REPUBLIC OF KENYA

THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO 35 OF 2017

SHEDRACK KIRUKI M'LAARIA.....PLAINTIFF

VERSUS

SAMUEL KIPTANUI KORIR.....1st DEFENDANT

JOHN ETHURO.....2nd DEFENDANT

GIDEON LOTHEMBO.....3rd DEFENDANT

LONGIS MICHOO.....INTENDED 4th DEFENDANT

JOHN KIPCHUMBA SAMUEL.....INTENDED 5th DEFENDANT

ELIJAH CHERUIYOT SAMUEL.....INTENDED 6th DEFENDANT

RULING

1. Vide an application by way of Notice of Motion dated the 19th July 2017, the Plaintiff/ Applicant had sought for a permanent injunction to issue jointly and severally to restrain the Defendant/Respondents and their servants or agents or any person claiming through them from continuing to graze their animals, cut down trees and all other forms of vegetation and in any manner taking or continuing to make any act that would lead to the destruction of the trees and vegetation on LR No.9379 or to its wastage and degradation howsoever, pending he hearing and determination of the suit

2. The Applicant also sought that a mandatory injunction do issue against the Defendants/Respondent alongside their servants and agents and any persons claiming through them to vacate the said parcel of land pending the hearing and determination of the suit.

3. This application was heard wherein vide a ruling delivered on the 19th April 2013, the court found that the Applicant had failed to meet the threshold for grant of interlocutory relief with the result that that the orders sought were declined.

4. The matter was subsequently certified ready for hearing where the plaintiffs case proceeded for hearing but or before the same to be concluded, the Plaintiff filed the present application dated the 17th September 2019 where the he now sought for orders that the 4th to 6th intended Defendants be enjoined as Defendants to the suit.

5. The Applicant also seeks that the court be pleased to review its ruling of 19th April 2013, declining their application dated 19th December 2012.

6. Lastly the Plaintiff/Applicant seeks that the 1st to 3rd Defendants be restrained by themselves, their servants or agents from settling other relatives, tenants, licensees or other persons on the suit land until the suit was heard and determined.

7. Directions were taken that the said application the prosecuted orally where the Plaintiff/Applicant's counsel submitted that their application was brought under Order 1 Rule 10 and Order 40 Rule (1) (2) (3) and Rule 10 and Order 53 of the Civil Procedure Rule.

8. That the said application was supported by an affidavit sworn by one Shedrack Kiruki M'Laaria on 17th September 2019, which application sought to protect the suit land pending the hearing and determination of the suit case. That this was necessary because of the

developments that had occurred since the 19th April 2013 when a similar application was declined vide a ruling dated 19th April 2013 where the Honorable Judge had directed for the status quo to be maintained to which the Respondents were to continue occupying a smaller portion of the suit land.

9. That the Respondents had not complied with the ruling thereof delivered. That they had brought other people on the land and now occupied a large portion of the suit land. That they had continued to carry out other activities outside the portion they were occupying as well as putting up further structures. The Applicants thus sought that the Respondents be compelled to respect the ruling of 19th April 2013.

10. That they did not file, the contempt of court proceedings because the same would not suffice since they had been convinced that the court would be processed with sufficient ground to review the orders of 19th April 2013. That at the time of the ruling, there was pending (sic) a Criminal Case No. 1036 of 2012 at Nyahururu Chief Magistrate's Court wherein the 1st -3rd Respondents had been charged with the offence of forceful detainer. They had been found guilty as charged vide the judgment of 5th April 2015.

11. That the Hon Judge had relied on the argument by the Respondent that they had been living on the suit land for 30 years. The judgment of the lower Court which was still in force had proved otherwise and the Respondents are guilty of forceful retainer. That they had been living on the suit land since the 2009.

12. That there had been new evidence brought out by the judgment that the Respondents had not been living on the suit land for the period they had alleged. That the court was now seized with proper evidence and that being the case, the court had grounds of reviewing its ruling dated 19th April 2013 and grant the prayers sought in the application dated 19th July 2012.

13. In regard to prayer No. 3 of the application, the Applicant submitted that as at the time the suit was filed, the intended 4th, 5th and 6th Defendants were not living on the suit land and it was thus not important to include them as parties to the suit. That since they had now been brought to live on the suit land and had given themselves a larger portion of the suit land, when the suit is finally finalized, the finding would affect their rights and thus it would be fair to include them in the suit so that they are not condemned unheard.

14. That in regard to prayers No. 5 – 11, the Applicant submitted that now that he believed that the ruling dated 19th April 2013 should be reviewed, given the evidence that the court now had and the fact that these prayers had not been sought in the application dated 19th July 2012, that it was now necessary to seek these prayers so that the subject matter of the suit is protected from the Respondents who have continued to carry on the activities mentioned therein.

