



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

**AT NYERI**

**E.L.C MISC. APPLICATION NO. 14 OF 2014**

**AMOS WAMUNYU..... APPLICANT**

**VERSUS**

**TABITHA WANJIRU OMOLLO**

**JOHANA MAINA SIMON**

***BEING GUARDIAN AD LITEM FOR***

**BENARD KANGANGI.....RESPONDENTS**

**RULING**

1. On **12<sup>th</sup> May, 2011** the applicant Amos Wamunya, filed the notice of motion dated **11<sup>th</sup> May, 2011** seeking review of the orders issued on 29<sup>th</sup> October, 1997 and the order issued on 10<sup>th</sup> April, 2000 to read the respondents' land as No. Nyeri/Municipality/Block 12/38 which formed after the sub- division of the original suit land reference No.8470/18.

2. The application which is brought under **Order 45 Rule 1(1) and (2), Order 51 Rule 3** of the Civil Procedure Rules and **Section 3A** of the Civil Procedure Act is premised on the grounds that the Original Parcel of land (LR NO. 8470/18) was jointly owned by the respondents and three other persons who are not parties to this case; that recently the applicant discovered that the land has been shared among the beneficiaries and that the respondents are now the registered proprietors of Land Parcel No. Nyeri/Municipality/Block 12/38 which resulted after the sub- division of the original land.

3. It is the applicant's case that he is entitled to a share of 1.5 acres within the respondents said parcel of land. The orders sought are said to be necessary in order to reflect the number of the parcel of land owned by the respondents.

4. In support of the application, the applicant Amos Wamunya, swore an affidavit reiterating the grounds thereon. The following documents are annexed to the affidavit sworn in support of the application:-

1. Copies of certificate of official search marked as AW-1;
2. A copy of the decree issued pursuant to the judgment dated 29<sup>th</sup> October, 1997 marked AW-2; and
3. A copy of the decree issued on 10<sup>th</sup> April, 2000.

5. In response to issues in the application herein, the 2<sup>nd</sup> respondent Johanna Maina Simon, filed the

replying affidavit he swore on **15<sup>th</sup> February, 2012**. In that affidavit he has inter alia, deposed that the suit property was formed after the sub-division of the original suit land to wit, Land Reference No.8470 /18; that before sub-division of the original parcel of land, the applicant had been awarded a portion of 1.0 acre out of the original parcel of land. The award was vide Nyeri SPMC's award Case No.8 of 1998; that vide an order dated 4<sup>th</sup> April, 2000 the High court ordered the chief executive officer of the court to sign all the documents required to effect the transfer. That the order of 4<sup>th</sup> April, 2000 also directed that the original parcel of land be sub-divided to facilitate transfer of 1.5 acres from the original parcel of land to the applicant; that the applicant is entitled to 2.5 acres from the suit property being his 1.5 acre entitlement as per the decree of the court herein and on account of having bought an additional acre from his brother and step-mother; that in execution of the decrees issued in favour of the applicant, the applicant's share of 2.5 acres should be carved out of the suit property.

6. The following documents are annexed to the 2<sup>nd</sup> respondent's replying affidavit:-

- i) A copy of the court order issued on 12<sup>th</sup> May, 1999 in Nyeri SPM Award Case No.8 of 1998 marked **JMS-1**;
- ii) A copy of the order issued on 4<sup>th</sup> April, 2000 in Nyeri SPM Award Case No.8 of 1998 marked **JMS-2**;
- iii) A copy of the Order issued on 20<sup>th</sup> February, 1997 in Nyeri High Court Miscellaneous Application No.114 of 1996 marked **JMS-3**.

7. When the application came up for hearing, counsel for the applicant **Mr. Njuguna**, informed the court that the orders sought to be reviewed were issued on 29<sup>th</sup> October, 1997; that by a consent order entered on 10<sup>th</sup> April, 2000 the court issued an order that the executive officer of the court do sign all documents necessary for transfer of the suit property. He explained that the delay in bringing the application was occasioned by the fact that the applicant was waiting for the original parcel of land to be shared out. He further explained that the applicant wants the orders hereto reviewed in order to reflect the correct position concerning the suit property; The decrees sought to be reviewed were not appealed from.

8. Counsel for the 1<sup>st</sup> respondent Mr. Muthui, submitted that there appears to be two decrees. In this regard, reference is made to annexure AW-2 and contended that the 1<sup>st</sup> respondent is not aware of those orders. Counsel further submitted that the 1<sup>st</sup> respondent was not aware of the proceedings at the Land Disputes Tribunal and contended that the tribunal, in any event, did not have jurisdiction to hear and determine the dispute.

9. Wondering why the succession cause filed in respect of the suit property has never been heard and determined, counsel submitted that the applicant's claim can only be addressed through the pending succession cause.

10. Making reference to the affidavit sworn by the 1<sup>st</sup> respondent filed on 2<sup>nd</sup> September, 2015 and the annexures thereto and in particular JMS-1 which is to the effect that Bernard and Joshua Maina should give Amos 1 acre, he pointed out that in that order, there is no mention of Tabitha Amollo. Further, that none of the 2 decrees mention Tabitha's portion yet the parcel of land was registered is her named and Benard Kangangi in equal shares.

11. It was his contention, that a Miscellaneous application cannot override 3 judgments, therefore this application is said to be tantamount to an appeal against the 3 judgments referred to above. It is further pointed out that the estate was distributed to various people and the name of the applicant does not feature as one of the beneficiaries or as one of those entitled to the estate. Further, the applicant's bid to be enjoined in the pending succession cause as an interested party was struck out.

12. It is further contended that the requirements of **Order 45 Rule (1)** have not been met. For instance,

there has been unexplained delay of more than 18 years.

13. It is pointed out that the applicant had as early as 2008 lodged a caution to prohibit dealings with the suit property showing that he was at that time aware that the property had changed hands. (The Original parcel of land was no longer in existence and the 1<sup>st</sup> respondent's title was not part of the decree relied on).

14. The 2<sup>nd</sup> respondent Johana Maina, stated that the application may be granted as prayed as he had no objection to it.

15. In a rejoinder, Mr. Njuguna pointed out that the replying affidavit cited or relied on by counsel for respondent was sworn in respect of a different application.

16. Referring to the replying affidavit of the respondent and the order annexed to the replying affidavit of the 1<sup>st</sup> respondent and marked JMS-1, he submitted that it is clear that the applicant is entitled to 2 ½ acres out of the suit property.

### **Analysis and determination**

17. The applicant's claim against the respondents can be traced to a claim the applicant filed in court in 1995 to wit, Nyeri SPMCCC No.407 of 1995; Amos Wamunyu v. Tabitha Wanjiru Omolo & Johana Maina. In that suit, the applicant sought judgment against the respondents for, inter alia, an order of permanent injunction to restrain the respondents from interfering or otherwise dealing with L.R No.8470/18 and an order to compel the respondents to upon survey/sub- division of L.R NO.8470/18 to excise 1 ½ acres there from and transfer the same to him at their own cost.

18. The applicant's claim against the respondents was said to be premised on existence of a sale agreement executed between himself and the respondents. Owing to want of jurisdiction to hear and determine the suit, the suit was transferred to the High Court and registered as Nyeri High Court miscellaneous Civil Application No. 81 of 1996.

19. At the High Court, the matter was by consent of the parties referred to the Land Disputes Tribunal for arbitration.

20. The award was, thereafter adopted as the judgment of the court. In this regard, see annexure AW-2 in the affidavit sworn in support to the application herein which captured the order issued in respect of the Tribunal's Award in the following terms:-

**“This suit coming for hearing of an application on 3<sup>rd</sup> day of July 1996 and for ruling on 10<sup>th</sup> day of July 1996 when all matters in dispute were referred to the land dispute tribunal Nyeri for determination and this suit coming up for hearing of an application to enter judgment in terms of the award on 29<sup>th</sup> day of October 1997 in presence of both parties, it is ordered:-**

**1. That by consent the elders award filed herein on 27<sup>th</sup> day of August 1997 and read to the parties be adopted and entered as judgment of this court in that Amos Wamunyu be given 1 ½ acres out of land parcel No. 8470/18 which parcel of land is in Nyeri Municipality.”**

21. Later on, the applicant filed an application dated 31<sup>st</sup> January,2000 praying for an order directing the executive officer of the court to sign the transfer documents and other necessary papers so as to put the applicant into possession of 1 ½ acres of L.R No. 8470/18 in Nyeri.

22. With regard to the application of 31<sup>st</sup> January, 2000 the parties entered into a consent in the following terms:-

**“1. That by consent of players in application dated 31.1.2000 be and are hereby granted as prayed,**

**with no orders as to cost;**

**2. That the executive officer of this court do sign transfer documents and other papers to effect transfer to the applicant one and bordering/adjacent to the applicant's land within Nyeri Municipality."**

23. Despite the foregoing, it appears that after the Original parcel of land was sub-divided and new titles issued in respect thereof, the portion which ought to have been excised from the original parcel of land and transferred to the applicant was not excised and transferred to him as agreed.

**Law on review**

24. The law on review is found in **Order 45 Rule 1** which provides as follows:-

**"(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."**

25. In the instant application, the applicant seeks review not because he has discovered new and important matter or evidence and/or their error on the face of the record, but on account of changes in circumstances which obtained when the order or orders sought to be reviewed were granted.

26. Since the orders sought to be reviewed were issued in 1997 and 2000 respectively and the alleged change of circumstances, to wit sub-division of the original property to create new titles were effected in 2008 (going by the title deed issued to the respondents), there is no doubt that there has been inordinate delay in bringing the application (The applicant waited for at least three years before bringing the application herein).

27. The explanation offered by the applicant for the delay in bringing the application that he was waiting for the original parcel of land to be sub-divided and transferred to persons entitled to it and noting that as early as 2008 the applicant had lodged a caution against the title issued to the applicants is found to be unsatisfactory. Be that as it may, taking into consideration the special circumstances of this case and in order to avoid endless litigation over the suit property and noting that the consent orders entered between the applicant and the respondents have never been set aside, in exercise of the powers donated to this Court under Section 3A of the Civil Procedure Act, I am inclined to allow the application in terms of prayer 1.

28. Each party to bear their own costs for the application.

**Dated, signed and delivered at Nyeri this 1st day of July, 2015.**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

Mr. Njuguna for the applicant

Mr. Muthui for 1st respondent

N/A for the 2nd respondent

Court Assistant - Lydia