REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 392 OF 2015

[Formerly Eldoret Hccc No. 1 of 2006]

FANIKIWA LIMITED.....PLAINTIFF

VERSUS

GEORGE KIPTABUT LELI.....1ST DEFENDANT/APPLICANT

JOHN ARAP SAINA.....2ND DEFENDANT/APPLICANT

RULING

The defendants/applicants who are judgment debtors have come to court by way of two applications being one dated 3rd October 2017 where the applicant seeks orders that there be a stay of execution of the orders issued by this court on 28th June 2017 pending the outcome of the Eldoret Civil Appeal no 15 of 2017 whose determination has a great impact on the matter, and the one dated 13th July 2018 for an order that they be granted leave to file a supplementary affidavit to incorporate documentary proof to the effect that the suit land is public land earmarked for allocation to squatters as opposed to private land, pending the ruling on the application dated 3.10.2017.

Moreover, that this court do recall its judgment pursuant to section 80 of the Civil Procedure Act, Cap. 21, Laws of Kenya in light of new material evidence fact that was not available to the court prior to the delivery of its judgment on 28.6.2017.

The application is based on grounds that at the time the application was canvassed, crucial documentary evidence could not be obtained by the defendants to prove that indeed, the suit land is public land as opposed to private land which information is now in the possession of the defendants.

In the second application, the applicants state that they have filed petition No. 10 of 2018. It is alleged that the issue of ownership of the property will be determined by the new evidence being sought to be incorporated.

In the supporting affidavit, the applicant states that the suit herein was declared public land by this court in Petition No. 4 of 2016. They claim to have been in use and occupation of the suit property as L. R. No. 7739/1-14 property known as Kambi Nandi since 1950s till the time they were evicted pursuant to the decree in 392 of 2015.

According to the applicants, Petition No. 4 of 2016 has great impact on this matter for the reason that it formed part of the parcels of land that were surrendered to the government for allocation of squatters including the applicants. The applicants have now obtained evidence that they seek the court to consider. The evidence is a copy of the map showing the subdivision. The applicants pray that the court does recall it judgment.

In the replying affidavit of Sophie Chemengen, she states that the defendant's claim was that they were bona fide purchasers for valuable consideration in respect of the suit land and that the plaintiff has never paid for the said lands and obtained the same by fraud or by fraudulent means. The respondent believes that the applicants' claim based on ancestral rights is an afterthought, baseless, misconceived and unfounded. Moreover, that the applicants claimed to have lived in the suit land since 1971 and having purchased the property for Kshs.420,000.

The defendant states that the parcels of land herein Pioneer/Ngeria Block 1(EATEC)/1389, Pioneer/Ngeria Block 1 (EATEC)/1388, Pioneer/Ngeria Block 1 (EATEC)/1387, Pioneer/Ngeria Block 1 (EATEC)/1386, Pioneer/Ngeria Block 1 (EATEC)/1385, Pioneer/Ngeria Block 1 (EATEC)/1384, Pioneer/Ngeria Block 1 (EATEC)/1381, Pioneer/Ngeria Block 1 (EATEC)/1380, Pioneer/Ngeria Block 1 (EATEC)/1379, Pioneer/Ngeria Block 1 (EATEC)/1378, Pioneer/Ngeria Block 1 (EATEC)/1374, Pioneer/Ngeria Block 1 (EATEC)/1376, Pioneer/Ngeria Block 1 (EATEC)/1375, Pioneer/Ngeria Block 1 (EATEC)/1382 and Pioneer/Ngeria Block 1 (EATEC)/1383 are not and do

not form part of the resultant titles or any title issued and/or emanating from parcel of land Ref. L. R. 9606, 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794, which were the suit properties in E & L Court Petition No. 4 of 2016. It is claimed by the respondent that the suit parcels are a resultant subdivision of family land reference No. 753/3 and therefore there is no nexus between this suit and the Sirikwa Squatters case.

According to the applicants, litigation must come to an end and that there is no error or omission set evident on the face of record of judgment of the court.