15. The Application was opposed by Counsel for the Defendant/Respondent who submitted, while relying on the replying affidavit of Samuel Kiptanui Korir sworn on the 8th October 2019 and filed in court on 14th October 2019, that prayers 3 and 14 of the Applicant's Notice of Motion were not opposed save for the fact that the Applicants had all along been aware that the 4th to 6th Respondents had been residing on the suit property.

16. That in regard to the rest of the prayers, the Respondents submitted that the application was a regurgitation of the application dated 19th July 2012 and that what had changed was the wording. That what the Applicant was seeking were injunctive and or prohibitory orders which were essentially the same orders sought on 19th July 2012. That a ruling had been delivered wherein 7 years down the line, no Appeal had been filed against the said decision. That nothing had been placed before the court to show that circumstances had changed, hence there was no basis of granting the orders sought.

17. That indeed the 1st – 3rd Defendants had been found guilty of forceful detainer Contrary to Section 91 of the Penal Code in Criminal Case No. 1036 of 2012, however the 1st to 3rd Defendants had since lodged an Appeal which was pending determination in Cr. Appeal No. 173 of 2015 at the Nakuru High Court as per their the documents annexed as "SSK 2 – SSK 4".

18. That the court's conviction should not be a basis for review of the court's ruling. That the 4th–6th Defendants had not been parties to the conviction in Cr. Case No. 1036 of 2012 and using the conviction of that case as a basis for review of the orders of the court would be unfair to the 4th – 6th Defendants. That the orders as sought by the Applicants amounted to final orders at the interlocutory stage which could only be issued at the determination of the main suit.

19. The Respondents further submission was that the Applicant had not demonstrated what prejudice he would suffer if the orders are not granted. Further, the Applicant had also not resided on the subject suit property and the structures that had been erected could be demolished after the determination of the main suit. They sought for the Applicant's application to be dismissed.

20. In rejoinder, the Applicant submitted that the Respondents' submission supported their case. That the fact that a person doesn't reside on a property did not distinguish his right. That the application beforehand was not a regurgitation of the previous application and that the Applicant did not appeal the ruling because they had thought that the Respondents would obey the orders of the court.

21. That considering that the 4th – 6th Respondents were not party to ruling dated the 19th April 2013 just went to confirm the complaint raised by the Applicants that there were new developments on the ground. That lastly there was nothing on the record to show that the ruling delivered by Hon. J. Waithaka had been overturned, therefore it still remained the law. They reiterated that their application be allowed.

Determination.

22. I have carefully considered the grounds in support of and against the application and the submissions by both parties and the relevant law and the peculiar facts of this case. I shall first deal with issues that are not contested.

23. On the first issue for determination, since the application to enjoin the 4th -6th Defendants to the suit as Defendants is not opposed, the same is herein allowed. The Intended Defendants are herein enjoined as the 4th-6th Defendants to the suit. Leave is therefore granted to the Plaintiff to amend their Plaint enjoining the said Defendants to the suit.

24. On the issue that is contested, in my considered opinion, the key issue that emerges for determination is w*hether the Applicant has satisfied the principles set to enable the court review its earlier ruling.*

25. Order 45 Rule 1 of the Civil Procedure Rules, 2010 under which the application is brought 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 review of judgement to the court which passed the decree or made the order without unreasonable delay."*

26. Section 80 of the Civil Procedure Act provides as follows:-

> *Any person who considers himself aggrieved-*
>
> *(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
>
> *(b) by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

27. From the above provisions, it is clear that whereas Section 80 of the Civil Procedure Act gives the court the power to review its orders, Order 45 Rule 1 of the Civil Procedure Rules sets out the rules which restrict the grounds upon which an application for review may be made. These grounds include;

> *i. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made or;*
>
> *ii. on account of some mistake or error apparent on the face of the record, or*
>
> *iii. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

28. In an application such as the present one where review is sought, the court is obligated to consider the same under the parameters set out under Order 45 Rule 1 of the Civil Procedure Rules herein above stated.

29. For such an Applicant to succeed under the provision of Order 45 Rule 1, the Applicant must satisfy the conditions set out thereunder:

> i. The Applicant must not have appealed the decision/order;
>
> ii. The Applicant must either show:-
>
> > a. There is discovery of new and important matter or evidence that could not by exercise due diligence not be available at the time the order was made; or
> >
> > b. There is some mistake or error apparent on the face of the record; or
> >
> > c. There is some other sufficient reason.
>
> iii. The application must be made without unreasonable delay.

30. On the 19th April 2013, this court delivered its ruling whereby it declined to grant the orders sought by the Plaintiff in his Notice of Motion dated 19th July 2012 where the Plaintiff had sought injunctive orders against the 1st-3rd Defendants restraining them from dealing in any manner whatsoever with the Plaintiff's parcel of land No. LR 9379.

