



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 22 OF 2017

CELESTINE NJERU APPLICANT

VERSUS

NYAGA ROBERT NGARI.....1ST RESPONDENT

GERALD MUNENE MBOGO.....2ND RESPONDENT

RULING

On 11th July 2013, this Court delivered a judgment in this case dismissing the Applicant's claim to be declared to have become entitled to the land parcel No. MBEERE/KIAMBERE/1769 by adverse possession and that he be registered as the proprietor thereof instead of the 2nd Respondent.

The order dismissing the Applicant's case was founded on the following reasons:

- 1. The extract of title to the land parcel No. MBEERE/KIAMBERE/1769 was not annexed to the Originating Summons.***
- 2. The Court was not convinced that one ROBERT NGARI KARANGI who sold the suit land to the Applicant and NYAGA ROBERT NGARI who is named as the 1st Respondent were one and the same person. This is because when the said ROBERT NGARI KARANGI testified before me on 25th April 2013, he gave his Identity Card number that was different from that appearing on the sale agreement.***

By an application dated 19th September 2013, the Applicant moved this Court seeking orders that the said agreement be reviewed or set aside.

The application is founded under the provisions of ***Order 45 Rules 1 and 2 of the Civil Procedure Rules*** and is supported by the affidavit of **CELESTINE NJERU** the Applicant herein. The gravamen of the application which is the subject of this ruling is that there is new evidence which was not available in the form of the extract of title to the land parcel No. MBEERE/KIAMBERE/1769 and that **ROBERT NGARI KARANGI** and **NYAGA ROBERT NGARI** are one and the same person and that there was an error made by the person who drew the sale agreement who indicated the Identity No. as 20843667 which is actually the Serial No. instead of No. 4826049 which is the correct Identity Card No. A copy of the Identity Card and extract of title are now annexed (annextures **CN2** and **CN3**). The applicant therefore depones that there was no deliberate attempt to mislead the Court but rather there was only a ***“discrepancy which is clear, honest and attributable to the writer of the agreement”***.

The 1st Respondent **NYAGA ROBERT NGARI** did not oppose the Applicant's claim. Instead he supported it and deponed as follows in paragraphs 2, 5 and 9 of his replying affidavit dated 16th January 2013:

2: "That on 13.3.1996, I sold the land parcel MBEERE/KIAMBERE/1769 to the Applicant herein (attached is a copy of sale agreement marked NRN 1) whereby he took vacant possession of the suit land where he lives with his family till today".

5: "That the 2nd Respondent has never resided on this land ever, also he has never questioned me when I was living there and also when the 1st Applicant (sic) has been living there, which period is exceeding 50 years"

9: "That the Applicant is therefore entitled to be registered as the owner of the land in place of the 2nd Respondent".

The 2nd Respondent did not file any response to the Originating Summons. On 19th April 2017, **ANGINA J.** directed that the application be served by advertisement in the Standard Newspaper which was done but the 2nd Respondent filed no response to the application just as he had done with respect to the Originating Summons. On his part, the 1st Respondent appeared in Court on 2nd October and indicated that he was not opposed to the application.

I have considered the application which is not opposed.

Order 45 Rule 1 (1) of the Civil Procedure Rules provides as follows:

"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". Emphasis added.

Although the Applicant has not explained why the extract of title to land parcel No. MBEERE/KIAMBERE/1769 was not availed during the hearing of this suit, this Court is minded to accept it particularly in view of the fact that though served, the 2nd Respondent in whose names the land is registered did not deem it fit to oppose both the Originating Summons or this application. And with regard to the discrepancies regarding the names and Identity Card numbers of **ROBERT NGARI KARANGI** alias **NYAGA ROBERT NGARI**, this Court also accepts the explanation given. In my view, there are "**sufficient reason**" put forward by the Applicant as to why this Court should review its orders dismissing the Applicant's Originating Summons. It would be harsh to punish the Applicant for an honest mistake which he has now satisfactorily explained to this Court.

Ultimately therefore, the Applicant's Notice of Motion dated 19th September 2013 is hereby allowed in the following terms:

1. The judgment dated 11th July 2013 is reviewed to the extent that the dismissal order is set aside.

2. There shall be judgment for the Applicant as prayed in the Originating Summons dated 17th October 2012.

3. No order as to costs.

B.N. OLAO

JUDGE

10TH NOVEMBER, 2017

Judgment dated, delivered and signed in open Court this 10th day of November 2017 at Kerugoya

Applicant present

1st Respondent present

2nd Respondent absent

Mr. Muraguri for Applicant absent

Right of appeal explained.

B.N. OLAO

JUDGE

10TH NOVEMBER, 2017