



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 284 OF 2014

PETER OMANI OBIRIA PLAINTIFF

VERSUS

HUDSON OKEMWA 1ST DEFENDANT

JOHN NYANGERI 2ND DEFENDANT

AGRICULTURAL SOCIETY OF KENYA (ASK) 3RD DEFENDANT

GUSII MWALIMU ACHWA ASSOCIATION 4TH DEFENDANT

R U L I N G

1. The plaintiff/applicant by a Notice of Motion application dated 18th May 2016 expressed to be made under Order 45 of the Civil Procedure Rules and Section 18 (3) (f) of the Environment and Land Court Act, 2011 seeks an order:

“That this honourable court’s order given on 8th day of April 2016 be reviewed, varied and/or set aside.”

The application is supported on the grounds set out on the face of the application and on the affidavit sworn by Peter Omani Obiria on 18th May 2016. The grounds on which the application is supported are as follows:-

- a. That the 3rd defendant/respondent trustees are registered pursuant to and are subject to the provisions of Trustees perpetual Succession Act [Cap 164 Laws of Kenya]**
- b. That the 3rd respondent is a body corporate which can sue or be sued in its corporate name.**
- c. That the 3rd defendant/respondent cannot be sued in the actual names of the trustees being a corporate body.**
- d. That the plaintiff/applicant has discovered new and important matter which after due diligence were not within his knowledge or could not be availed to court prior to the ruling of this court given on 8th April 2016.**
- e. That the applicant has a sufficient reason.**

2. In the affidavit sworn in support, the applicant states under paragraph 7 that his advocate obtained the names of the trustees on 4th May 2016 vide a copy of the minutes of the ASK Council furnished to them which showed the list of trustees as at 21st March 2014. The list of the ASK Council members and an abstract of the ASK Constitution were exhibited as “P002” and “P003”. The applicant avers that under Article 19 (j) of the ASK Constitution the trustees were required to be registered under the provisions of the Trustees Perpetual **Succession Act**, Cap 164 Laws of Kenya and therefore it was the applicant’s contention that the 3rd defendant/respondent is a body corporate capable of suing and being sued in its corporate name and thus was properly sued as “**Registered Trustees Agricultural Society of Kenya**”. The applicant avers that owing to the discovery of the new and important matters it is fair and just that the court sets aside and/or varies the order it gave on 8th April 2016. The court in the ruling/order sought to be reviewed, set aside, and/or varied inter alia stated:-

“The 3rd defendant in my view is a necessary party in these proceedings and the ends of justice demand that the 3rd defendant do appropriately become a party. I will accordingly grant liberty to the plaintiff to within the next 21 days from the date of this ruling to replace the 3rd defendant as presently constituted with the proper 3rd defendant, giving the names of the Trustees/officials to represent the “Agricultural Society of Kenya” as the 3rd defendant in the suit failing which the suit as against the 3rd defendant will stand struck out on account of being defective.”

This is the order the applicant seeks to be reviewed and/or set aside or varied.

3. The 3rd defendant filed grounds of opposition to the plaintiff’s application on 7th June 2016. The grounds of opposition are as follows:-

- a. **The said application does not provide the particular rules under Order 45 of the Civil Procedure Rules 2010 that it is premised on and as such is defective.**
- b. **The said application for review raises grounds for appeal and not review and as such the said application is without merit.**
- c. **That the plaintiff has failed to comply with the timelines granted by the court to rectify the pleadings and as such, there is no suit pending as against the 3rd defendant as the suit stood struck out on 29th April 2016 21 days after the ruling of 8th April 2016 was delivered.**
- d. **That the application is as such without merit and a clear abuse of the court process.**
- e. **The proposition that the plaintiff has discovered new and important matter that was not within its knowledge does not stand as the Constitution of the 3rd defendant is readily available at the Registrar of Societies.**
- f. **That the said application does not raise any new ground or fact that can warrant the exercise of this court’s jurisdiction to review its ruling and as such ought to be dismissed with costs to the 3rd defendant.**
- g. **That as things stand, the 3rd defendant remains a society under the Societies Act and as such, the plaintiff’s application is not only frivolous, but a clear abuse of court process.**
- h. **That the plaintiff only seeks to confuse the issues at hand having failed to comply with the court’s direction which gave him 21 days within which to amend his pleadings failure of which the suit against the 3rd defendant stood struck out.**
- i. **That there is no suit pending against the 3rd defendant and as such, no orders can be**

granted as prayed.

4. The parties argued the plaintiff's application dated 18th May 2016 by way of written submissions. The plaintiff's application dated 18th July 2016 was filed on the same date while the 3rd defendant's submissions dated 21st October 2016 were filed on 24th October 2016. The plaintiff in his submissions asserts that by virtue of Article 19 (j) of the 3rd defendant's Constitution which provided for the registration of the Trustees pursuant to the provisions of the Trustees Perpetual Succession Act, Cap 164 Laws of Kenya the 3rd defendant was a body corporate capable of suing and being sued under its corporate name. In support of his submissions the plaintiff relies on the case of the **Registered Trustees of Maximum Miracle Center –vs- Andrew Mlewa Mkare [2013] eKLR** where the court held thus:-

“Section 3 (2) and (3) of the Trustees (Perpetual Succession) Act, Cap 164 clearly stipulates that once the trustees who have been appointed by anybody or association of persons established for any religions, educational, literacy, scientific, social, athletic or charitable purpose have been incorporated and a certificate of incorporation of the trustees has been issued, the trustees shall thereupon become a body corporate by the name described in the certificate and shall have the power to sue and be sued in the corporate name”.

