



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC NO. 156 OF 2014**

**KAWANGWARE GREEN HARAMBEE GROUP..... PLAINTIFF/RESPONDENT**

**VERSUS**

**KIPAREN OLE KURARU.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**WILLIAM SEIKURU.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**JOSEPH KIPAREN.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

1. On 16<sup>th</sup> January, 2015 this court issued injunctive orders on a Motion dated 6<sup>th</sup> November, 2014 lodged by the Plaintiff/Applicant. This was after the matter was argued inter parties based on the pleadings on record and the Affidavits.

2. The Defendants did not file an appeal to impugn the court's ruling. However, by a Motion dated 21<sup>st</sup> January, 2015, the Applicant seeks for orders to review the Ruling of this court of 16<sup>th</sup> January, 2015

3. The Motion is based on **Section 80** and **Order 45** of the **Civil Procedure Rules Cap 21**. The same is predicated on the facts that the court ignored the Defendant's Defence on record when it made the impugned Ruling, and that thus there is an error apparent on the face of the record.

The application is supported by the affidavit of Kiparen Ole Kararu sworn on 21<sup>st</sup> January, 2015.

4. The Applicants aver that had the court perused the defence which was on record, it would have appreciated the weight of the Defendants' case which goes to the root of the ownership of the suit land.

6. According to the Applicants, there are serious allegations of fraud and breach of contract which were not factored in the Ruling and that the Ruling offends the agreement between the parties.

7. The Applicants' advocate submitted that there is an error on the face of the record and cited the cases of **Draft and Develop Engineers Ltd vs National Water Conservation and Pipeline Corporation HCCC 11/2011** and **Muyodi vs Industrial & Commercial Development Corporation & another (2006)1EA 243**. In the case of **Michael Mungai vs Ford Kenya Elections & others (2013)eKLR**, the court held that ***"for one to succeed in having an order of the court reviewed for mistake or error apparent on the record, he must demonstrate that the order contains a mistake that is for the whole world to see"***.

8. The Applicants' advocate submitted that the court having observed in the Ruling that there was no

defence on record, the said observation was an error or mistake.

9. The Respondent opposed the Application.

10. The Respondent's Chairlady deponed that the Application is incompetent as the advocate who lodged it is not on record for the Applicants. The Respondent also took issue with the Supporting Affidavit because it is not properly commissioned.

11. The Respondent submitted that the request for judgment in this matter was filed on 16<sup>th</sup> January, 2015 as there was no Defence on record; that the court's decision was based on the content of the parties' Affidavits but not the Defence and found that a prima facie case had been disclosed and that the issues raised in Defence were raised in the Replying Affidavit which was considered by the court. There is therefore no new and important matter or evidence which has been unearthed.

12. In any event, it was submitted, the Applicant will not suffer any prejudice by the marking of the boundaries and the placing of beacons. The suit property will remain intact pending the hearing of the suit.

13. The requirements of **Order 45** of the Civil Procedure Rules in moving the court for review are: discovery of new and important evidence, mistake or error apparent on the face of the record and other sufficient cause. The Respondent has submitted that none of the aforesaid requirements have been established herein.

14. Counsel submitted that in the case of **Barclays Bank Ltd vs Elizabeth Agidza & 2 others** which quoted the cases of **Nancy Wanjeri & 5 others vs Michael Muigai (2014) eKLR** and **National Bank of Kenya Ltd vs Njau in (1996) LLR 469 (CAK)** the court held that "*a review may be granted wherever the court considers it necessary to correct an apparent error or omission on the part of the court. The error must be self-evident and should not require an elaborate argument to be established*".

15. The issue of the affidavit not being commissioned and the advocate not being properly on record has also been raised. The court has been urged to strike out the application on that basis. The case of **C.M.C Motors Group Ltd vs Marben School & another (2013) eKLR** has been relied on.

16. The Respondent submitted that the failure to annex the order sought to be reviewed is fatal. Counsel relied on the case of **MEA Ltd vs Gititu Coffee Growers Co-operative Society (2006) eKLR** to buttress that argument.

17. After going through the pleadings, affidavits and submissions, I find the following issues arising;

*a) Whether the Application is incompetent? If the above is negative,*

*b) Whether the Applicant has met the threshold set out by **Order 45** on the requirement for review?*

18. The technical issues raised by the Respondent will be addressed first.

They are:-

*Failure to commission the Affidavit,*

*Failure to file the change of advocate by Omasa Omosa & Co. advocates and,*

*Failure to extract and attach the order sought to be reviewed.*

19. The record shows that the Affidavit that was sworn by Kiparen Ole Kiraru on 21<sup>st</sup> January, 2015 supporting the instant application was commissioned by **Evans Moronge**. The court therefore rejects the first objection.

20. On record, there is a notice of change of advocate that was filed on 19<sup>th</sup> January, 2015 by Omas Omosa. The court therefore rejects the second objection.

21. According to the Supporting Affidavit sworn on the 21<sup>st</sup> January, 2015, the impugned Ruling is attached as **KO2**.

22. In the same Ruling at page 4, the orders that were made by the court are very explicit. They clearly indicate the court's determination and the same are not misleading. All the authorities relied on by the Respondent are all dated before the promulgation of the Constitution in 2010, which changed the constitutional and legal dispensation in Kenya. **Schedule 6 Rule 7(1)** of the Constitution stipulates that all laws in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it in conformity with the Constitution. **Article 159(2) d, of the Constitution and Section 1A and 1B of Civil Procedure Act** put emphasis on doing justice devoid of procedural technicalities. In the light of the foregoing provisions, I hold that annexing a Ruling on an Application for Review suffices and the omission of not annexing the extracted order does not prejudice any of the parties.

23. On merit, the court notes that the Ruling found that the "Defendant was yet to file a defence to enable the court appreciate the shape the suit is going to take". The Defence and counterclaim that has been brought to the attention of the court appears to have been filed on 17<sup>th</sup> December, 2014, though it could have been outside the court record. The court takes judicial notice that many documents filed are not always put in their respective files immediately due to various logistic latches in the registry. The same situation could have obtained herein.

24. The Defendant has sought for a declaration that the suit land belongs to him and for rectification of the register. The orders sought to be reviewed are only meant to facilitate the fixing of boundaries and the placing of the beacons of the suit land.

25. The subject matter will not change in nature and substance nor will the suit property be wasted or alienated. The Defendants will not suffer any prejudice. If the Defendants win the case, they will take back the land with well defined boundaries and beacons. If the Plaintiff wins, it will retain it with well defined boundaries and fixed beacons.

26. The court finds that although the Defence was not considered at the making of the impugned Ruling, the said Defence and counterclaim would not have changed the result. The Replying Affidavit replicated virtually all that is contained in the Defence and the counterclaim.

27. In the circumstances, the court dismisses the Notice of Motion dated 21<sup>st</sup> January, 2015 with costs.

It is so ordered.

**Dated and Delivered at Machakos this 27<sup>TH</sup> day of JANUARY, 2017.**

**O. A. ANGOTE**

**JUDGE**