REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 22 OF 2014

REUBEN KAMWOCERE.....PLAINTIFF

VERSUS

HELLENA WAKINA MAURICIO.....DEFENDANT

AND

HENRY NJERU KINYUA.....1ST INTERESTED PARTY

JULIANA WERUMA IRERI.....2ND INTERESTED PARTY

IRENE MUTHONI MURIITHI.....3RD INTERESTED PARTY

RULING

1. By a notice of motion dated 6th August 2018 filed under certificate of urgency under the provisions of **Order 45 Rule 1 (a) and (b) of the Civil Procedure Rules** the Plaintiff and the interested parties sought, *inter alia*, a review or setting aside of the orders made on 1st February 2018 and an order to stop any further dealings with *Title No. Gaturi/Nembure/2548.*

2. The grounds upon which the said application was based were that a title deed could only be cancelled through proceedings commenced by way of plaint and not by way of notice of motion and that the provisions of **sections 1A and 3A of the Civil Procedure Act (Cap 21)** could not be relied upon in an application for cancellation of title. It was further alleged that the court had been misled by the Defendant's advocate by filing the notice of motion dated 30th July 2017 for cancellation of title.

3. The said application was supported by the affidavit sworn jointly by the Plaintiff and the 3 interested parties (hereinafter collectively known as the Applicants). It was contended that the Defendant's notice of motion dated 30th May 2017 was illegal and that it was mistakenly filed to seek cancellation of title to land. The Applicants, therefore, wanted the court to set aside its ruling dated 1st February 2018 on the Defendant's said notice of motion.

4. The Applicants' said notice of motion was opposed by the Defendant who filed grounds of opposition dated 4th September 2018 and a replying affidavit sworn by the Defendant on 4th September 2018. In summary, it was contended that the said application was frivolous, vexatious and an abuse of the court process. It was contended that the Plaintiff had lost in the litigation all the way to the Court of Appeal hence litigation should come to an end. The Defendant further contended that the Applicants had not established any grounds for review or setting aside the order of 1st February 2018 hence the Applicants ought to have appealed against the said order if they were aggrieved by it.

5. When the said application was listed for hearing on 4th September 2018, the Plaintiff orally prosecuted the said application on his own behalf and on behalf of the other Applicants whereas Ms Mutegi advocate for the Defendant opposed the same on behalf of the Defendant. The Applicants relied upon the grounds set out in their application and supporting affidavit whereas Ms Mutegi relied on the Defendant's replying affidavit.

6. The court has carefully considered the application on record, the grounds of opposition, the replying affidavit, and the oral submissions by the parties. In my opinion, the main question for determination is whether or not the Applicants have made out a case for review of the orders made on 1st February 2018 under **Order 45 of the Civil Procedure Rules**.

7. The material provisions of **Order 45 Rule 1 of the Rules** provide that;

> **(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.

8. In the case of **Origo & Another Vs Mungala [2005] 2KLR 307**, the Court of Appeal reiterated those grounds for review as the ones applicable in Kenya. So, have the Applicants demonstrated any of those grounds in this matter? The court is unable to find evidence of discovery of any new or important matter or evidence of a mistake or error apparent on the face of the record or any other sufficient reason to warrant a review. The mere fact that the Applicant's believe that the Defendant adopted a wrong procedure in approaching the court by way of a notice of motion instead of a plaint cannot be sufficient reason to warrant a review.

9. The issue of the propriety of the procedure adopted by the Defendant was raised by the Plaintiff's advocate in the earlier application of 30th May 2017 and it was dealt with by the court in its ruling of 1st February 2018. If the court arrived at a wrong conclusion on a point of law, then that cannot form the basis of a review. I can do no better than quote the Court of Appeal in the case of **Origo & Another V. Mungala (supra) at P. 316** on this issue;

> **"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a ground of appeal. Once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction. They have come to a dead end…"**

10. Similarly, in the case of **National Bank of Kenya Ltd Vs Ndungu Njau Civil Appeal No. 211 of 1996 [1997] eKLR** it was held, *inter alia*, 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 self-evident 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 erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review."**

11. The court has also considered whether or not the application for review was filed without unreasonable delay. It is evident from the record that the order sought to be reviewed was made on 1st February 2018. The Applicants' notice of motion for review was not filed until 6th August 2018. There was no explanation whatsoever rendered by the Applicants for the delay of over six (6) months in the filing of the application. The court finds and holds that the application for review must also fail for not having been filed without undue application for review must also fail for not having been filed without undue delay.

12. The Applicants having failed in their application for review are not entitled to any orders of inhibition to prevent further dealings with *Title No. Gaturi/Nembure/2548* or any resultant subdivisions.

13. The upshot of the foregoing is that the court finds no merit in the Applicants' notice of motion dated 6th August 2018 and the same is hereby dismissed in its entirety with costs to the Defendant. The costs shall be borne by the Plaintiff who seems to be the main mover of the application and the architect of the mischief in the alienation of the suit property after loosing in litigation all the way to the Court of Appeal. The costs are assessed at Kshs 10,000/- to be paid within the next 30 days in default of which the Defendant shall be at liberty to execute for the costs.

14. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 20TH day of SEPTEMBER, 2018.

In the presence of the Plaintiff and in the absence of the Defendant and the interested parties.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

20.09.18