The plaintiff further submitted that the court should having regard to the provisions of Section 19 of the Land and Environment Court Act No. 9 of 2011 not be shackled by technicalities of procedure but should rather administer justice expeditiously guided by the principles of natural justice.

5. The 3rd defendant for its part submitted that the applicant failed to comply with the directions of the court requiring him to substitute the 3rd defendant within 21 days and accordingly the suit against the 3rd defendant automatically stood struck out on 29th April 2016 and hence there was no suit against the 3rd defendant on 18th May 2016 when the plaintiff filed the instant application. It is a fact that the orders/directions issued by the court on 8th April 2016 were self executing such that upon the expiry of the period of 21 days from the said date the suit against the 3rd defendant dissipated having been struck out following default by the plaintiff to comply.

6. The plaintiff states that he only managed to obtain a list of the Trustees of the 3rd defendant and a copy of the Constitution on the 3rd defendant on 4th May 2016. Having obtained the names of the trustees it is not clear why the plaintiff chose not to amend the plaint as directed which he could have done by seeking the enlargement of time to enable compliance.

7. The plaintiff's argument as I understand it is that he made discovery that the 3rd defendant had registered trustees under the Trustees (Perpetual Succession) Act, Cap 164 Laws of Kenya and that this was not within his knowledge at the time the court made its ruling on 8th April 2016. The 3rd defendant maintains it is a society registered under the Societies Act, Cap 108 Laws of Kenya as per the certificate issued by the Registrar of Societies dated 23rd March 1965 exhibited in its bundle of documents. Although the plaintiff states that the 3rd defendant's trustees are registered under the Trustees (Perpetual Succession) Act no copy of certificate of incorporation under the Act has been exhibited. If there was such a certificate it should have been possible for the plaintiff to obtain a copy from the registrar. Where is the evidence that the trustees of the 3rd defendant have been registered in compliance with Section 3 of the Trustees (Perpetual Succession Act) as claimed by the plaintiff?

8. Section 3 of the Trustees (Perpetual Succession Act) provides as follows:-

3. Incorporation of Trustees;

(1) Trustees who have been appointed by anybody or association of persons established for any religious, educational, scientific, social, athletic or charitable purpose, or who have constituted themselves for any such purpose, or the trustees of a pension fund or

provident fund may apply to the Minister in the manner provided in this Act for a certificate of incorporation of the trustees as a corporate body.

(2) If the Minister, having regard to the extent, nature and objects and other circumstances of the trust concerned considers incorporation expedient, he may grant a certificate accordingly, subject to such conditions or directions generally as he thinks fit to insert in the certificate, and particularly relating to the qualifications and number of trustees, their tenure and avoidance of office, the mode of appointing new trustees, the custody and use of the common seal, the amount of movable or immovable property which the trustees may hold and the purposes for which that property may be applied.

(3) The trustees shall thereupon become a body corporate by the name described in the certificate and shall have perpetual succession and a common seal and power to sue and be sued in their corporate name and, subject to the conditions and directions contained in the certificate, to hold and acquire, and by instruments under the common seal to convey, transfer, assign, charge and demise any movable or immovable property or any interest thereon now or hereafter belonging to, or held for the benefit of the trust concerned in the same manner and subject to such restrictions and provisions as trustees might so do without incorporation.”

9. It is apparent from the above that an elaborate procedure for the registration of trustees and for the issue of an incorporation certificate under the Act exists. It has not been demonstrated to the court that such procedure was followed or that indeed there is a certificate of incorporation in existence. The court cannot act on presumptions and/or in a vacuum. The plaintiff who claims the Trustees of the 3rd defendant are registered under the Trustees (Perpetual Succession) Act has not produced any evidence to that effect.

10. On the question whether the discovery of the list of Trustees and the Constitution of the 3rd defendant by the plaintiff when he states he did, would constitute discovery of new and important matters, which after due diligence were not within the knowledge of the plaintiff, my view is they would not. The Constitution of the 3rd defendant and indeed certificate of registration, if it was incorporated would be public documents which would be available for inspection at the relevant public offices. The plaintiff could with exercise of due diligence have been able to access them even before he filed the instant suit. In my view therefore the plaintiff cannot rely on this purported discovery to seek a review of the court orders of 8th April 2016. The conditions under which review may be granted under Order 45 of the Civil Procedure Rules have not been satisfied.

11. Gikonyo, J. while considering an application for review in the case of **Salama Mahmoud Saad –vs- Kikas Investment Ltd & Another [2014] eKLR** where inter alia the applicant had sought review on the ground of discovery of new and important matter of evidence cited the work by **Mulla’s** commentary on the Indian Civil Procedure Code with provisions similar to ours (15th Edition at page 2726) thus:-

“...Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause...”.

In the instant application, as I have observed the new and important matter of evidence that the applicant claims to have discovered was always available and would have been available if the applicant had exercised due diligence.

12. The upshot is that indeed the applicant has infact not shown the Trustees of the 3rd defendant were registered and incorporated under the provisions of Section 3 of the Trustees (Perpetual Succession) Act so as to become a corporate body. Article 19 (1) of the Constitution of the 3rd defendant that the plaintiff

relies upon to support the application merely provides that ...**“Trustees shall be registered pursuant to and be subject to the provisions of Trustees Perpetual Succession Act, Cap 164 Laws of Kenya”**. Were they infact so registered? Even if they were so registered that evidence would have been in the public domain and would not have constituted discovery of new and important matters of evidence.

13. I accordingly find and hold that the plaintiff’s Notice of Motion dated 18th May 2016 is devoid of any merit and the same is dismissed with cots to the 3rd defendant/respondent.

14. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 24th day of February, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the appellant

..... for the respondent

..... Court assistant

J. M. MUTUNGI

JUDGE