REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 27 OF 1999

GILIDI CHERUIYOT KIPKOECH.…….....PLAINTIFF

VERSUS

NATHAN KIPCHUMBA LAGAT…….…....….....1ST DEFENDANT

MARY NAIBEI CHANGWONY……...…….. 2ND DEFENDANT

DAVID OSORO…….……. 3RD DEFENDANT

R U L I N G

1. The application dated 13/3/2017 seeks the following orders:-

1. …….spent

2. …….spent

3. The Honourable Court be pleased and is hereby pleased to review its judgement delivered on 16th September, 2015 and all consequent orders by entering judgment in favour of the 2nd defendant/applicant as against the plaintiff/respondent or make directions for re-hearing of the matter pursuant to the provisions of Order 45 (r.5) of the Civil Procedure Rules, 2010; and

4. Costs of the application be granted to the 2nd defendant/applicant.

2. The history of the matter is as contained in the judgment dated 16/9/2015 a copy of which is attached to the supporting affidavit as **Exhibit** "**MCI**".

3. The main ground upon which the application is brought is that counsel who had handled the defence of the suit suppressed evidence of the existence of sale agreements by which the 2nd defendant's husband purchased the land yet the principal issue upon which the judgement of the court was premised was whether or not the 2nd defendant had tendered evidence of purchase of land. It is urged that that suppression of evidence by counsel has prejudiced the 2nd defendant who now has to contend with a judgment against her. It is submitted on behalf of the 2nd defendant that the sale agreements constitute new and crucial evidence which necessitates a review of the judgment of this court dated 16/9/2015. The 2nd defendant avers that if the court had been seized of what she calls "*new evidence*" at the time of judgment, it would have arrived at a different determination.

4. The 2nd defendant also argued that the mistake by counsel of not disclosing the evidence to court cannot be blamed on the 2nd defendant who is a lay person and who only relied on the services and advice of a person considered to be an officer of this court.

5. The 2nd defendant further states that there is an error on the face of the judgment in that the judge wrongly misconceived the discrepancy on the acreage and used it to dismiss the claim by the 2nd defendant without the same being an issue that fell for determination.

6. The 2nd defendant also identifies what she calls another error on the face of the record: that the court did not consider the competence of the suit as the court did not decide whether the suit was time barred under the provisions of the ***Limitation of Actions Act Cap 22 of the Laws of Kenya***.

7. The 2nd defendant also averred that she was wrongly enjoined in the suit as her husband is the person the proceedings should have been commenced against.

8. The application is opposed by the plaintiff who filed a replying affidavit on 30/10/2017. His main grounds of opposition are as follows: that the application is brought in bad faith; that it seeks to reopen the case; that the purported sale agreements are "*forged*"; that a notice of appeal was filed by the 2nd defendant on 22/9/2016; that the instant application has been brought late which is evidence of indolence, and is an afterthought; that the 2nd defendant changed counsel to the current firm of advocates in 2015 after judgment was entered on 16/11/2015, and presented a series of applications which were abandoned; that the delay in filing this application is unexplained; that no agreements were produced by the 2nd defendant and her husband at the hearing; that if the fact of agreements being in existence was within the 2nd defendant's husband's knowledge as at the time of hearing then he should have stated that fact at the hearing; that the proposed introduction of the sale agreements is meant to further fraud; that evidence in the proposed agreements contradicts evidence given by the 2nd defendant, and finally, that the evidence of the Land Control Board Consent was considered at the hearing.

9. The 2nd defendant filed written submissions on the application on 2/11/2017 and the plaintiff filed his on 7/11/2017. In my view, the only issue that arises for determination in this application is whether the applicant is entitled to a review of the judgment dated 16/9/2017.

10. In order to be entitled to a review of an order or a decree, one must satisfy the provisions of ***Order 45 Rule 1 of the Civil Procedure Rules***. That order states the grounds which the court may consider upon an application for review. First is the discovery of new and important matter or evidence. In this court's view, the matter or evidence discovered has to be truly new to the applicant, such that the applicant, in all fairness, could not have known of their existence at the time of the hearing in order to bring them to the attention of the court.

11. In this case the agreements said to have been omitted from the evidence produced at the hearing were with the counsel for the 2nd defendant. What I understand the 2nd defendant to be saying is that she knew of the agreements, and that her advocate knew of the said agreements, but they were nevertheless not produced in evidence.

