REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 2 OF 2015

EMAN KAMUNYA KITHAKA….PLAINTIFF/RESPONDENT

VERSUS

PETER KINYUA KAMUNYA……DEFENDANT/APPLICANT

RULING

On 27th January 2015 the plaintiff filed this suit against the defendant seeking the main order that the defendant's registration as the owner of land parcel No. KIRINYAGA/GATHIGIRIRI/698 (herein after the suit land) be cancelled and the same be registered in the names of the plaintiff. The plaintiff's claim was premised on pleadings that although he was at all times the registered proprietor of the suit land, the defendant had fraudulently registered it in his names by inter alia, forging his (plaintiff's) signature and/or thumb print.

The defendant filed a defence in which he denied fraud and added that infact the suit land was given to him as a gift by the plaintiff.

After hearing all the parties and their witnesses, this Court delivered a judgment on 26th February 2016 in favour of the plaintiff.

Aggrieved with that judgment, the defendant filed a Notice of Motion on 6th June 2016 citing ***Order 45 Rule 1 of the Civil Procedure Rules*** in which he seeks the following orders:-

> ***1. That this Honourable Court be pleased to review and set aside the judgment delivered on 26th February 2016.***
>
> ***2. That this Honourable Court be pleased to make an order for the defendant/applicant to continue occupying the portion he has built a house.***
>
> ***3. That the defendant/applicant be issued with a title for the portion occupied and has built a house.***

The application is based on the grounds set out therein and on the defendant/applicant's supporting affidavit. The gist of the application is that the plaintiff/respondent did not prove the particulars of fraud and neither was it in dispute that the defendant/applicant had possession of the suit land which had been given to him to construct a house. That it is therefore in the interest of justice that this Court reviews its judgment and award him a portion of the suit land.

The plaintiff/respondent filed a replying affidavit in opposition to that application in which he averred, inter alia, that the defendant/applicant is not entitled to a portion of the suit land and that there is no error

apparent on the face of the record of the judgment delivered by this Court nor any material to warrant the settings aside of the same. Further, that the defendant/applicant's advocate did not seek this Court's leave to come on record after judgment.

Submissions have been filed both by the firm of **NGIGI GICHOYA ADVOCATE** for the plaintiff/respondent and **G.O. OMBACHI ADVOCATE** for the defendant/applicant.

I have considered the application, the rival affidavits and the submissions by counsel.

Perhaps the starting point should be the plaintiff/respondent's averment that the defendant/applicant's advocate did not seek this Court's leave to come on record since judgment had already been entered for the plaintiff/respondent in this case. The plaintiff/respondent's advocate no doubt had in mind the provisions of ***Order 9 Rule 9 of the Civil Procedure Rules*** which provides as follows:-

> ***"Where there is a change of advocate, or where a party decides to act in person having previously engaged an advocate, after judgment had been passed, such change or intention to act in person shall not be effected without an order of the Court –***
>
> ***a. Upon an application with notice to all the parties; or***
>
> ***b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be".***

Although this issue was to be taken up by the defendant/applicant as a Preliminary Objection, it was not taken up and in my view rightly so because the provisions of ***Order 9 Rule 9 of the Civil Procedure Rules*** are not applicable in the circumstances of this case. This is because the defendant/applicant was not represented by an advocate when the case was heard and the judgment sought to be reviewed delivered. He was acting in person and only instructed **Mr. G.O. OMBACHI ADVOCATE** to come on record for purposes of this application. The mischief sought to be addressed by ***Order 9 Rule 9 of the Civil Procedure Rules*** was to inform previous advocates who were on record that another advocate was now taking over the matter so that the issue of fees could be sorted out and also to notify other advocates and parties of the change of address. In the circumstances of this case, the defendant/applicant was not represented by an advocate and therefore there was no breach of the provisions of ***Order 9 Rule 9 of the Civil Procedure Rules.***

I shall now consider the defendant/applicant's Notice of Motion on its merits. It is premised on ***Order 45 Rule 1 of the Civil Procedure Rules*** which provides as follows:-

> ***"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"***

It is therefore clear from the above that the conditions upon which a Court can review its judgment or order are:-

> ***1. Discovery of new and important matter or evidence.***

2. Such new and important matter or evidence was not within the knowledge of the applicant even after the exercise of due diligence or could not be produced; or

3. A mistake or error apparent on the face of the record; or

4. Any other sufficient reason; and

5. Once any of the above grounds are established, the application for review must be made without un-reasonable delay.

In his application, the defendant/applicant has raised the following issues:-

1. That the plaintiff/respondent never proved fraud.

2. That the defendant/applicant had the possession of the suit property having acquired proprietary rights and built a house thereon.

In his supporting affidavit, the defendant/applicant raises issues alleging an error apparent on the record as he was entitled to construct a home and therefore that it is in the interest of justice that he be awarded a portion of the suit land.

