



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA IN BUSIA**  
**LAND & ENVIRONMENTAL DIVISION**  
**ELC NO. 115 OF 2014**  
**DORCAS WAIRIMU NJUNGUNA..... PLAINTIFF**  
**VERSUS**  
**JOSEPH MWIGAI NJUNGUNA ..... DEFENDANT**

**R U L I N G**

1. The application under consideration is a Notice of Motion dated 27/5/2016 and filed here on the same date. It is stated to be brought under Sections 1A, 1B, 3, 3A and 63(e) of Civil Procedure Act (cap 21), Order 42 of Civil Procedure Rules and Article 159(1) and (2) of the Constitution of Kenya, 2010. The Defendant/Applicant – **JOSEPH MWIGAI NJUGUNA** – filed it against the Plaintiff/Respondent – **DORCAS WAIRIMU NJUGUNA** – seeking various prayers. The relevant prayers at this stage are as follows:

Prayer 2: That the judgement entered on the 30/11/2015 be reviewed and/or set aside in entirety.

Prayer 3: That the Defendant/Applicant be allowed to recall Mr. Chepkwesi, the Land Registrar, Busia, for purposes of his providing the original transfer form in respect of the suit title.

Prayer 4: That costs of this application be in the cause.

2. It is averred in the grounds advanced in support of the application that land parcel No. BUKHAYO/MUNDIKA/1915 (“Suit land” hereafter) is registered in the name of the Defendant/Applicant, having been transferred procedurally to him by the previous registered owner – PAUL NJUGUNA MWIGAI. The Defendant/Applicant noted that the court made its decision on the basis that the transfer form lacked the signature of the transferor – PAUL NJUGUNA MWIGAI. The said transfer form, the Defendant/Applicant averred, was a photocopy, and the visibility of the transferor’s signature got lost during photocopying. According to him, the original transfer form is duly signed by the transferor. He therefore want the Land Registrar, who had testified as DW3, recalled to avail the original transfer form.

3. The Plaintiff/Respondent responded to the application vide a replying affidavit filed on 9/8/2016. According to the Plaintiff/Respondent, the application is defective, having invoked Order 42 of Civil Procedure Rules which deals with appeals, instead of relying on the relevant law dealing with review. It was stated further that even assuming the relevant law for review had been invoked, there are no sufficient facts to warrant a review. According to the Plaintiff/Respondent, the photocopies availed to court were confirmed to be copies of the original by the court and the parties.

5. The Plaintiff/Respondent had also filed grounds of opposition. The grounds here filed together with the replying affidavit. Generally, what the grounds contain is also contained in the replying affidavit.

5. The Defendant/Applicant, not wishing to be outdone or probably to even scores, filed a supplementary affidavit on 5/4/2017. In the affidavit, it was pointed out that the grant of letters of administration earlier granted to Plaintiff/Respondent had been revoked and succession remained to be done again. The issue of ownership of the suit land was therefore stated to be undetermined.

6. The application was canvassed by way of written submissions. The Defendant/Applicant's submissions were filed on 2/6/2017. The Defendant/Applicant reiterated the issue raised in his application. The Plaintiff/Respondents submissions were filed on 28/7/2017. Like the Defendant/Applicant, the Plaintiff/Respondent generally reiterated what he had stated earlier.

7. I have considered the application, the responses made, and the rival submissions. The Defendant/Applicant sole basis for seeking review is that the original transfer form was duly signed by the transferor. He alleges that in the application but does nothing to demonstrate it. One would expect that a copy of such form showing the signature alleged would be availed as an annexure. Better still, one would expect that there would be information from the land registrar intimating or confirming that such signed form is available in its original form. As things stand, there is no such annexure and there no such intimation or confirmation from the Land Registrar. The allegation that such transfer form is available remains just that, an allegation. In a court of law, you not only allege but also demonstrate or prove.

8. More crucially however is this: In law, an application for review is always treated with utmost caution. And this is so because review should not be sought to supplement or introduce new evidence. The applicant is always duty bound to demonstrate that he could not produce the evidence inspite of due diligence. In this matter, I expected the Applicant to show that he exercised due diligence but could not get the form that he now seeks to avail. Additionally, he needed to show that he had no knowledge of the existence of such form during trial or that he knew of it but was deprived of a chance to avail it during trial. All this was not shown and the court is expected to allow the application without these crucial requirements being met. What the Applicant has presented has not persuaded the court that it should exercise its discretion in his favour.

9. But there is even a much more fundamental consideration: the Plaintiff/Respondent, by dint of what paragraph 3 of the Defendant/Applicant's supplementary affidavit discloses, is no longer the administrator of her late husband's estate. The grant that enabled her to file the suit herein was said to have been revoked. This suit was filed and tried on the basis that the Plaintiff/Respondent had the requisite legal capacity to sue or be sued. This seems to be no longer the case, the grant she had having been revoked. It would be not be proper now therefore to issue orders against her.

10. It is important too to appreciate the import of the judgement that was delivered. The court did not vest the ownership of the suit land to Plaintiff/Respondent. The title was simply to revert to the previous owner. From there the necessary legal processes would need to be initiated so that it can be established who owns what in the estate of the previous owner. The Defendant/Applicant himself seems to allude to this at paragraph 4 of his supplementary affidavit. It is not very clear therefore why the Defendant/Applicant cannot wait to utilize the chance.

11. When all is considered there, I find the application herein unmeritorious and dismiss it with costs to Plaintiff/Respondent.

**Dated, signed and delivered at Busia this 29<sup>th</sup> day of November, 2017.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: .....

Defendant: .....

Counsel of Plaintiff: .....

Counsel of Defendant: .....