12. The 2nd defendant relies on ***Pancras T. Swai -vs- Kenya Breweries Ltd 2014 eKLR***. It is true that the discovery should relate to issues of fact which may emerge from evidence. It is regrettable, as counsel for the 2nd defendant states, if the said agreements were in existence and were not brought to the attention of the court at the hearing. However the very fact that they could have been produced at the hearing with the exertion of a little bit more diligence on the part of the defence, ousts them from the category of "*new and important matter or evidence*" envisaged by ***Order 45 Rule 5***. Failure to produce the agreement was a default on the part of the 2nd defendant and her counsel. In my view, this does not satisfy the definition of new and important matter or evidence sufficient to persuade this court to review the judgment or order a re-hearing of the matter.

13. It has also been urged that the suppression of that "*evidence*" violated the 2nd defendant's right to be heard and hence violated the rules of natural justice. The 2nd defendant cited ***Mbaki & Others -vs- Macharia & Another*** in support of this proposition. In my view however, caution must be taken so that not all circumstances in which a party is not heard are interpreted to be a denial of the right to be heard or a violation of rules of natural justice even when the party complaining of denial was in default.

14. Whenever a suit is filed in court, the court is presumed to be ready to hear the same to its logical conclusion and parties are deemed to be entitled to appear and call evidence.

15. In appropriate instances even in some where a party does not deserve it, the court may adjourn a hearing or extend time to enable a party file relevant evidence to enable the decision of the court be on the merits.

16. I do not hear the 2nd defendant as saying that the court denied the 2nd defendant a hearing by being overly strict on the rules of procedure or rules of evidence or adjournments or otherwise. What I appreciate is that a defence counsel is being blamed for failing to ensure that evidence was brought before the court.

17. Caution must be taken by noting that if at all times a judgment is made the same were to be subjected to review on the basis of matters extraneous to the merits of the suit such as readiness of counsel or of a party to proceed with hearing or being possessed of such evidence, to ably present his evidence before court, very many judgements may fall by the wayside to review orders for one reason or the other.

18. A restrictive definition of "new and important matters" in my view should necessarily preclude instances where parties, having been granted by the court the chance to present their case, and having presented it poorly return to court seeking another bite at the cherry, a second chance to be heard on the same evidence that was available or could have been presented at the time of the hearing. It is doubtful that most of the litigation commenced in this country would ever come to easy finality if the latter scenario was allowed to be the norm.

19. For the reasons set out herein above, I find that there is no new and important matter or evidence in the instant case to warrant a review of the judgment dated 16/9/2015.

20. The next question that rises is whether there is an error on the face of the judgment. This is a ground of review that, unlike the previous ground, does not concern any omissions on the part of any litigant.

21. The argument by the 2nd defendant on this point is that the judge misconceived the discrepancy on the acreage and used it to dismiss the claim by the 2nd defendant without it being an issue that fell for determination. It is also urged that the court did not consider the competence of the suit which had a hearing as to its jurisdiction. In brief, what the applicant urges this court to find is that in the judgement sought to be reviewed, this court omitted to make findings and issue a determination on whether the suit was time barred by statute.

22. On the first point concerning acreage, no details are given in the 2nd defendant's submissions. However this court has referred to the judgment and noted that the court found (at paragraph 13) that "*the 2nd defendant herself does not know what her husband bought because her pleadings and evidence is at variance*".

23. The answer to this argument is simple: Parties are bound by their pleadings. It is pleadings that define issues that come up for determination by the court. If a party's pleading is at variance with their evidence, and the court bases its decision against a party on this variance, it cannot be said that there is an error on the face of the judgment since the evidence is meant to prove the factual statements in the pleadings. This ground too cannot stand.