In my view, the main issue being raised by the defendant/applicant is that there was no proof of fraud by the plaintiff/respondent and therefore this Court ought not to have arrived at the decision that it did. What the defendant/applicant is actually alleging is that this Court made an error of law. However, that can only be a ground for appeal and not for review. In ***NATIONAL BANK OF KENYA LTD VS NDUNGU NJAU (1996) K.L.R 469*** which has been correctly cited by counsel for the plaintiff/respondent, the Court of Appeal held 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 provision of law cannot be a ground for review***". Emphasis added

The defendant/applicant also raises the issue that there is an error apparent on the record in that he is entitled to construct a home on the suit land having acquired proprietary interests therein. This Court did appreciate that the defendant/applicant had been allowed to put up a home on a portion of the suit land. In the judgment sought to be reviewed, I stated as follows:-

'That the plaintiff intended to give the defendant a portion of the suit land to put up a home is not really in doubt. The plaintiff himself confirms as much. But he denies having gifted the suit land to the defendant and infact accuses him of stealing it. From the evidence and surrounding circumstances, that accusation is not far fetched".

What this Court was saying, in simple terms, is that whereas the defendant/applicant was allowed to put up a home on part of the suit land, there was no evidence that the plaintiff/respondent gifted him the suit land as known in law. As the suit land is agricultural land and since the plaintiff/respondent was alleging fraud, it was incumbent upon the defendant/applicant to go further and avail minutes of the Land Control Board meeting that gave consent to the transaction in view of the plaintiff/respondent's assertion that his thumb print was forged and that he did not consent to the transfer of the suit land to the defendant/applicant. If this Court misconstrued the law in that regard, the only avenue left to the defendant/applicant is to file an appeal against that judgment as was held in the case of ***NATIONAL BANK OF KENYA LTD VS NJAU*** (supra). That cannot be a ground for review.

It is also the law that an application for review must be filed without un-reasonable delay. In ***FRANCIS ORIGO & ANOTHER VS JACOB KUMALI MUNGALA C.A CIVIL APPEAL No. 149 of 2001, (2005) 2 K.L.R 307,*** the Court of Appeal stated that:-

> "***In an application for review, an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly, the applicant must make the application for review without un-reasonable delay".*** Emphasis added

As to whether the delay is unreasonable will depend on the circumstances of each case. In this case, the judgment sought to be reviewed was delivered on 26th February 2016 and a decree extracted on 1st March 2016 and as at the time this application that was filed on 6th June 2016, was being canvassed, the Land Registrar Kirinyaga had already complied with this Court's judgment and issued a title deed in the names of the plaintiff/respondent a copy of which was annexed to his replying affidavit – see annexture **EKK 2**. It is not clear why it took the defendant/applicant four (4) months to file this application yet he was present in Court in person when the judgment sought to be reviewed was delivered on 26th February 2016. I find that delay to be unreasonable in the circumstances of this case and I am fortified in that view by the findings of **ONYANGO OTIENO J**. (as he then was) in ***KENFREIGHT E.A LTD VS STAR EAST AFRICA CO. LTD 2002 2 K.L.R 783*** where the Judge found a delay of three (3) months to be unreasonable. In ***HASSAN VS NATIONAL BANK OF KENYA LTD H.C.C.C No. 446 of 2001***, the Court also found an un-explained delay of three (3) months to be un-reasonable. I therefore find the delay of four (4) months, which is not even explained, to be unreasonable and in the circumstances, the application for review must be dismissed.

The defendant/applicant additionally seeks from this Court that an order be made for him to continue occupying the portion of the suit land on which he has built his house and that he be issued with a title for that portion. Again, as indicated above, it was conceded that the plaintiff/respondent had allowed the defendant/applicant to put up a home on a portion of the suit land. But that only made him a licencee whose license could be terminated at any time. This Court cannot force the plaintiff/respondent to extend that licence if he does not wish to do so and to order that a title be issued to the defendant/applicant for the portion of the suit land that he occupies in the absence of any legal justification for such an order would be tantamount to infringing upon the plaintiff/respondent's Constitutional right to own property which is protected under ***Article 40 of the Constitution***. If the defendant/applicant had any justification for those orders, he ought to have filed a counter-claim seeking the same. Such orders cannot be granted on an application of this nature and the plaintiff/respondent can only gift the defendant/applicant that portion of the suit land on his own volition and in accordance with the law. That is why on 13th October 2016, I encouraged both parties to pursue that option.

Ultimately therefore, the defendant/applicant's Notice of Motion dated 6th June 2016 is devoid of merit and is accordingly dismissed. Each party to meet their own costs since they are family.

B.N. OLAO

JUDGE

3RD MARCH, 2017

Ruling delivered, dated and signed in open Court this 3rd day of March 2017

Mr. Mwangi for Plaintiff/Respondent present

Mr. Macharia for Mr. Ombachi for Defendant/Applicant present.

B.N. OLAO

JUDGE

3RD MARCH 2017