REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 8 OF 2016

ISAACK KIPKALUM KOECH..............................PLAINTIFF/APPLICANT

VERSUS

NATHAN KIBET KOECH..............................DEFENDANT/RESPONDENT

RULING

The application is dated 20th April, 2016 wherein the plaintiff prays for an order that this court reviews the order issued on 28.1.2016 by setting aside and permitting the plaintiff/applicant to utilize the land for planting as he had been doing before pending the hearing land final determination of the suit. In the alternative, the applicant prays that the respondent be ordered to deposit in court every month such sum and interests that will be payable the Agricultural Finance Corporation for the due performance of the loan repayments which have been disrupted by the freeze on the land Nandi/Eisero/425. Moreover, that the respondent, be further ordered to furnish security for costs on the counterclaim before the hearing date.

Which application is based on grounds that the order issued effectively froze all activities on the suit land on 28.1.2016. The property is charged to Agricultural Finance Corporation and the funds used to liquidate the loan was generated solely from the suit land thus from farm produce harvested from the farm. The only acreage in contention is the 15 acres that the respondent had forcefully encroached upon the ploughed and thus laying illegal claims to it. The land was given to the applicant and his step mother the late Hellen Jemeli Bargutwo in equal shares which land was formally known as Nandi/Eisero/325 and currently bears numbers 425 and 426 after partition. That any challenge to the partition can only legally be done by the administrators to the estate of the late Hellen Jemeli Bargutwo and as at now, the administrators are not known. The partition was done in the year 1990 which was 10 years before the death of Hellen Jemeli Bargutwo. That they are in the year 2016 which is about 25½ years since the applicant was issued with Title deed.

The plaintiff contends that the Agricultural Finance Corporation to which the Title has been charged have a superior right to the property as their interest has been registered against the title and they are also not parties to the current proceedings and that the Limitation of Actions Act, Section 7 bars any action to recover land after the end of 12 years from the date on which the right of action accrued. The plaintiff contends that the right of action if any accrued on 16.10.1990 when the partitions were registered and not otherwise and was extinguished in October, 2002. That under Section 104 of the Registered Land Act Cap. 300 (now repealed) Parliament gave power to the Registrar to effect the partitions in such manner as he may deem fit even in the absence of any agreement between the parties. That the Registrar has not been made a party to the proceedings.

According to the plaintiff, the respondent should be ordered to give a written undertaking to pay any sums to the Agricultural Finance Corporation towards the loan repayments since the freeze on the land has been

occasioned by him. The applicant is going to lose out on this year's planting since the rains have started and he has not yet prepared the land for planting thereby exposing himself to financial ruin as the loan will not be paid. That should the freeze not be lifted; the applicant shall not be in a position to service the loan and he stands to lose the land through Public Auction by the Agricultural Finance Corporation.

The application is opposed by the defendant who has restated the facts of the matter as one in the replying affidavit filed on 22.1.2013 save the issue of the loan advanced by the Agricultural Finance Corporation.

The plaintiff/applicant submits that at the time of the issuance of the order, it was not brought to the court's attention that the Agricultural Finance Corporation issued a loan to the plaintiff and the land in dispute was the collateral. The property has not been discharged to-date. The order does not disclose the 45 acres that has been frozen. The applicant further submits that the Agricultural Finance Corporation has a superior right over the property. The applicant has also raised the issue of lack of letters of administration and Limitation of Actions in respect of the counterclaim. On the order for injunction, the plaintiff claims that the injunction was issued through the back door as the applicant is in occupation and that injunction cannot issue to a person in occupation. On the issue of ownership, the plaintiff argues that he is the absolute owner of Nandi/Eisero/425 which measures approximately 90.81 acres. Until the title is cancelled, he remains the lawful owner of the land.

The defendant/respondent argues that the order issued by court was made after both parties ventilated their respective positions through counsel on record. Moreover, that the order issued is not unfair as both parties were restrained from utilizing the land.

I have considered the application supporting affidavit, replying affidavit and the rival submissions and do find that such applications are based on grounds that there is error apparent on the face of record;

In **National Bank of Kenya Limited v. Ndungu Njau** (Civil Appeal No. 211 of 1996 (unreported)) the Court of Appeal, with respect, correctly held:

> ***"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. More 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 ground for review."***
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> ***"... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it."***

In **Francis Origo & another v. Jacob Kumali Mungala** (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. The court stated: -

> ***"our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."***

The plaintiff argues that it was not brought to the court's attention that the plaintiff was servicing the Agricultural Finance Corporation loan that was obtained on the basis of a charge on the suit property. It has not been demonstrated by the plaintiff that the loan is still subsisting as the certificate of official search is dated one year before filing of the application. There is no demonstration by the applicant that he has been paying the loan to enable this court make an order that he will be prejudiced if the application for review is not granted. Moreover, the applicant has not demonstrated to the court that the fact that the loan existed could not be ascertained with due diligence before the order was made on 28.1.2016.

This court further finds that the applicant is guilty of delay in making his application and that the application is an abuse of the court process because it comes after the suit has been set down for hearing. Why did it take the applicant almost three months to make this application? When the order was made, both parties were in court and none protested.

On 8.3.2016, Mr. Cheptarus came to court ready to proceed with the hearing of the suit but Mr. Miyienda had not filed defence. The court issued an order that the defendant do file defence within 4 days, failure of which, the application dated 16.1.2016 be allowed in terms of prayer (3) and the matter was scheduled for the hearing of the main suit on 7.6.2016. The defence was timeously filed on the 8.3.2016 and therefore, the order did not take effect. The applicant was all along aware that the court had fast-tracked the suit for hearing and given an order that both parties be restrained from utilizing the land and only decided to set aside the orders after the defendant appeared to be delaying in filing the defence.

This court finds that the order issued by court was not through back door as it was issued in open court in the presence of both counsels though one appears to have been asleep and lacked diligence and therefore, the lack of diligence by the plaintiff's counsel cannot be visited on the defendant and the court.

It is worth noting that the defendant's counterclaim is based on fraud and time begins running when the fraud is discovered and therefore, most of the issues raised by the applicant can only be determined on the hearing of the suit on merit. The applicant has not demonstrated that there are grounds to correct an apparent error or omission on the part of the Court and that the applicant has not shown that he has made a discovery of new and important matter or evidence. The application is otherwise dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF JUNE, 2017.

A. OMBWAYO

JUDGE