24. As to the last issue, that is the issue of limitation, I note that the same was raised at **paragraphs 7** and

10 of the joint statement of defence and that it was listed as **issue No. 14** in the statement of agreed issues annexed to the summons for directions application dated 28/1/2000. In order for this court to determine whether the plaintiff had been given notice of the issue, sufficient to enable him to counter it, the evidence presented by the 2nddefendant is relevant. According to the record on 6/5/2015 the 2nd defendant (**DW1**) testified as follows:-

> **"I have been on my land since 1986. I am still staying on the suit land to date. I have developed the land. I am married to Wilfred Changwony Naibei. I am staying on the land with my husband".**

25. The plaintiff had testified as follows on 14/11/2005:-

> **"I have sued Nathan Kipchumba because he claims that my mother sold the land to him. He has trespassed in my shamba. He started cultivating it in 1989. He came forcefully. Mary Naibei is also living in my shamba. She also came with Nathan. She also says she bought the land. David Osoro also says he bought the land. I do not know how he bought it. He is cultivating the shamba. David Osoro is the one who came there first. He is still on the plot. The land initially belonged to my father. He died in 1985. I have the death certificate. I do not have the original. It went with Wilfred Naibei Changwony".**

26. Later on in cross examination the plaintiff said as follows:-

> **"I just saw the agreement. The person who took the original grant is Wilfred Changwony. I have not sued him. 2nd defendant is the one who lives in the land. The husband moved out and married another wife and settled elsewhere".**

27. In cross examination, **DW1** stated as follows:-

> **"I bought the land where I am staying in 1986……The main title for Koitogos Farm was 3709. Maria was entitled to 15 acres. She sold 5 acres out of her share of 15 acres. I am staying where Maria showed me".**

28. As can be seen from the proceedings the evidence of the two defence witnesses regarding their time of entry onto the suit land was not shaken in cross examination. The plaintiff's sole evidence therefore was weaker. In addition the record shows that the plaintiff admitted to being untruthful while testifying in the proceedings. He said under re-examination as follows:-

> **"I lied about my age in my identity card because I did not want to retire from my job early. I am telling the truth".**

29. I have considered the material restated herein above in detail. I have also referred to the judgment of the court. The judgment did not address the issue of limitation which was a stand-alone issue; it was not dependent on proof of other issues in the suit. I find that from the year 1986, which I will accept as the year in which the 2nd defendant and **DW2** settled on the land, up to the year **1999** is a period of slightly over **13** years. The ***Limitation of Actions Act*** states as follows at ***Section 7***:-

> **"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some other person through whom he claims, to that person."**

30. In the case of **Rawal vs Rawal 1990 KLR 275**, the court stated as follows:-

> **"The object of any limitation enactment is to prevent a plaintiff from prosecuting "stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. The effect of limitation enactment is to remove remedies irrespective of the merits of the particular case. "**

31. In the case of **Rawal** (supra) the court also cited the case of **Iga vs Makerere University 1972 EA 65** where the court stated as follows:

> **"A plaint which is barred by limitation is a plaint "barred by law". A reading of the provisions of section 3 and 4 of the Limitation Act cap 70 together with order 7 rule 6 of the civil procedure rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court shall reject his claim… The Limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred the court can not grant the remedy or relief."**

32. Consequently, I find that there was one triable issue that the court omitted to deal with despite the fact that it was agreed to be an issue for determination by both parties and that is the issue of limitation.

33. Upon a review of evidence on the record, I find the plaintiff had proper notice of the issue. In view of section 7 of the Limitation of Actions Act, I do not consider that the transfer of the suit land to the plaintiff as was done by his mother in 1999 is capable of stopping the time from running so as to nullify the 2nd defendant's rights arising from her continuous possession or occupation of the suit land.

34. For the above reason, I find that there was an error on the face of the record. There is no need in the circumstances to order a re-hearing of the suit. The error stands out clearly. It can be remedied with finality by an order made in the current application.

35. Therefore, the judgment of the court dated 16/9/2015 shall be reviewed to the extent that the order of eviction made against the 2nd defendant is hereby set aside and substituted with an order dismissing the plaintiff's suit against the 2nd defendant for the reason that the same is statutorily barred by the provisions of ***Section 7 of the Limitation of Actions Act Cap 22 of the Laws of Kenya***.

36. The order that the 2nd defendant should pay the plaintiff the costs of the suit is also set aside and substituted with an order that the plaintiff should meet the 2nd defendant's costs of the suit.

It is so ordered.

Dated, signed and delivered at Kitale on this **16th** day of **January, 2018.**

MWANGI NJOROGE

JUDGE

16/01/2018

Coram - Before Mwangi Njoroge Judge

Court Assistant - Picoty

Mr.Kiarie holding brief for Kipsein for Respondent

N/A for the Applicant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

16/01/2018