



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.5 OF 2013**

**WILSON AMUGE LAGAT.....PLAINTIFF**

**VERSUS**

**KIPRONO KAPTEBEREWO & 4 OTHERS.....DEFENDANTS**

**RULING**

***(Application for review; applicant stating that there is discovery of new matter and that there was non-disclosure of material facts; applicant having been heard before the High Court and Court of Appeal on a dispute over ownership of property; application having been filed to strike out the applicant's suit; application allowed; applicant now seeking a review of the dismissal order; no new matter disclosed; issues claimed to have been new considered in the ruling; alleged non disclosed facts being that a party was deceased; these facts having been disclosed; application dismissed; suit remains dismissed)***

1. The application before me is that dated 7 October 2015 filed by the plaintiff. The application seeks one main prayer which is prayer (c) of the application being :-

*That this Honourable Court be pleased to review its ruling delivered on 4 March 2015 with the result that the plaintiff's suit be reinstated/restored for full hearing and determination on merits.*

2. The application is based on various grounds and is opposed, and before I go to the gist of it, I think it is best that I give a little background to this suit.

3. The applicant commenced this suit by way of a plaint which was filed on 10 January 2013 through the law firm of M/s Kiplenge & Kurgat Advocates. The drafting of the plaint is rather convoluted but I can deduce that the applicant claimed to have had a dispute with the father of the 1st - 4th defendants, one Kapteberewo Koibos, over the land parcel Baringo/Perkerra- 101/178. The applicant pleaded that their dispute went to the High Court, and the High Court ruled in favour of the father of the 1st - 4th defendants in the case Nakuru HCCC No. 164 of 1990. He then appealed to the Court of Appeal vide Civil Appeal No. 96 of 1995 which again he lost. In his plaint, he pleaded that the judgment was never executed and that 12 years since the judgment was delivered have lapsed. His main prayers in the plaint were for orders that the judgments of the High Court and the Court of Appeal are time barred and unenforceable pursuant to Section 4(4) of the Limitation of Actions Act, Cap 22, Laws of Kenya. He also sought orders that the 5th defendant, the Settlement Fund Trustees, are at liberty to allocate the suit land to him and register the same in his name.

4. The 1st - 4th defendants entered appearance through the law firm of M/s N. Kinyanjui & Company Advocates and pleaded inter alia that the applicant's suit is res judicata. They denied that they have failed

to pursue the fruits of their judgment and averred that their late father subdivided the land parcel Baringo/Perkerra -101/178 and transferred the consequent titles to five beneficiaries.

5. Through an application dated 6 May 2013, the 1st - 4th defendants applied to have this suit struck out for want of a cause of action. They contended that the applicant's suit is scandalous, frivolous and an abuse of the court process. I heard the application and delivered a ruling on 4 March 2015. I found that the issue of who is entitled to the land parcel Baringo/Perkerra-101/178 was decided in Nakuru HCCC No. 164 of 1990 and Court of Appeal, Civil Appeal No. 96 of 1995. I also found that the said judgments were executed and the plaintiff's title to the land parcel Baringo/Perkerra-101/178 cancelled in execution of the said judgment. I also found that the said title has already been subdivided into several parcels of land namely Baringo/Perkerra/ 101/694- 705. I found absolutely no substance to go for trial and struck out the applicant's suit with costs.

6. Through this application, the applicant now wants me to review my orders of 4 March 2015. In his grounds in support of the application, the applicant has inter alia stated that he has discovered new and important evidence which was withheld by the respondents, and if it had been availed to court, the court would have arrived at a different decision; that the applicant could not get this new and important evidence even with extreme due diligence; and that the respondents gave false and misleading evidence.

7. In his supporting affidavit, the applicant has inter alia deposed that the respondents gave false evidence when they stated that the land parcel Baringo/Perkerra-101/178 had been subdivided. He has deposed that the said land exists to date and he has displayed an official search said to have been issued on 18 March 2013 and showing that the land is still registered in the name of the Settlement Fund Trustees (SFT), the 5th defendant. He has further stated that Kapteberewo Koibos, the father of the respondents died a long time ago, but only became registered as proprietor of the land parcel Baringo/Perkerra-101/178 on 15 April 2015, after delivery of the ruling of 4 March 2015.

