



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KERUGOYA**

**ELC APPEAL NO. 19 OF 2014**

**JESSE MUTHIGA ALBERT.....APPELLANT**

**VERSUS**

**DAVID MWANIKI CHEGE.....1<sup>ST</sup> RESPONDENT**

**CHARLES MAINA CHEGE.....2<sup>ND</sup> RESPONDENT**

***(APPEAL AGAINST THE RULING OF THE LAND REGISTRAR MURANG'A IN A***

***BONDARY DISPUTE INVOLVING LAND PARCEL NO. LOC.8/KIONJOINE/408***

***AND LOC.8/KIONJOINE/675 DELIVERED ON 30<sup>TH</sup> APRIL, 2014***

***(BUT ISSUED ON 14<sup>TH</sup> MAY, 2014)***

**RULING**

The disputes between the parties herein revolves around the boundary to the land parcels No. LOC 8/KIONJOINE/408 and LOC 8/KIONJOINE/625. That dispute was heard by the Land Registrar N.N. NJENGA on **30TH APRIL 2014** who thereafter proceeded to fix the boundary as required.

Being dissatisfied with the decision of the Land Registrar, the applicant **JESSE MUTHIGA ALBERT** filed an appeal to this Court seeking the quashing of that decision. This Court heard the appeal, found it lacking in merit and dismissed with it with costs on **4TH DECEMBER 2015**.

On **14TH JANUARY 2016**, the applicant filed a Notice of Motion under **Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules** and **Section 1A, 1B and 3A of the Civil Procedure Rules** seeking the following orders:-

**1. Spent.**

**2. This Honourable Court be pleased to vary and/or review its judgment and Decree in the matter hereof made on 4th DECEMBER 2015 dismissing the applicant's appeal.**

**3. This Honourable Court be pleased to substitute its judgment with an order and Decree for the alignment of the boundary between Titles number LOC 8/KIONJOINE/408 and LOC 8/KIONJOINE/675 jointly by a licensed surveyor from each party hereof and in the presence of**

*the District Surveyor Muranga.*

**4. The costs of this application be provided for.**

The application is based on the grounds set out therein and supported by the affidavit of the applicant and he says that he has made discovery of new and important matters and evidence which after the exercise of due diligence was not within his full knowledge and possession and could not be produced at the time the appeal was canvassed. That the respondents have acquired an undue advantage over the applicant due to the absence or want of all necessary relevant materials and this Court's judgment and Decree has resulted in an un-Constitutional deprivation of property whereby a portion of his land has been hived off and lumped together with that of the respondents who have erected a barbed wire and fence causing an encroachment of six (6) metres. That according to the mutation dated **19TH MAY 2008**, his parcel No. LOC 8/KIONJOINE/675 ought to be 70 metres on its frontage but the surveyor has established it at 64 metres thus unlawfully annexing 6 metres from his land. That the judgment of this Court has led to a situation where part of his land has unjustly been taken away and given to the respondent and therefore the judgment and Decree has resulted in an un-Constitutional deprivation of a portion of his land and it is in the interest of justice that this Honourable Court varies or reviews its order to avoid an injustice to him.

The application is opposed by **DAVID MWANIKI CHEGE** the 1st respondent who in his replying affidavit has deponed, inter alia, that the judgment sought to be reviewed was an appeal in which one relies on the record of appeal and the said discoveries are an afterthought tailor made to suit this application in an attempt to have this Court sit on its own appeal.

Submissions have been filed by counsel for both parties.

I have considered the application, the rival affidavits and the submissions by counsel.

