



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISHII

ENVIRONMENT AND LAND CASE NO. 1229 OF 2016

(FORMERLY HCC NO. 47 OF 2003)

GEORGE ONCHIRI MBOGA.....PLAINTIFF

VERSUS

SABINA KEMUNTO ONGENI.....1ST DEFENDANT

THOMAS ONKWARE ONGENI.....2ND DEFENDANT

ALEX NYAMWEYA OSIEMBO.....3RD DEFENDANT

R U L I N G

1. On 13th July 2018 the court dismissed the plaintiff's application dated 1st September 2017 seeking the enjoinder of new parties as defendants to the suit and amendment of the plaint intended to implead the new parties enjoined to the suit. The parties the plaintiff sought to be enjoined were relatives of deceased parties but who were not persons who had been appointed as personal legal representatives of the deceased persons.

2. In dismissing the plaintiff's said application, the court in paragraph 12 of the ruling stated as follows:-

12. The net effect of the enjoinder of the 1st defendant's children and the 2nd defendant's wife as parties to the suit is to substitute both the 1st and 2nd defendants who were now deceased without following due process. The plaintiff wishes that they take the place of the deceased defendants, yet they are not the legal representatives of the deceased defendants and have not been substituted in accordance with the law. Paragraphs 7A, 9A and 10A and 13A which form the substratum of the plaintiff's claim constitute of acts and/or actions which were done and/or are attributable to the 1st defendant (now deceased). The suit against the 1st defendant having been abandoned and in any event there having been no substitution of the 1st defendant, the plaintiff's suit has no legs to stand on and in my view is unsustainable against the 3rd defendant who was not privy to any transaction the plaintiff may have had with the deceased 1st defendant.

3. The court held that as the plaintiff sought to unprocedurally substitute the 1st and 2nd defendants (who were deceased) through an application for joinder and amendment of proceedings, the application was an abuse of the court process.

4. Aggrieved by the ruling of the court, the plaintiff has brought the instant application dated 14th August 2018 expressed to be brought under Sections 3 & 3A of the Civil Procedure Act, Order 45 Rule 1 and 2 of the Civil Procedure Rules and seeks the following orders:-

1. That there be a review or variation of orders/ruling made on 13th July 2018 and suit be reinstated.

2. That the application dated 1st September 2017 be allowed.

3. That costs be provided for.

5. The application is premised on the grounds set out on the face of the application and the affidavit sworn in support by the plaintiff dated 14th August 2018. The grounds the applicant relies on are as follows:-

(a) That the amendment will bring out the issues.

(b) That it is for the interest of justice.

(c) That the land registrar transferred the land despite caution being there.

(d) The 3rd defendant sold the land during the pendency of the suit to defeat the ends of justice.

6. The 3rd defendant/respondent filed grounds of opposition dated 17th September 2018 and inter alia avers that the application is frivolous and an abuse of the court process and does not satisfy any of the conditions under which an order may be reviewed under Order 45 of the Civil Procedure Rules.

7. I have reviewed and considered the plaintiff's application dated 14th August 2018. The application is as it were, inviting me to rehear the application by the plaintiff dated 1st September 2018 where the plaintiff sought both leave to amend the plaint and to enjoin other defendants. After due consideration of the application the court gave its ruling on 13th July 2018. The plaintiff's present application seeks review and/or variation of the orders/ruling made on 13th July 2018.

8. The conditions that an applicant for review needs to satisfy are set out under Order 45 Rule 1 and such a party must demonstrate there has been discovery of new and important matter or evidence that was not there or available as at the time the order or decree was made; that there was a mistake or error apparent on the face of the record; or that there was some other sufficient cause to warrant review; and that the application for review has been made without undue delay. The court in making the ruling that it did on 13th July 2018, considered the issues that the applicant is inviting the court to reconsider relating to the amendment sought and declined to grant the application. I cannot sit on appeal against my own ruling.

9. The applicant has not shown there has been any discovery of any new matter and/or that there was an error apparent on the face of the record. Equally, no sufficient cause has been demonstrated that can warrant a review of the order/ruling of 13th July 2018. What is apparent is that the applicant did not necessarily agree with the order dismissing his application dated 1st September 2017 but his recourse ought not to have been to apply for review but to appeal against the ruling if he considered he had valid grounds to lodge an appeal. This court having made a determination on the application dated 1st September 2017 cannot sit on appeal against its own decision.

10. I am satisfied there are no grounds to warrant a review of my ruling dated 13th July 2018 and I accordingly find no merit in the plaintiff/applicant's application dated 14th August 2018. The same is ordered dismissed with costs to the 3rd defendant.

11. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 20TH DAY of DECEMBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Moguche for Nyangwencha for the plaintiff

N/A for the 1st and 2nd defendants

N/A for the 3rd defendant

Ruth Court assistant

J. M. MUTUNGI

JUDGE