements produced hence this application.

The application is contested and in his replying affidavit dated July 2019, the defendant has pleaded, inter alia, that it was the plaintiff who made a mistake by confusing the Court and that cannot be viewed as a mistake of the Court. That the plaintiff did not have any relevant documents to prove his allegation of ownership of land parcel **NO WEST BUKUSU/SOUTH MATEKA/3503** which he is now claiming and which genuinely belongs to the defendant who obtained it through the succession process. That this application has been filed in bad faith and is an abuse of the Court process and should therefore be dismissed.

When the parties appeared before me on 9th October 2019 for directions on the application, it was agreed that it be determined on the basis of the parties' respective affidavits.

I have considered the application and the rival affidavits. I have also looked at this Court's Judgment dated 15th November 2018 and which the plaintiff seeks to be reviewed on account of a mistake on the land parcel in dispute.

The application is premised on the provisions of **Sections 1A and 3A of the Civil Procedure Act** and **Orders 9 Rule 9 and 45 of the Civil Procedure Rules**.

Order 45 Rule 1(1) of the Civil Procedure Rules provides as follows: -

“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.” Emphasis added.

It is clear therefore that before a Court can review its Judgment or order, the party moving the Court must demonstrate the following: -

1: Discovery of new and important matter or evidence which, even after the exercise of due diligence, was not within the party’s knowledge or could not be produced; or

2: Some mistake or error apparent on the face of the record; or

3: Any other sufficient reason; and

4: The application must be made without un – reasonable delay.

The Judgment sought to be reviewed was delivered on 15th November 2018 and this application was filed on 17th December 2018. I do not consider that period to be un-reasonable bearing in mind that the decree was issued on 11th December 2018.

From the plaintiff’s averments, this application is predicated on the fact that there was a mistake on the part of the Court in describing the land in dispute as **WEST BUKUSU/SOUTH MATEKA/3502** instead of **WEST BUKUSU/SOUTH MATEKA/3503**. This mistake was compounded both by the convoluted pleadings and also, as confirmed by the plaintiff’s own supporting affidavit, counsel’s response when the Court sought to know from him the exact land in dispute. The suit was commenced by way of an Originating Summons dated 2nd September 2014 and among the issues set out for the determination of the Court were: -

“(a) –

(b) whether the suit land now comprised in Title numbers W. BUKUSU/S. MATEKA/3502, 3503, 3504 among others all of which arose from the surface area being 7.3 Ha the parent Title being the combination of L.R NO W. BUKUSU/S. MATEKA/332, 389 and 390 is the plaintiff’s deceased father aforesaid was buried there.

(c) Whether the registration of land parcels numbers W. BUKUSU/S. MATEKA/332, 389 and 390 in the name of one MAURICE WANJALA NASI (now deceased), the subsequent creation of Title NO W. BUKUSU/S. MATEKA/3501 surface area being 7.3 Ha which in this gave rise to new numbers 3503 whose beneficiary is the defendant herein among others was procured through fraud and misrepresentation of facts particulars of fraud attributed to the defendant.”

It is already clear even from the above pleadings that the Court had difficulties in understanding whether the plaintiff’s claim was for adverse possession of land or cancellation of a title obtained through fraud. Indeed, I mentioned that difficulty in the Judgment sought to be reviewed. And with respect to which parcel of land was in dispute, this Court did enquire from **MR WATTANGA** then or record who confirmed that it was land parcel **NO WEST BUKUSU/SOUTH MATEKA/3502** hence the dismissal of the plaintiff’s claim because that parcel was not registered in the defendant’s names.

Having now looked again at the pleadings herein and the plaintiff’s supporting affidavit, it has become clear to me that there was an error both by the Court and counsel and which was compounded by the not so elegant pleadings that resulted in the Court finding that the land in dispute was number **WEST BUKUSU/SOUTH MATEKA/3502** when in fact it was parcel number **WEST BUKUSU/SOUTH MATEKA/3503**. Although there was confusion on the description of the land in dispute from the issues set out for this Court’s determination in paragraphs (a) to (f) of the Originating Summons, the first paragraph actually reads as follows: -

“LET DAVID FABIAN MUKWEA of RENWA area within KABULA LOCATION OF BUNGOMA COUNTY OF THE REPUBLIC OF KENYA within (15) fifteen days after service of this summons which is issued on the application of RASHID MASHAURI NAMURWE who claims to be in physical occupation of land parcel number W. BUKUSU/S. MATEKA/3503 which arose from the sub – division of L.R W. BUKUSU/S. MATEKA/3501 which in this arose from the sub – division of a combination of L.R W. BUKUSU/S. MATEKA/352, 389 and 390 measuring approximately 7.3 Ha and for determination of the following issues.” Emphasis added.