8. In opposing the application, the 3rd defendant/respondent has first raised issue on the appearance of the law firm of M/s Karanja Mbugua & Company Advocates, who came on record after the dismissal of the applicant's suit, and it is contended that the said firm is not properly on record pursuant to the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010. He has also pointed out that the applicant issued a notice of appeal against the ruling of 4 March 2015 for which he has taken no step. He has further deposed that there has been continuous interference with the land records, a matter which he had earlier raised in his pleadings, and has argued that the applicant cannot benefit by his interference of land records. In a further affidavit sworn on 28 October 2016, he has deposed that Kapteberewo Koibos died on 20 November 2006 and that the 1st defendant, Kiprono Kapteberewo died on 25 October 2013. He annexed copies of their Certificates of Death.

9. In his written submissions, Mr. Karanja Mbugua, learned counsel for the applicant, admitted that the applicant had a suit for the land parcel Baringo/Perkerra-101/178 before the High Court, which he lost, and his appeal to the Court of Appeal was dismissed. He however argued that in the application dated 6 May 2013, the respondents withheld vital information i.e, that their father Kapteberewo Koibos was deceased, yet he became a beneficiary of the ruling of 4 March 2015 by becoming registered as proprietor of the said land on 15 April 2015. He also stated that the 1st defendant, Kiprono Kapteberewo had died when the supporting affidavit to the motion seeking to dismiss the suit was filed. He averred that there is a mistake or error apparent on the face of the record by the non-disclosure of the death of the 1st defendant and of Kapteberewo Koibos. He referred me to the case of ***Yatich Chepkonga & 13 Others vs Chairman, Secretary, Treasurer and Board of Trustees, Baringo Technical College, Eldoret ELC No. 166 of 2015*** and ***National Bank of Kenya Ltd vs Njau, Nairobi Court of Appeal, No. 211 of 1996***.

10. On her part, Mrs. Kinyanjui, learned counsel on record for the 1st - 4th respondents, submitted inter alia that the applicant must have known of the death of Kapteberewo Koibos, and that is why he did not sue him in this matter, and that this was disclosed in the defence herein. She pointed out that Kiprono Kapteberewo died on 25 October 2013, after this suit had been filed, and after the application to strike out the applicant's suit had been filed on 6 May 2013. She submitted that the suit against him abated one year later pursuant to the provisions of Order 24 of the Civil Procedure Rules, 2010. She did not think that the

issues herein fall within the purview of a review application and referred me to the case of **Grace Akinyi vs Gladys Kemunto Obiri, Eldoret ELC No. 193 of 2015.**

11. I have considered the application. The applicant seeks review of the ruling of 4 March 2015, which dismissed his case, on two broad grounds. The first, is that there was non-disclosure of the deaths of Kapteberewo Koibos and Kiprono Kapteberewo, and the second is that the land records still show that the title to the land parcel Baringo/Perkera-101/178 is still intact contrary to what the respondents had stated in their application seeking the dismissal of the applicant's suit. Before I go into the issues, there is a preliminary objection that the law firm of M/s Karanja Mbugua & Company Advocates is not properly on record. On this, I see no substance. I have seen that a consent was filed on 13 October 2015 when this application was also filed, vide which the applicant's erstwhile counsel, M/s Kiplenge & Kurgat Advocates, gave consent to the law firm of M/s Karanja Mbugua & Company to come on record in their place. This to me is compliant with the provisions of Order 9 Rule 9 which states as follows :-

*Change to be effected by order of court or consent of parties [Order 9, rule 9.]*

*When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—*

*(a) upon an application with notice to all the parties; or*

*(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.*

12. It will be seen from the above, that where judgment has been passed, an incoming advocate needs to file an application to come on record, or in the alternative, file a consent executed by the outgoing and incoming advocate. In our case, there is a consent filed by the incoming and outgoing advocate and I really do not see the place of the objection raised by the respondents on the representation of the applicant.