31. Subsequently, 6 years later, the Plaintiff, has come to court again via his application dated the 17th September 2019, wherein being aggrieved by the ruling of the court on 19th April 2013 filed the Notice of Motion, the subject of this ruling expressed to be made under Order 1 Rule 10, Order 40 Rule 1-3 and Rule 10 and Order 51 Rule 1-3 of the Civil Procedure Rules he seeks inter alia the following orders:

i. spent

ii. spent

iii. spent

iv. That this honorable court be pleased to review its ruling herein declining the Plaintiff's application dated 19th December 2012.

v. That the 1st -3rd Defendants be the restrained by themselves their servants or agents from settling other relatives tenants, licensees or other persons on the suit property LR 9379 until further orders of the court

vi. That the 1st -3rd Defendants and the intended Defendants be the restrained by themselves their servants or agents from settling other relatives tenants, licensees or other persons on the suit property LR 9379 until this suit is heard and determined.

vii. That the Defendants be the restrained by themselves their servants or agents from building on the said suit land, planting additional maize, wheat, or other crops or rearing sheep and goats on the suit property.

viii. They also sought for a mandatory injunction to issue or requiring the Defendants to demolish the four houses built on the suit property during the trial of the suit.

ix. That the 4th -6th Defendants be restrained by themselves, their servants or agents and members of their family from entering and the remaining on the suit property pending the hearing and determination of the suit.

xi. That the costs of the application be provided for.

32. The Respondent/Defendants in their Replying Affidavit averred that:-

i. The Plaintiff had presented before this court an application dated the 19th July 2012, court seeking similar reliefs to those he was seeking in the present application where the court had declined to grant the orders sought. The Plaintiff never appealed the ruling and the circumstance has not changed since the delivery of the ruling**.**

ii. That in the year 2015, the Principal Magistrate Nyahururu had found the 1st -3rd Defendants guilty of the offence of Forceful detainer contrary to Section 91 of the Penal Code in Criminal case No. 1036 of 2012 a finding that they had since appealed to the High Court.

iii. That the conviction of the Magistrate's court cannot be used as a basis to seek review of the ruling while the same has been appealed against in the High Court and is pending hearing and determination.

iv. That since the 4th -6th Defendants were not party to the criminal proceedings in the Magistrate's court, the orders sought against them should fail.

v. That it was within the knowledge of the Plaintiff that the intended 4th -6th Defendants were relatives to the 1st -4th Defendants and resided on the suit land yet they had not been enjoined to the suit since its commencement.

vi. That the Plaintiff was seeking final orders at the interlocutory stage.

vii. That they had acquired the suit land by adverse possession.

viii. That the Plaintiff had not met the threshold to be granted the restraining orders sought

33. Since I have set out the necessary conditions an Applicant needs to satisfy in an application for review. With respect I am not persuaded that the Applicant has indeed satisfied any of the conditions to warrant a review. From the submissions of the Plaintiff, he appears to peg his application for review on the ground of discovery of new and important matter of evidence and on the fact that the Defendants have now invited other members of their family on the suit land who have now put up additional temporary buildings where they have continued to graze their animals and plant crops thereon.

34. In the decided case of ***Ajit Kumar Rath vs State of Orisa & Others on 2 November, 1999 Court at Page 608*** the Supreme Court of India had this to say:-

"The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule"

35. I have reviewed the ruling by **Hon. Justice Lucy Waitheka** and I am satisfied the issue of whether or not to issue an interlocutory mandatory injunction at an interlocutory stage, since the Defendants were in occupation of the suit land, as well as the issue on Adverse possession were appropriately canvassed. The judge in arriving at the decision that she did considered that the Plaintiff had not adduced special circumstance to warrant a mandatory injunction. The court found that since the Defendants occupied a portion of land that it was therefore in the best interest of justice that the status quo be maintained by the parties pending the hearing and determination of the suit.

36. It has been submitted by the Defendants that there was no appeal filed to overturn the ruling of the court and therefore in essence the plaintiff is asking me to sit on appeal on the ruling of my sister Judge. That would amount to asking this court to question its previous ruling. Having looked at the reasons herein advanced by the Plaintiff/Applicant seeking that this court reviews its ruling of 19th April 2013, I find that the said application did not meet the threshold set out under Order 45 Rule 1 of the Civil Procedure Rules. I find that this is not a proper case for this court to exercise its discretion in favour of the Applicant and accordingly, I proceed to dismiss the application dated 17th September 2019 and confirm the orders of status quo to be maintained as earlier directed in the ruling of 19th April 2013.

37. Costs to the Respondents.

Dated and delivered at Nyahururu this 10th day of December 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE