



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 187 OF 2016

LOYCE JEROP CHELAGAT.....PLAINTIFF

VERSUS

HERMAN MARINE NDERI & 8 OTHERS.....DEFENDANTS

RULING

(Application for review; principles to be applied; applicant seeking review of an order made pursuant to an application for injunction; court having decided that possession of the suit land be with the respondents; applicant insisting that she was in possession of the land at the time the case was filed and that the court misapprehended the facts that she presented; applicant now seeking a review of the order on possession and for a verification exercise to determine who is in possession; from the application, the argument of the applicant would be an argument for appeal and not review; an error in the manner the court appreciates the facts is not a ground for review but for appeal; no error apparent on the face of record; application dismissed with costs)

1. The application before me is that dated 15 March 2017 filed by the plaintiff. It is an application brought pursuant inter alia to the provisions of Order 45 Rules 1, 2 and 5, and principally seeks orders for review of the ruling that was delivered on 22 February 2017. That ruling was in respect of an application for injunction that was filed together with the plaint by the plaintiff on 31 May 2016.

2. It is the case of the plaintiff/ applicant that she is the rightful owner of the land parcel Lenginet Settlement Scheme/637 (hereinafter also described simply as parcel No. 637) which she avers to have purchased on 17 September 1999 from one Rachel Njoki Ndung'u, whom she has described as the original allottee of the said land. She pleaded that at the time of sale, the property was described as Lenginet Settlement Scheme/674 but was later changed to the parcel No. 637. She has averred that the original allottee cleared her loan with the Settlement Office in the year 2013, but that she was unable to transfer the land to the plaintiff because of a parallel title issued to the 1st defendant on 10 August 2009. The land parcel No. 637 has since been subdivided by the 1st defendant into the land parcels Lenginet Settlement Scheme/ 1368 to 1403 and some of the subdivisions have been transferred to the 2nd to 8th defendants in this case.

3. In her application for injunction, the applicant sought orders that there be no dealings in all the subdivisions arising from the parent title and also sought to have the 1st - 8th defendants/respondents restrained from possession of the said parcels of land. In her application, she claimed to have been in possession of the property since the year 1999.

4. In his reply to the said application for injunction, the 1st respondent contended that he is the rightful

allottee of the land parcel No. 637 and that title was discharged in his favour by the Settlement Fund Trustees (SFT) in the year 2003. He then obtained title to the said land and proceeded to subdivide it. He refuted that the applicant had been in possession prior to the filing of this case. 5. The 2nd to 8th respondents also opposed the application for injunction. They averred that in November 2015, they entered into a sale agreement for a portion of the land parcel No. 637. The parent title was then subdivided and they were issued with title to the portion that they had purchased.

5. In my ruling on the application for injunction, I found that the facts on ownership of the land parcel No. 637 were heavily contested and thought it wise to decide the application on a balance of convenience. In my ruling, I held the following view :-

"In my opinion, the balance of convenience, with regard to possession of the suit properties, tilts in favour of the 1st - 8th respondents. They currently do hold titles to the land in question. I have my doubts as to whether the plaintiff was in possession of the land prior to this suit being filed, for the reason that in order to have the land in dispute subdivided, surveyors must have come to the ground and must have done quite some work on it. I also believe that the 2nd - 8th respondents must have visited the ground before purchase. It is therefore my considered opinion that while this case is pending determination, possession of the disputed properties ought to be with the 1st -8th respondents. However, the 1st-8th respondents are barred from making any developments on the suit properties, save probably for farming activities which will not go to change the character of the land in dispute. So that there is no change of proprietorship, I also deem it fit to issue an order of inhibition, inhibiting the registration of any disposition in the land parcels Leninget Settlement Scheme 1368 to 1403, until this case is heard and determined. The parties are also barred from entering into any dispositions pending the hearing of the case. On costs, the same shall be in the cause."

