



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 57 OF 2017

{FORMERLY NAIROBI HCCC NO. 1253 OF 1975 (O.S)}

NDAGARA W/O KAUMBUTHU

SUBSTITUTED BY PETER MURITHI NYAGA ::::::::::::::::::::::::::::::::::: APPLICANTS

MURIUKI KAUMBUTHU

VERSUS

MBOGO KATHARANGUSHU (DECEASED

SUBSTITUTED BY NYAGA S/O MBOGO (DEC).....RESPONDENT

AND

JOSEPH MBOGO

JAMES NYAGA MBOGO (DECEASED)

NJOMO MBOGO KATHANGUSHU ::::::::::: APPLICANTS (AGGRIEVED PARTIES)

SELESION KINYUA NYAGA

PATRICIA MUTITU

RULING

1. By a notice of motion dated 16th May 2012, the advocate for the Applicants/aggrieved parties moved the court under Order 45 of the Civil Procedure Rules for the following orders:

a. That this honourable court be pleased to review the decree dated 9th April 1987 and extracted on 23rd February 2011.

b. That the costs of this application be paid to the applicants.

2. The said application was based on the grounds that there was an error apparent on the face of the record; that the decree was extracted fraudulently and that a new and important matter had arisen to justify the review.

3. The said application was supported by the affidavit of the advocate for the Applicants, Moris Gachura Njage, sworn on 26th April 2012 in which he expounded the grounds stated above. On the 1st ground, it was stated that the decree herein was extracted more than 12 years from the date of the judgement hence statute-barred under the **section 4 (4) of the Limitation of Actions Act (Cap 22)**. It was further stated that the judgement in question had been set aside by the time the decree was purportedly extracted and that the decree was extracted in violation of **Order 21 Rule 8 of the Civil Procedure Rules**.

4. On the 2nd ground, it was stated that the decree holder had concealed some material information from court on the disappearance and reconstruction of the court file, the setting aside of the judgement, and the transfer of the court file to Embu.

5. Finally, the applicants stated that there was a new and important matter in that whereas the suit property vested in them in 2004 the decree holder was registered as proprietor in 2011 resulting into a double registration and deprivation of their property in violation of the rules of natural justice.

6. The decree holder, who was one of the original applicants in the originating summons, filed what he described as a notice of preliminary objection to the said application on 17th October 2012. The decree holder also filed another notice of preliminary objection on 26th May 2017 and a “supporting affidavit” in response to the said application. A perusal of the said notices, however, reveals that they are merely grounds of opposition to the application which gave a response and background information on the various grounds raised by the aggrieved parties in the application for review.

7. In his response, the decree holder disputed that the judgement delivered on 1987 was set aside or that the file was transferred to Embu Law Courts. He also disputed the genuineness of the will through which the aggrieved parties acquired an interest in the suit property. It was also stated that there was no appeal against the judgement of the court delivered in 1987 by the High Court at Nairobi.

8. When the said application was listed for hearing on 31st May 2017 Mr Moris Njage appeared for the aggrieved parties/applicants and prosecuted his application while the decree holder, Muriuki Kaumbuthu opposed the same. Mr. Njagi reiterated the grounds set out in the application and relied upon the skeletal submissions and authorities he filed on 12th July 2012. He submitted that the decree was extracted about 24 years after judgement in contravention of **section 4 (4) of the Limitation of Actions Act**. He referred to the authorities of **Njuguna Vs Njau [1981] 2KLR 93** for the proposition that execution of a decree for recovery of land after the lapse of 12 years from the date of judgement was time-barred. He also maintained that the decree was irregularly extracted in violation of **Order 21 Rule 8 of the Civil Procedure Rules** and prayed that the application for review be allowed.

9. On the other hand, the decree holder relied upon the documents he had filed and submitted that when judgement was delivered on 9th April 1987, the Respondent did not appeal. He submitted that the court file thereafter went missing for about 6 years or so. He later on applied for a copy of the judgement and used it to obtain the decree in 2011. He disputed that the decree was statute-barred and stated that he did not know about such limitations. He submitted that it is the court which issued the decree and that the Land Registrar registered it after ascertaining its genuineness.

10. The decree holder also submitted that he sent a draft decree to the firm of Morris Njage & Co Advocates for approval but he rejected it in consequence of which it was presented to the Deputy Registrar who apparently approved and issued the decree. Finally, he submitted that although there was an application for transfer of the file to Embu which was filed in 1992, that application was never prosecuted and he wondered how the file ended up at Embu.

11. In my view, the main question for determination on this matter is whether or not the aggrieved parties have made out a case for a review of the decree under **Order 45 of the Civil Procedure Rules**. The material provisions of **Order 45 Rule 1 (1)** provide that;

1. “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 judgement to the court which passed the decree or made the order without unreasonable delay”.

12. The court has considered the application for review and the rival arguments of the parties herein. There is no dispute that judgement was delivered herein in favour of the original applicants in the originating summons dated 24th June 1975 on or about 9th April 1987. What is not agreed upon is whether or not the said judgement was set aside in a skeleton file when the original file went missing. There is no evidence on the basis of the record before me that the said judgement was set aside. The date of the setting aside has not been mentioned by the aggrieved parties in their application. The court shall therefore hold that there is no evidence to demonstrate that the said judgement was set aside.

13. The next question is whether or not such judgment could be enforced in 2011 after passage of a period of about 24 years. The court is satisfied that on the basis of **section 4 (4) of the Limitation of Actions Act** and the case law cited by Mr Morris Njage for the aggrieved parties, that execution of such a decree is not permissible in law.

14. The material provisions **of section 4 (4)** provide that:

“An action may not be brought upon a judgement after the end of twelve years from the date on which the judgement was delivered or...”

15. In view of this holding, the court is of the view that it is not necessary to consider whether or not the decree was extracted in violation of the provisions of **Order 21 Rule 8 of the Civil Procedure Rules**. It shall also not be necessary to make a decision on whether the decree was extracted fraudulently and whether there is discovery of any new or important matter to warrant a review. The court is satisfied that there is a good reason to grant the application for review on account of an error of law apparent on the face of the record. It is clear beyond doubt that the decree extracted in 2011 on the basis of a judgement delivered in 1987 is barred under **section 4 (4) of the Limitation of Actions Act (Cap 22)**.

16. The upshot of the foregoing is that the court finds merit in the notice of motion dated 16th May 2012 and the same is hereby granted in terms of prayer No. 1 thereof. There shall be no order as to costs.

17. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this 27th day of **JULY, 2017**

In the presence of the Respondent in person and Ms Muriuki holding brief for Mr Njage for the Applicants/Aggrieved Parties.

Court clerk Njue/Leadys

Y. M. ANGIMA

JUDGE

27.07.17