13. Now, to the substance of the application. The application is for review and Order 45 Rule 1 of the Civil Procedure Rules has been cited. The said provision is drawn as follows :-

*Application for review of decree or order [Order 45, rule 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.*

14. It will be observed for a party to bring himself under the umbrella of an application for review, he needs to demonstrate discovery of new and important matter or evidence, which could not have been

within his knowledge or could not be procured by him, despite exercise of due diligence when the order was made; or he may demonstrate a mistake or error apparent on the face of the record; or demonstrate other sufficient reason. In our case, the applicant has stated that there are some facts which he could not have been able to bring to court despite the exercise of due diligence, and the facts stated are, that there had been no issuance of titles despite the depositions of the respondents to the effect that the land parcel Baringo/Perkerra-101/178 had been subdivided and fresh titles issued. On my part, I am not persuaded that this is evidence which could not be obtained at the time the application was heard. In this application, the applicant has displayed a search certificate which was issued on 19 March 2013 which purports to demonstrate that the title of the land parcel Baringo/Perkerra-101/178 is still in the name of the Settlement Fund Trustees. The application that resulted in the dismissal of the applicant's suit was filed on 6 May 2013 and the applicant in his reply, did annex a copy of the same search. It is therefore evidence that I considered before I arrived at my ruling of 4 March 2015 and that cannot be said to constitute new evidence.

15. It is further claimed in this motion that the respondents lied in their application by stating that the property has been subdivided. Again, there is nothing new here. In his reply to the motion filed by the respondents, the applicant did state in his reply that the mother title has never been subdivided and has never been surrendered. He did state on oath that the subdivided titles displayed are therefore fraudulent. I considered whether or not fresh titles had been issued before arriving at my ruling of 4 March 2015 and my conviction was that titles had been issued. If the respondents moved to effect other changes in the register of the parent title, after my ruling of 4 March 2015, that is post the application and cannot be a ground for review. In essence, I do not find any new or important evidence displayed by the applicant which was not displayed at the hearing of the motion to dismiss suit and there is nothing tabled by the applicant which he could not table at the hearing of that motion for dismissal.

16. It has further been argued that there was nondisclosure of the fact that Kapteberewo Koibos had died when the application was being argued. Nothing arises out of this because I believe that the applicant himself was aware of his death, given that he did not sue him in these proceedings. Indeed, in his plaint, the applicant referred to Kapteberewo Koibos using the past tense "was" meaning that he was aware of his non existence. Further, the demise of Kapteberewo Koibos is disclosed in paragraph 7 of the defence, which clearly states that he is now deceased. On the disclosure of the death of Kiprono Kapteberewo, the 1st defendant, I have seen that this occurred on 25 October 2013, which was before the application dated 6 May 2013 that led to the dismissal of the applicant's suit. I see no relevance in the ruling of Ombwayo J, in the case of *Yatich Chepkonga & 13 Others vs Chairman, Secretary, Treasurer and Board of Trustees, Baringo Technical College, Eldoret ELC No. 166 of 2015*. In that case, it emerged that the suit was purportedly instituted by a person, who it turned out to be deceased by the time the case was filed. The court found the case to be incompetent. That is not the situation we have here. The application herein was instituted before the death of Kiprono Kapteberewo. I have seen no material non-disclosure in the affidavits that supported the application to dismiss the suit.

17. I frankly see no substance in this application for review. If the applicant found my ruling of 4 March 2015 to have been misplaced, he should have pursued an appeal. He filed a Notice of Appeal which he appears to have abandoned and opted to file this application for review which is completely unmerited.

18. In my ruling of 4 March 2015, I found that the applicant had been heard on his claim over the land parcel Baringo/Perkerra-101/78 and he lost. He even lost before the Court of Appeal. I wonder what other business he has in court over the same land. He should let the respondents peacefully enjoy the fruits of their judgment.

19. I see no merit in this application and it is hereby dismissed with costs. The effect is that the plaintiff's suit remains dismissed with costs.

20. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 30<sup>TH</sup> day of January 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of :-**

Ms. Karuga for the plaintiff/applicant.

No appearance on the part of M/s N. Kinyanjui & Company Advocates for the 1<sup>st</sup> - 4<sup>th</sup> defendants/respondents.

No appearance for the 5<sup>th</sup> defendant.

Court Assistant : Nelima Janepher.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**