The use of the words **“who claims to be in physical occupation of land parcel number W. BUKUSU/S. MATEKA/3503”** clearly shows that the land which the plaintiff was claiming in adverse possession was not parcel number **W. BUKUSU/S. MATEKA/3502** as this Court erroneously decided. But as is now obvious, the pleadings did not make this Court’s work any easier. Pleadings must be drafted with some reasonable degree of clarity and precision so that both the Court, the parties and counsel can appreciate what is in controversy. That will save judicial time and resources. The situation was not helped by the plaintiff’s supporting affidavit dated 2nd September 2014 either.

Having said so, it is clear from my Judgment dated 15th November 2018 that the only reason why the plaintiff’s suit was dismissed was

because there was an error in describing the land in dispute as **WEST BUKUSU/SOUTH MATEKA/3502** yet it was infact **WEST BUKUSU/SOUTH MATEKA/3503**. This is how this Court addressed the issue in the last three paragraphs of that Judgment: -

“Therefore, since the defendant herein is not the registered proprietor of the land parcel NO W. BUKUSU/S. MATEKA/3502, no adverse orders can be made in respect to that land in the absence of the registered proprietor thereof.

Secondly, it is clear from the same Certificate of Search that the parcel NO W. BUKUSU/S. MATEKA/3502 ceased to exist on 4th October 2013 over a year before this suit was filed. Orders in adverse possession cannot be made in respect to land that no longer exists.

The up – shot of the above is that the plaintiff’s Originating Summons filed herein on 3rd September 2014 lacks merit. It is dismissed with no order as to costs.”

In **NATIONAL BANK OF KENYA LTD .V. NDUNGU NJAU C.A CIVIL APPEAL NO 211 OF 1996**, the Court while considering an error or omission as a ground for review stated that: -

*“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 selfevidence 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 enormous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review.”*Emphasis added.

I have agonized on whether or not allowing this application would amount to sitting on appeal over my own Judgment delivered on 15th November 2018. It must be remembered that the plaintiff’s oral evidence that he and his family have lived on the land in dispute since his birth in 1975 and that his father is buried thereon was not really controverted because the defendant did not attend Court for the hearing. In paragraph (f) of his Originating Summons, the plaintiff pleaded that among the issues to be determined is whether he: -

“ has been in open continuous and peaceful occupation and utilization of the suit land from childhood to-date.”

There was evidence in the form of a Certificate of Search showing that the land parcel **NO WEST BUKUSU/SOUTH MATEKA/3503** was infact registered in the names of the defendant at the time of the suit and although the defendant in paragraph four (4) of his replying affidavit denied the plaintiff’s claim of being in occupation of the suit land, no evidence was led by the defendant and so that averment remained a mere allegation which could not dislodge the plaintiff’s oral evidence. Therefore, there was conclusive and un-rebutted evidence that the plaintiff and his family had been in open, continuous and peaceful occupation of the land in dispute since 1975 and it follows that by the time this suit was filed in 2014, that occupation had been for a period of thirty nine (39) years well in excess of the twelve (12) year period provided for in law to enable him acquire it by adverse possession. And as is now abundantly clear, the only reason this Court denied the plaintiff the orders in adverse possession was due to the error in describing the land in dispute as **WEST BUKUSU/SOUTH MATEKA/3502** instead of **WEST BUKUSU/SOUTH MATEKA/3503**. This was an error of fact, not law and I take the view that the Court under the provisions of **Sections 80 and 3A of the Civil Procedure Act** as well as **Order 45 of the Civil Procedure Rules** can review it’s Judgment to avoid real injustice arising due to an error or mistake which is clearly apparent on the face of the record as is the situation in this case. It is for circumstances such as those obtaining in this case that the Court’s powers for review were provided for in law. I am persuaded therefore that the application dated 4th December 2018 is merited.

Ultimately therefore and having considered all the matters herein, this Court reviews its Judgment delivered on 15th November 2018 and makes the following orders: -

1: Judgment is entered for the plaintiff against the defendant.

2: An order is made that the plaintiff is entitled to the land parcel NO WEST BUKUSU/SOUTH MATEKA/3503 by way of adverse possession.

3: The registration of the defendant as proprietor of the land parcel NO WEST BUKUSU/SOUTH MATEKA/3503 be cancelled and the same be registered in the names of the plaintiff.

4: The defendant shall execute all the necessary documents to facilitate such registration within 30 days of this Judgment failure to which the Deputy Registrar of this Court shall be at liberty to execute all such documents on behalf of the defendant.

5: No orders as to costs.

Boaz N. Olao.

J U D G E

21st November 2019.

Ruling dated, delivered and signed in Open Court at Bungoma this 21st day of November 2019.

Plaintiff present

Defendant present

Joy/Okwaro – Court Assistants

Right of Appeal explained.

Boaz N. Olao.

J U D G E

21st November 2019.