



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 32 OF 2012

KELLEN KARIMI NDUMA NDAMBIRI.....1ST PLAINTIFF/APPLICANT

NICHOLUS NJINE 2ND PLAINTIFF/APPLICANT

Suing as legal representative of the Estate of JAMES NDAMBIRI (DECEASED)

VERSUS

THE HON. ATTORNEY GENERAL 1ST DEFENDANT/RESPONDENT

PERMANENT SECRETARY

MINISTRY OF WATER AND IRRIGATION 2ND DEFENDANT/RESPONDENT

GENERAL MANAGER

NATIONAL IRRIGATION BOARD 3RD DEFENDANT/RESPONDENT

RULING

By a ruling delivered on 3rd October 2014, this Court dismissed the Applicants suit for being statute barred.

On 27th April 2016, the Applicants filed a Notice of Motion citing provisions of **Order 45 Rule 1, 2 and 3 of the Civil Procedure Rules, Order 22 Rule 25 of the Civil Procedure Rules** and also **Order 51 of the Civil Procedure Rules**. The Applicants seek the following orders:

- 1. That this Honourable Court be pleased to stay execution of the ruling/order dated 30th October 2014 (that is an error. It is dated 3rd October 2014.***
- 2. That this Honourable Court be pleased to set aside the orders issued pending hearing and determination of this application.***
- 3. That this Honourable Court be pleased to review the ruling/order issued on 3rd October 2014 in such terms as the circumstances of the claim.***
- 4. That costs of this application be costs in the cause.***

The application is premised on the grounds set out therein and also supported by the affidavit of **NICHOLUS NJINE** the 2nd Applicant herein.

The gravamen of the application is that the Applicants were dissatisfied with this Court's ruling dated 3rd October 2014 and are now in possession of new and important evidence in form of documents pertaining to their claim. That their claim was based on trust and is therefore not defeated by the **Limitation of Actions Act**. Further, that this claim is based on fraud which is also not affected by the **Limitation of Actions Act**. That the new evidence is a bundle of letters marked NN – 3 (a) (e) and NN – 4 (a to c). That these letters amount to acknowledgement by the 2nd Respondent to compensate the Applicants. That this application is based on substantial justice and should be allowed. Annexed to the application are several letters being correspondences regarding the termination of licence to rice holding No. 4388 WAMUMU which seem to have gone upto the office of the then Minister for Justice and Constitutional affairs. However, the Applicants did not succeed in getting back the said rice holding which in one of the correspondences, the 3rd Respondent stated as follows:

“We have reviewed all the correspondences and records available at our Mwea offices on the same matter. These records clearly show that the termination of your licence was well founded, was procedural and was within the provisions of the law governing Management of National Irrigation Schemes”

The same letter which is dated 19th September 2005 and is addressed to **JAMES NDAMBIRI** on behalf of whose Estate the Applicants filed this case, continues to state in paragraph two thereof that:

“Nevertheless, following your numerous appeals for assistance and your letter to this office on 20th June 2001 explaining the circumstances that led to your eviction, the General Manager instructed the Scheme Manager to find ways of assisting you. Subsequently, a two-acre plot was identified at Karabe and offered to you. However, you declined the offer and insisted that you would not welcome anything else other than your former holding and residential plot. You maintained this position when you visited our Head office on 12.9.05.

In the circumstances, the Board is now forwarding your case to the Mwea Irrigation Scheme Advisory Committee for further determination”

The long and short of all the annexed correspondences is that **JAMES NDAMBIRI** never got back rice holding No. 4388 following the termination of his licence on 8th June 1983. And so when the Applicants as his legal representatives filed this suit on 15th February 2012, it was clearly time barred and inevitably, this Court delivered its ruling on 3rd October 2014 to that effect.

The 3rd Respondent filed grounds of opposition to the application describing it as an abuse of the Court process, having been filed with inordinate delay and further, that there is no discovery of new and important evidence and neither was fraud raised in the plaint filed herein on 15th February 2012.

Submissions have been filed to the application both by **A.N. CHOMBA** advocate for the Applicants and **G.O. OMBACHI** advocate for the 3rd Respondent.