6. It is the above ruling that the applicant now seeks to have reviewed in so far as possession of the suit properties is concerned. The applicant has also asked for orders that the Deputy Registrar do visit the land in question and file a report to determine who is in possession. The main ground upon which the application is premised is the applicant's insistence that she has been in actual possession since the year 1999 and therefore the order that I made giving possession to the respondents amounts to issuance of an eviction order. It is argued that the respondents have never been in possession of the suit properties, that no survey work has ever been done, and that there are no beacons in place. It is averred that the alleged subdivision of the parent property was only done on paper.

7. The application is opposed by the respondents who filed a replying affidavit sworn by the 1st respondent and 8th respondent. It is deposed by the 1st respondent that the applicant's contention that she has been in possession since the year 1999 is false. The 8th respondent has averred that he, alongside the 2nd to 7th respondents, are the ones in possession of the land and that they have ploughed the land.

8. I have considered the application alongside the submissions of counsels for the applicant and respondent.

What is before me is an application for review and therefore the provisions of Order 45 apply. The same provides as follows :-

Order 45 Rule 1 - Application for review of decree or order

(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 judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

9. It will be noted from the above, that a person may seek review on three broad grounds, being :-

(i) There is discovery of new matter which could not be availed at the time the order was made;

(ii) There is an error apparent on the face of record;

(iii) There is other sufficient reason.

10. In his submissions, Mr. Kisilah, learned counsel for the applicant, submitted inter alia that there was an error of fact in the ruling, the error being the court's doubt that the applicant is in possession of the suit land. He submitted that the plaintiff's case is that her land was fraudulently subdivided only on paper. Ms. Omwenyo, for the respondents, on her part, submitted that an erroneous view of the evidence is not a ground for review. She also pointed out that the plaintiff in her own pleadings had stated that the respondents had taken possession of the land in question and she could not now run away from that.

11. I have laid down the above three points for review and looking at the application and submissions of Mr. Kisilah, I do not believe that the application is based on the discovery of any new matter. I think that the applicant is trying to fit herself under the umbrella of "error apparent on the face of the record", the error here being, in her view, the misapprehension by the court of the fact of who was in possession of the land. She wants the court to have a second look at its decision which doubted that she was in possession of the suit properties. In my ruling, I indeed gave reasons as to why I doubted that the plaintiff was in possession.

12. I could have been wrong of course, but that is how I appreciated the pleadings and the affidavit evidence that was tabled. If I am wrong, as I could very well be, the avenue for the applicant is to appeal against that ruling, and not to seek a review of it, since that would be an error on the evidence. As was held by the High Court of Uganda in the case of **Abasi Balinda vs Frederick Kangwamu and Another (1963) EA 557**, an erroneous view of evidence or of law is not a ground for review, though it may be a good ground for an appeal. I am persuaded by this position of the law. It is not appropriate, in my view, for parties to seek a second bite of the cherry, so to speak, when they lose suits or applications unless they can properly fit themselves into the provisions of Order 45 Rule 1. Review is not a jurisdiction aimed at rehearing a matter afresh, in the hope that this time, the court will arrive at a decision that will now be favourable to the applicant.

13. At the hearing of the application for injunction, the applicant had the avenue to fully demonstrate her possession of the land. It is not now for me to go back and revisit the application for injunction on the sole argument that I failed to agree with what the applicant presented before me. Of course, I was not convinced that she was in possession, and if the applicant is of the view that I was wrong in construing the affidavit evidence that she presented before me, then her avenue is to appeal, not to come for review. Whatever error, if any, does not qualify to be termed as an error apparent on the face of record and actually, in my opinion, there is no error apparent on the face of record in this instance. As was stated in the case of **National Bank of Kenya vs Ndungu Njau (1996) KLR 469**, "*the error or omission must be self evident and should not require an elaborate argument to establish.*"

Here, if indeed there was any error that is not deducible from the record. It requires another elaborate

ascertainment of facts, and in fact, the applicant herself in her application has sought orders to have the Deputy Registrar visit the land in question to ascertain what is on the ground. That reveals the extent of what is sought to be discovered through this application and is clearly not something that is readily apparent on record.

14. I really do not see the need of saying more. This application has no merit and is hereby dismissed with costs. The orders as issued on 22 February 2017 to remain in force until this case is heard and determined.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 21ST day of September 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :