



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**LAND AND ENVIRONMENT COURT**

**CIVIL CASE NO.345 OF 1996**

DAVID MUGO MWANIKI.....PLAINTIFF

**VERSUS**

NJERU NDAMBIRI.....DEFENDANT

**R U L I N G**

The application is dated 30/8/2010 and seeks 3 prayers namely that his Honourable Court be pleased to review the decree dated 11th June 1997 and issued herein on 16th June 1997, and do substitute L.R. NO.BARAGWE/THUMAITA/1032 with L.R. No.BARAGWE/GUAMA/1720, and in the alternative, the defendant/respondent be ordered to refund the purchase price of Kshs.340,000/= to the plaintiff/applicant with interest at court rates from 11th June 1997 until payment in full, and that costs of this application be provided for.

The application is based on the grounds that on 11th June 1997 this Honourable Court decreed that the plaintiff do get 2 acres out of the defendant's L.R. NO.BARAGWE/THUMAITA/1032. However, the said land was on 12th July 2001 transferred to one JOHN M. MUCHIRA through sale by Public Auction which sale the plaintiff has tried to reverse but to no avail. The said land is no longer within reach of the plaintiff and the defendant so as to facilitate the execution of the decree dated 11th June 1997. The plaintiff believes that the defendant has another land, L.R. NO.BARAGWE/GUAMA/1720 which is registered in his name, and 2 acres thereof can be transferred to the plaintiff. That in the alternative the plaintiff herein should be ordered to refund to the defendant the purchase price of Kshs.430,000/= together with interest with effect from 11th June 1997. He contends that the defendant's appeal seeking to reverse the sale and transfer of the initial land L.R. NO.BARAGWE/THUMAITA/1032 was dismissed on 24th June 2010.

David Mugo Mwaniki deposes In the supporting affidavit that on 11th June 1997 this Honorable Court decreed that the defendant do transfer 2 acres out of L.R.BARAGWE/THUMAITA/1032 but it was not possible for the applicant to cause the said decree to be implemented as when he went to Kirinyaga Land Registry, the Land Registrar informed him that there was a case pending in respect of the said land, namely Nairobi HCCA 350 OF 1997. That he applied to be enjoined in the said HCCA No.350 of 1997 and which orders were granted and on 14th February 2001 and the said NBI HCCA No.350 of 1997 was dismissed. Before he could facilitate the implementation of the decree herein, one NYAGA MWENDIA who was the respondent in Nairobi HCCA No.350 of 1997 taxed his costs and applied the suit,namely L.R. NO.BARAGWE/THUMAITA/1032 to be sold by Public Action. The applicant objected to the said sale and on 31st May 2001 the Kerugoya SRMCC issued an order staying the execution and sale of the said property. That however, despite the said order,the auctioneer proceeded to sell the said property and the Kerugoya Court executed the transfer documents in the name of purchaser one JOHN M. MUCHIRA. The applicant challenged the said sale and transfer by filing an application dated 28th September 2001 in this Honourable Court and on 13th November 2001, the court made a ruling stating that he should pursue the issue in the Subordinate Court. Thereafter he challenged the transfer by filing the application dated 5th February 2002 which was heard and a ruling delivered on 13th August 2002 whereby the application was dismissed. Subsequently he appealed against the said dismissal in Nyeri HCCA No.142 of 2002 and which was later transferred to Embu in HCCA No.23 of 2006, and which appeal was dismissed on 24th

June 2010. Now the suitland has been transferred to a third party and is not available to facilitate the implementation of the decree herein.

I have not seen a replying affidavit filed by the respondent, however both parties filed written submissions. The import of the above is that the facts are not controverted.

The applicant appears to have abandoned prayer 1 in the application dated 30/8/2010 because in his submissions he has only urged me to grant prayer 2 of the Notice of Motion dated 30/8/2010.

Though it appears abandoned, this court finds that the order sought if granted would affect a parcel of land which is not in dispute. The decree issued on the 16th of June 1977 was in respect of property No.Baragwe/Thumaita/1032, substituting it with L.R. No.Baragwe/Guama/1720 would amount to adjudicating on a different parcel of land that was not in dispute.

**Order 45 of the Civil Procedure Act** envisages a situation whereby there is discovery of a new and important fact or evidence which after the exercise of due diligence was not within ones knowledge or could not be produced by him at the time when the decree was passed or made, or on account of some mistake or error apparent on the face of record or for any sufficient reasons. Moreover an application for review ought to be made without unreasonable delay.

The application herein is made on the 30/8/2010 more than 10 years after the decree is made and issued. The application does not fall within the ambit of order 45 of the Civil Procedure Rules because there is no new matter that was discovered by the applicant as what is alleged to be new happened after the decree was passed. This court finds that the applicant has not satisfied the test in **Order 45 of the Civil Procedure Rules**.

Moreover, this court agrees with the respondent that the applicant has not pursued this matter diligently and in accordance with the law. The fact that the applicant intends to review a decree on the basis of a new matter that happened many years after the decree had been issued indicates that he is misapprehending the law. Indeed, according to the provision of **Section 4(4) of the Limitation of Action Act Cap 22 Laws of Kenya**, the decree expired 12 years after it was made. The fact that the application is made 12 years after the decree is issued shows that the applicant is guilty of laches and is not amenable to equitable remedies as equity does not assist the indolent. The upshot of the above is that prayer 1 is not granted.

On prayer 2, what the applicant seeks is the amendment of the decree to include a substantive order that was not prayed for in the suit and was not granted. Though the court has powers under the slip rule to amend the decree to correct errors such as dates, words, names and particulars of title, the court has no power to amend a decree to provide for a remedy that was not prayed for in the pleadings and was not granted by the court. Ultimately, this application is dismissed with costs.

***Dated, signed and delivered at Nyeri this 4th day of July 2014.***

**A. OMBWAYO**

**JUDGE**