I have considered the application, the annexures thereto, the grounds of opposition by the 3rd Respondent and the submissions by counsel.

This application basically seeks the following two orders:

- 1. Stay of execution of the ruling/order dated 3rd October 2014; and***
- 2. The setting aside/review of the said order.***

STAY OF EXECUTION OF ORDER DATED 3RD OCTOBER 2014:

This Court's order dated 3rd October 2014 did not order any of the parties in this suit to do anything. No judgment was entered in favour of the Respondents. The order only dismissed the Applicants' suit. It was therefore a negative order which cannot be stayed. In **WESTERN COLLEGE OF ARTS &**

APPLIED SCIENCES VS ORANGA & OTHERS 1976 K.L.R 63, the Court of Appeal whilst declining to grant an order for stay of a negative order stated as follows:

“But what is here to be executed under that judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. An execution can only be in respect of costs The High Court has not ordered any of the parties to do anything, or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in any application for stay to enforce or to restrain by injunction”.

See also **KANWAL SARJIT SINGH DHIMAN VS KESHAVJI JIURAJ SHAH (2008) e K.L.R** where the Court of Appeal while dealing with an application for stay of a negative order stated:

“By the order, this Superior Court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only”.

It is clear that this Court’s order/ruling delivered on 3rd October 2014 only dismissed the Applicants’ suit. It did not direct any of the parties to do or refrain from doing anything. It was a negative order and therefore incapable of being stayed. The application of stay is therefore without merit. It is dismissed.

SETTING ASIDE/REVIEW OF THE ORDER DATED 3RD OCTOBER 2014

Order 45 Rule 1 (1) which donates to the Court the power to review a decree or order provides that:

“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 or 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 clear from the above that the grounds for review of an order are:

1. Discovery of new and important matter or evidence which, after exercise of due diligence was not within the Applicant’s knowledge or could not be produced at the time the order was made.

2. Mistakes or error apparent on the face of the record.

3. Any other sufficient reason.

4. The application should also be made without unreasonable delay.

The Applicants herein have based their application on the discovery of new and important evidence that was not within their knowledge. They also allege fraud, acknowledgment and admission of liability on the part of the 3rd Defendant. This Court has not been told what new and important evidence which could not be produced earlier has now become available. Presumably the new and important matter refers to the correspondences annexed to the supporting affidavit of the 2nd Applicant. Those correspondences cannot be new and important evidence that was not available to the Applicants through due diligence. We are not even told when they became available. And looking at them, I do not discern any new and important evidence disclosed by them. They are simply the routine correspondences that the deceased

JAMES NDAMBIRI exchanged with various entities in pursue of his rice holding No. 4388 WAMUMU.

The Applicants now allege that their suit is also founded on fraud and that the correspondences amount to acknowledgement. The plaint filed herein on 15th February 2012 did not plead fraud and it was never amended. I have also perused the correspondences annexed and I do not see any admission in any of them including the one quoted earlier on in this ruling. An admission must be clear, unambiguous and unequivocal. It must, in other words, be plain and obvious. And if there was any admission in the pleadings, then the Applicants ought to have moved the Court to enter judgment for them on that admission. Plainly, there was no admission either in the 3rd Respondent's defence or in the correspondences annexed. A case for review under **Order 48 (1) of the Civil Procedure Rules** has not been made out by the Applicants who are also guilty of un-reasonable delay having taken 1 ½ years (from 3rd October 2014 to 27th April 2016) to file this application. **Order 45 (1) of the Civil Procedure Rules** requires that such an application is filed "**without un-reasonable delay**". Clearly, the remedy of review is not available to the Applicants.

In the circumstances therefore, and upon considering all the matters herein, I find that the Applicants' Notice of Motion dated 22nd April 2016 and filed herein on 27th April 2016 is wholly without merit. It is accordingly dismissed with costs to the 3rd Respondent.

B. N. OLAO

JUDGE

14TH JULY, 2017

Ruling delivered, dated and signed in open Court this 14th day of July 2017

Ms Muthike for Mr. Ombachi for 3rd Respondent present

Ms Nyangati for Mr. Chomba for Applicants present.

B. N. OLAO

JUDGE

14TH JULY, 2017