



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC CASE NO. 847 OF 2016**

**NGUGI TICHA.....PLAINTIFF/RESPONDENT**

**=VERSUS=**

**KIRITU TICHA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**WAITHIRA TICHA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**WANJIRU TICHA.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

1. This is a ruling in respect of a notice of motion dated **27<sup>th</sup> May 2016** which seeks review of a judgment delivered on **6<sup>th</sup> February 2001**. This ruling arises from a judgment delivered on **6<sup>th</sup> February 2002** in **Nairobi High Court Civil Case No. 1408 of 1976** between Ngugi Ticha and Kiritu Ticha and 2 others.
2. I do not wish to delve so much into the background of this matter because I do not have the benefit of proceedings of this old case. The original court file is said to have been lost leading to an application for re-construction being made. The only documents availed for re-construction was a judgment of the High Court and a judgment from the Court of Appeal which arose from the decision of the High Court.
3. A reading of the two judgments shows that one Ticha Kiritu alias Kimani who was originally from Kiambu had re-located to Embu. He had three wives. Ticha's family later came back to Kiambu where they were received back by their relatives who had remained behind. The Ticha family found that land in the area had been distributed and the process of demarcation was in progress.
4. Ngugi Ticha the Plaintiff in this case was from the first house. Kiritu Ticha, his step brother was from the second house Eunice Wanjiru Kimani who is now deceased was the third wife of Ticha. Ngugi Ticha was registered as owner of **LR No. Kiambaa/Kihara/796 and Kiambaa/Kihara/T.204**. Kiritu Ticha was registered as owner of **LR No. Kiambaa/Kihara/T.201**.
5. Ngugi Ticha had differences with his family members over the ownership of LR No. Kiambaa/Kihara/796. He filed a case against his step brother and two of his step mothers in which he sought among other prayers eviction from the suit property. The defendants in their defence stated that Ngugi Ticha was holding **LR No. Kiambaa/Kihara/796** in trust for the Ticha family and that it should be shared equally amongst the three houses of Ticha.
6. The case was heard and in a judgment delivered by Justice Aganyanya as he then was, the Plaintiffs

suit was dismissed and the Judge went on to make a finding that Ngugi Ticha was holding the land in trust for the family of Ticha and that the same should be shared equally amongst the three houses.

7. Ngugi Ticha was aggrieved by the Judgment of the High Court. He preferred an appeal to the Court of Appeal. The Court of Appeal in a judgment delivered on 18<sup>th</sup> April 2014 dismissed the appeal and affirmed the judgment of the High Court. The parties to the case started to execute the decree of the High Court by bringing in a Surveyor to sub divide **LR NO. Kiambaa/Kihara/796** into three portions. This is what prompted the applicant who is the son of the third wife of Ticha to move to court seeking stay of execution of the Judgment of 6<sup>th</sup> February 2002 and review of the same.

8. The applicant contends that the judgment of 6<sup>th</sup> February 2002 should be reviewed to the extent that a Plot measuring 100x100ft. should be excised from LR Kiambaa/Kihara/796 before the remainder can be shared equally. The applicant argues that his mother's house did not benefit as the other houses benefited and that if LR No. Kiambaa/Kihara/796 is shared out before the 100x100ft. plot is excised and given to them, his mother's house will end up to be the losers. This he argues is because Ngugi Ticha has 100x100ft plot registered in his name as Kiambaa/Kihara/T.204 and that Kiritu Ticha from the other house is registered as owner of LR No. Kiambaa/Kihara/T.201 which is 100x100ft.

9. The applicant's application is opposed by the Plaintiff/Respondent Ngugi Ticha based on the grounds of opposition filed on 8<sup>th</sup> July 2016. The respondent contends that the applicant supported both the judgment of the High Court and that no cross-appeal was filed. That no claim for a plot measuring 100x100ft was made in the High court and that the application has been brought too late and cannot be sustained.

10. I have carefully considered the applicant's application as well as the grounds of opposition by the plaintiff/respondent. I have also considered the submissions by Counsel for the applicant and plaintiff/respondent. The only issue for determination is whether the applicant has met the threshold for grant of an application for review. The grounds upon which an application for review can be allowed are clearly spelt out in order 45 of the Civil Procedure Rules.

11. An application for review is open to any aggrieved person by a decree or order from which an appeal is allowed, but from which no appeal has been preferred or by a decree or order from which no appeal is allowed. The grounds upon which review can be based are firstly discovery of new and important matter or evidence which was not within the knowledge of the applicant or could not be produced after exercise of due diligence. Secondly, on account of some mistake or error apparent on the face of the record. Thirdly, for any other sufficient reason.

12. It is clear from the supporting affidavit of the applicant that both the High Court and the Court of Appeal did not take into account the fact that the other houses had benefited from plots measuring 100x100ft. each. The contention by the applicant does not fall in any of the grounds for review. The fact that Ngugi Ticha from the first house and Kiritu Ticha from the second house had each plots measuring 100ft.x100ft was known by the applicant's mother. It cannot therefore be said that it is a discovery which was not within their knowledge. There is also no error apparent on the record.

13. The trial judge in the High Court made a finding that the only land which was in contention was **LR No. Kiambaa/Kihara/796** and this is the one which he ordered shared equally amongst the three houses. The issue of **LR No. Kimbaa/Kihara/T.204 and T. 201** was never raised. The applicant seems to suggest that the trial judge and the Court of Appeal Judges who affirmed the High Court decision did not consider the fact that the two houses had benefited and that the applicant's house had not benefitted. An erroneous finding or misapprehension of evidence by a Judge is not a ground for review. It is a ground for appeal. In this case, I am not dealing with an appeal. I am dealing with an application for review.

14. In the case of **T. Swai –Vs- Kenya Breweries Limited [2014] eKLR** the Judges of Appeal had this to say:-

*“If parties were allowed to seek review of decisions on grounds that the decisions are erroneous*

*in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio” and have no appellate jurisdiction. The power to review decisions on appeal is vested in Appellate courts.”*

15. The Judgment in this case was delivered in 2002. The application for review was made after 14 years. **Order 45** provides that an application for review should be made without unreasonable delay. There is no reason given why the applicant did not apply for review within a reasonable time. Applying for review after 14 years on a matter which has even gone to the Court of Appeal is clearly an abuse of the process of the court. Litigation has to come to an end. This is a matter which should now rest. I do not find any merit in the applicant’s application which is hereby dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

**Dated, signed and delivered at Nairobi on this 30<sup>th</sup> day of May 2017.**

**E.O .OBAGA**

**JUDGE**

In the presence of Mr. Thige for Mr. Olonde for 3<sup>rd</sup> defendant

Court assistant - Hilda