The applicant submits that when the application dated 3.10.2017 was argued inter-parte, crucial documentary evidence could not be obtained to prove that the suit parcel of land is indeed public land as opposed to being private. The evidence has been obtained. The applicants rely on the letters dated 26.05.2006, 14.05.2008 and 10.09.2008, 22.09.2010, the judgment for Petition No. 4 of 2016.

The applicant submits further that the parcels of land in dispute are public land which fact was not within the knowledge of the court at the time of judgment. It is submitted that L. R. No. 7739 was earmarked for allocation to squatters. In conclusion, the applicant submits that there is need to recall judgment herein delivered on 28.06.2017.

The respondent submits that the applicant has failed to satisfy the conditions set in Order 45 of the Civil Procedure Rules, 2010. The respondent cites section 80 of the Civil Procedure Act that provides for Review thus: -

> ***Any person who considers himself aggrieved—***
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> > ***(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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.***
>
> **Further Order 45 that provides for application for review of decree or order thus :-**
>
> ***(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.***

According to the respondent, there is no discovery of a new and important matter or evidence which after due diligence was not within the knowledge or could not be produced at that time. There is no mistake, or error apparent on the face or the judgment.

The respondent submits that it is strange and very deceptive for the applicants to attempt to take advantage of the judgment in Petition No. 4 of 2016 and fundamentally change the pleadings in manner that departs from the case before court. The respondents argue that the applicants cannot depart from bona-fide purchasers to squatters.

According to the respondents, there is no sufficient cause to review the judgment. The respondents argue that there is inordinate delay in bringing the application as judgment as made on 28.6.2017 and the application made on 13.7.2018.

I have considered the second application and rival submission and do find that the applicant's case basically is that they have discovered new evidence that the suit parcel of land is part of land that was declared by the President as public land for allocation to the squatters. The applicants now argue that the land in dispute is public land and the decree of the court amounts to conversion of public land to private land without following due process.

This court observes that Judgment in this matter was delivered on 28.6.2017 whilst judgment in Petition No. 4 of 2016 was delivered on 9.2.2017, the applicants ought to have been more diligent to have discovered that the land in dispute was public land before the judgment herein as the judgment in the Petition was delivered almost 4 months before the Judgment herein.

Moreover, the applicants ought to have applied to be enjoined in the Petition No. 4 of 2016, having failed to do so, cannot claim to be a beneficiary of the said judgment. Furthermore, the applicants, who appear to be changing their cause of action, can apply to be enjoined in the appeal pending in the court of appeal. Up to now, the applicants have not demonstrated that they have applied to be enjoined in the Eldoret Court of Appeal Civil Appeal No. 15 of 2017 which allegedly revolves on the subject matter. The applicants have not demonstrated that they are parties to the appeal.

The applicants have not demonstrated that they are part of Sirikwa Squatters and therefore, a beneficiary of the judgment in Petition No. 4 of

2016 and therefore, even if the court finds that L. R. No. 7739(13) was part of the parcels of land declared having been surrendered to the government for allocation to squatters, the applicants have not demonstrated to the court that they have a claim against the respondents as squatters. Moreover, they have not shown that they are in the list of Sirikwa Squatters.

On delay, I do find that filing the application more than 2 months after judgment is inordinate delay as there is a likelihood that a lot of proceedings have been undertaken at the Court of Appeal. The applicants have not declared the status of the proceedings in the Court of Appeal.

I have discerned the new evidence in the form of the map and various letters referred to by the applicant and do find no merit to review the judgment dated 28.6.2017 as the applicants are not coming to court as Sirikwa Squatters and that the applicants are introducing a new claim that amounts to a departure from their pleadings. The application dated 13th July, 2018 is dismissed with costs.

It has not been demonstrated that the Eldoret Civil Appeal No. 15 of 2017 is related to this suit and that it is clear that the appeal No. 15 of 2017 is not from this suit. The applicants have no appeal pending in the court of appeal hence not entitled to any stay pending appeal. Moreover, the order of the court was executed by the Decree holder hence there is nothing to stay. The upshot of the above is that the application dated 3.10.2017 is likewise dismissed with costs. Orders accordingly.

Dated and delivered at Eldoret this 6th day of December, 2018.

A. OMBWAYO

JUDGE