This application is premised under **Order 45 Rule 1 of the Civil Procedure Rules** which 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 mistakes 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”***

It is clear from the application herein that the basis upon which the review is being sought by the applicant is 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”. And which is this ***“new and important matter or evidence”*** which was not within the applicant's knowledge or could not be produced at the time when the decree was passed or the order made? That is found in paragraphs 9, 10, 11, 12, 13 and 14 of the applicant's supporting affidavit in which he has deponed as follows:-

**9** ***“That I have made discovery of new and important matters and evidence which, after the exercise of due diligence was not within my full knowledge and possession and could not have produced the same at the time the appeal was canvassed”.***

**10** ***“That soon after the said judgment the respondents proceeded and erected a barbed wire and pole fence on the disputed portion of land tilting the common boundary and causing an***

**encroachment of 6 metres. Annexed herewith and marked as ‘JMA 1’ are photographs reflecting the said new fence”.**

**11 “That I have further obtained fresh and concrete evidence of the extent of the injustice caused by the judgment of this Court on the basis of which the respondents have with full impunity proceeded to annex part of my land. Annexed herewith and marked as ‘JMA 2’ is a copy of a report by a licensed surveyor”.**

**12 “That according to the mutation dated 19th May 2008 vide which my parcel No. 675 was curved out, my said land ought to be 70 metres on its frontage but the said surveyor has now conclusively established that after erection of the said fence it is now 64 metres on the frontage hence 6 metres of my land has been unlawfully annexed. Annexed herewith and marked as ‘JMA ‘ is a copy of the said mutation”**

**13 “That under the circumstances, it is evidently clear that the judgment of the Court has led to a situation where part of my land has been unjustly taken away and given to the respondents”**

**14 “That further this Court’s judgment and decree has thus resulted in an inadvertent un-Constitutional deprivation of property whereof a portion of my land has been hived off and lumped with that of the respondents”.**

It is clear from those averments that what the applicant seeks to rely upon to review this Court’s judgment delivered on **4TH DECEMBER 2015** are matters that arose subsequent to that judgment. In paragraph 10 of his supporting affidavit, he says that

**“after the said judgment, the respondent proceeded and erected a barbed wire and poles fence on the dispute portion...”** In paragraph 11 he says he has **“obtained fresh and concrete evidence of the extent of the injustice caused by the judgment”** and in paragraph 13, he depones that **“this Court’s judgment and decree has resulted in advertent un-Constitutional deprivation of property”** whereupon part of his land has gone to the respondent. All those are matters or evidence that was not in existence at the time of the judgment or decree sought to be reviewed which is what **Order 45 of the Civil Procedure Rules** is concerned with. That is why the said order refers to

**“.....new and important matters 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....”** emphasis added

**Order 45 of the Civil Procedure Rules** cannot apply where the new and important matter or evidence was not in existence when the order or judgment sought to be reviewed was made. In other words, a subsequent event or matter occurring after the delivery of the order or judgment sought to be reviewed cannot be a ground upon which a review under **Order 45 of the Civil Procedure Rules** can be founded.

In paragraph 12 of his supporting affidavit, the applicant refers to the mutation form dated 19th May 2008 which he says shows that his parcel No. 675 ought to be 70 metres on its frontage yet the surveyor established that it is now 64 metres on its frontage hence 6 metres of his land has been unlawfully annexed. The dispute was heard by the Land Registrar in **MAY 2014** and the mutation report dated 19th May 2008 was part of the record in this appeal and must have been available when the parties were litigating. It cannot therefore be **“new and important matter or evidence”** that was not within his knowledge or which could not be produced at the time of the order or judgment sought to be reviewed.

It is clear from all the above that the applicant has not demonstrated the existence of new and important matter or evidence, mistake or error apparent on the face of the record or indeed any other sufficient reason to warrant a review of this Court’s judgment dated **4TH DECEMBER 2015**.

The applicant’s Notice of Motion dated **14TH JANUARY 2016** is accordingly dismissed with costs to the 1st respondent.

**B.N. OLAO**

**JUDGE**

**3<sup>RD</sup> JUNE, 2016**

Ruling delivered, dated and signed in open Court this 3<sup>rd</sup> day of June, 2016

Appellant present in person

1st Respondent present in person

2nd Respondent absent.

**B.N. OLAO**

**JUDGE**

**3<sup>RD</sup> JUNE, 2016**