**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYERI**

**ELC NO.443 OF 2014**

**MURIMI KIMOTHO KIMIRIO..............................................1ST PLAINTIFF**

**BARTHOLOMEW GATHOGO KIMOTHO....2ND PLAINTIFF/APPLICANT**

**VERSUS**

**LINCOLN MIANO KIMOTHO..................................................DEFENDANT**

**RULING**

1. The 2nd plaintiff (applicant) **Bartholomew Gathogo Kimotho** brought the notice of motion dated **31st July, 2014** and filed on **24th September, 2014** seeking review of the judgment delivered on 21st February, 2014 in this matter.

2. The application is premised on the ground that **L.R. Iriaini/Kaguyu/745** was omitted in the judgment sought to be reviewed.

3. In the affidavit that the applicant swore in support of the application, the applicant has deposed that the sole issue framed for the court's determination in the judgment sought to be reviewed was-who between himself and Thomson Gichohi Kimotho will take land parcels No. Iriani Kaguyuni/744 and Iriani Kaguyuni/745.

4. It is the applicant's case that Iriani Kaguyuni/745 was omitted in the judgment. It is pointed out that in their submissions, the plaintiffs had submitted that the said property should be taken by the applicant because he had developed it by planting coffee, tea and food crops and even constructed houses thereon. Thomson Gikohi Kimotho is said to have made little developments in the suit property, for instance he has not constructed a house thereon.

5. The judgment sought to be reviewed is said to be silent on who should take the parcel of land in question. The 1st plaintiff who swore the supporting affidavit to this application, has deposed that he believes the parcel should be taken by the 2nd plaintiff/applicant. He explains that they (plaintiffs) have no objection to Thomson Gichoi Kimotho taking the other parcel.

6. According to the applicants, there is no reason why the 2nd plaintiff should uproot what he has developed over many years.

7. In reply and opposition to the application, the respondent swore and filed the replying affidavit sworn on **14th October, 2014** in which he deposes that no new matters or circumstances have arisen to merit review of the judgment. In this regard the respondent explains that the allocation of the parcels between

them took into account the developments effected on the parcels by the contending parties.

8. The respondent admits that the respondent has put up a semi permanent house in 745 but contends the applicant has not effected any extensive developments thereon to warrant issuance of the orders sought.

9. The respondent further argues that the application has been overtaken by events as the parcel of land which is the subject matter of the application has been registered in his favour.

10. The application was disposed of by way of written submissions.

**Submissions**

11. In the submissions filed on behalf of the applicant, it is admitted that the parcel of land which is the subject matter of this application was transferred to the respondent but argued that that transfer is not a bar to the application. It is contended that there is an oversight in the judgment sought to be reviewed in that it is silent on what was to happen to the suit property (that is L.R. Iriaini/Kaguyu/745).

12. It is further submitted that the judgment sought to be reviewed, did not take into account the parties respective developments in their respective parcels of land. In view of the foregoing, it is submitted that the applicant has established sufficient reasons for grant of the orders sought.

13. In the submissions filed on behalf of the respondent, it is reiterated that no new matters have arisen to warrant review of the judgment and that the suit property having been registered in favour of the respondent the application has been overtaken by events.

14. Reference is made to **Order 45 Rule (1)(b)** which sets down the grounds upon which an order of review may be made and submitted that the applicant has not satisfied any of those grounds. The application is also said to be unmaintainable as it was not brought without delay as required by law. In this regard it is pointed out that the judgment/order sought to be reviewed was made on 21st February, 2014 and the application for review made on 24th September, 2014, seven months later.

**Analysis and determination:**

15. In the proceedings that led to the judgment sought to be reviewed, the applicant was represented by **Mr. Charia** of **J. Macharia and Co. Advocates**. In the current application, the applicant is represented by **Mr. Kiminda Advocate**. There is therefore no doubt that there was change of representation of the applicant after entry of the judgment sought to be reviewed.

16. Under **Order 9 Rule 9** of the Civil Procedure Rules:-

> **"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**
>
> **(a) Upon an application with notice to all the parties; or**
>
> **(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."**

17. Although there was change of representation after entry of the judgment sought to be reviewed, from the record before me, there is no evidence of any change of advocate in this matter having been effected in accordance with the dictates of **Order 9 Rule 9** above.

18. Failure to comply with the said dictate of the law renders the application herein fatally defective in law. In this regard, see the decision of this court in the case of **Samuel Njunjiri Muthuma vs. Peter Kibui Nyuguto and another (2015).** In that case, this court was persuaded by the decision in the case of

**Monica Moraa v. Kenindia Assurance Company Ltd** Kisii HCC No. 43 of 1999 where it was held:-

> **"From the above order 9 at rule 9 it is mandatory after judgment has been entered for a new firm of advocates to seek leave to act for a party or file a consent to that effect after delivery of judgment."**

It consequently found the appeal filed before it to be incompetent and as such incapable of forming the basis of granting of the orders sought.

19. In the current application, there being no evidence that the change of advocates was done in accordance with the said provisions of the Civil Procedure Rules, I find the application to be bad in law and as such, incapable of forming the basis of issuance of the orders sought.

20. Even if this court were to consider the application on its merit, I hold the view that it would not see the light of the day for the following reasons:-

a) Whereas the applicant contends that the judgment sought to be reviewed did not deal with the suit property, a review of that judgment reveals that the judge was called upon to determine only one issue to wit, who between the applicant and the respondent was to get which of the two properties in contention. In his submissions, the applicant wanted the court to order that he takes 745 and the respondent 744. Upon considering the issue framed for him the trial judge rendered himself as follows:-

> **"In their submissions and their affidavits the plaintiffs have recommended that Bartholomew Gathogo Kimotho should move to LR No. IRIAINI/KAGUYU/745 while Thompson Gichohi should go to LR NO.IRIAINI/KAGUYU744 and to further find that Bartholomew Gathogo Kimotho has discharged his burden of proof on a balance of probabilities. After a careful consideration of the material placed before me I am convinced that the dispute is not complex as I thought. What comes out clearly is that the plaintiffs have all along been reluctant to treat the dispute on the basis of give and take attitude. In my estimation of the evidence, there appears to be hardly any permanent developments by either of the parties as to present difficulties for either uprooting or compensation. In the end, I am satisfied that the following order should and I hereby direct as follows:-….b)(iv) Lincoln Miano Kimotho is hereby ordered to transfer LR. NO. IRIAINI/KAGUYU/744 in favour of the Bartholomew Gathongo Kimotho.**
>
> **v) Any compensation for any development be a matter between the parties and in default everyone concerned to uproot and transfer all their improvement to their portions.**
>
> **The parties who have been directed to perform the above mandates should do so and in default the registrar of this court to step in and execute the relevant documents in place of those unwilling to comply with the order…."**

b) Since the question framed for the court's determination was simple to wit, who between the respondent should take which of the two parcels in contention, by expressly ordering that the applicant takes 744, the court left the other for the respondent. That is to say, the judge rejected the case of the applicant to the effect that he should take 745 and the respondent 744. The court also rejected the applicant's contention that he should get 745 because of the developments he had effected thereon. Concerning that contention, the judge held that the developments could be uprooted or the loss compensated by the party gaining there from.

c) Whereas the applicant was within his right to seek to have that judgment reviewed by the court which made it or lodge an appeal against it, the judgment cannot be challenged on the ground that it did not address who was to take 745 because that fact is explicit in the court's judgment.

d) Under **Order 45,** the applicant was under a duty to bring the application for review without

unreasonable delay. In the circumstances of this case, he waited for more than seven months before he moved the court for review. Because of the delay, which I find to have been in ordinate, the respondent applied for and obtained a title in respect of the parcel of land awarded to him.

e) Owing to transfer of the suit property to the respondent, the stay of execution sought under prayer 2 herein was rendered nugatory.

f) As for prayer 3, as pointed above, there is neither a mistake nor error apparent on the face of the record as contended by the applicant.

g) There being no other sufficient reason offered by the respondent for issuance of the orders sought, I find the application to be lacking in merit and dismiss it.

21. With regard to the order for costs, having found the application to have been brought in violation of **Order 9 Rule 9** and being of the view that it was the duty of the advocate taking up the brief to advice his client on the said requirement of the law, and even advise the applicant on the import of the judgment sought to be reviewed, I hold the view that awarding costs against the applicant will be tantamount to sanctioning the apparent negligence of the applicant's counsel in failing to advice his client on the import of the judgment under review or for failing to comply with **Order 9 Rule 9** of the Civil Procedure Rules.

22. Consequently, I direct that the cost of the application be personally met by the advocate for the applicant.

**Dated, signed and delivered at Nyeri this 13th day of May, 2015**

**L.N. WAITHAKA**

**JUDGE**

**In the Presence of:**

Mr. Kiminda for the Applicant

Mr. Nderi h/b for Ms Mwai for the Respondent.

Lydia - Court Assistant