



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**E.L.C. CASE NO. 1 OF 2018 (O.S.)**

**(FORMERLY NAIROBI E.L.C. CASE NO. 465 OF 2015)**

**CATHERINE MUTHONI NGARI.....1<sup>ST</sup> PLAINTIFF**

**GIBSON NYAGA NGARI.....2<sup>ND</sup> PLAINTIFF**

(Suing as the administrators of the estate of ANDREW NGARI RUMBIA (DECEASED))

**VERSUS**

**GERALD KITHU MUCHANJE.....DEFENDANT**

**RULING**

1. By its judgement dated 28<sup>th</sup> March 2019 the court entered judgement in favour of the Plaintiffs against the Defendant in the following terms:

a. A declaration be and is hereby issued that the Plaintiffs have become entitled to be registered as proprietors of a portion of eight (8) acres out of Title No. Mbeti/Gachuriri/5 which is in their possession by virtue of adverse possession under *section 38 of the Limitation of Actions Act (Cap 22 of the Laws of Kenya)*.

b. The Land Registrar Mbeere shall cause the Plaintiffs to be registered as proprietors of the said portion of eight (8) acres of Title No. Mbeti/Gachuriri/5 in place of the Defendant Gerald Kithu Muchanje.

c. The Defendant shall bear the costs of the suit.

2. On or about 18<sup>th</sup> June 2019 the Plaintiffs filed a notice of motion dated 10<sup>th</sup> June 2019 under **Section 3A of the Civil Procedure Act (Cap. 21)** seeking the following orders:

a. That the decree herein dated 28<sup>th</sup> March 2019 be executed as against the Defendant/Respondent's Title No. Mbeti/Gachuriri/4645 excised out of the closed suit Title No. Mbeti/Gachuriri/5.

b. That this honourable court do clarify that the said decree dated 28<sup>th</sup> March 2019 is enforceable against Gerald Kithu Muchanje alias Kithu Muchanje.

c. That the costs of this application be borne by the judgement-debtor/Respondent.

3. The said application was based upon the grounds set out on the face of the notice of motion and supported by the affidavit sworn on 10<sup>th</sup> June 2019 by the 1<sup>st</sup> Plaintiff. It was contended that the original suit property i.e. *Title No. Mbeti/Gachuriri/5* had been sub-divided into *Title Nos. Mbeti/Gachuriri/4643-4645* on or about 22<sup>nd</sup> January 2019 whilst the suit was pending judgement. It was further contended that the portion of land occupied by the Plaintiffs fell within *Title No. Mbeti/Gachuriri/4645* hence the new parcel No. should be made the subject of the decree for purposes of execution. It was also contended that the Defendant's name in the relevant land register was Kithu Muchanje as opposed to Gerald Kithu Muchanje which appears in the suit papers and that a clarification should be made that both sets of names refer to one and the same person.

4. The Defendant filed a replying affidavit sworn on 28<sup>th</sup> June 2019 in opposition to the said application. The Defendant contended that the said application was frivolous, vexatious and an abuse of the court process. It was further contended that the court had become *functus officio* and there was nothing it could do to give effect to its judgement. The Defendant contended further that he sub-divided his property way back in 2017 or 2018 before the suit was heard; that the doctrine of *lis pendens* was inapplicable; that the Plaintiffs knew all along that the suit property was not in existence; and that he did not sub divide the original suit property in order to frustrate execution of the judgement.

5. Whilst the said application was pending, the Defendant filed a notice of motion dated 28<sup>th</sup> June 2019 brought under **Order 45 Rule 1(1) of the Civil Procedure Rules, 2010, Section 80 of the Civil Procedure Act (Cap. 21) and all other enabling provisions of the law** seeking the following orders, namely:

a. That this court be pleased to review, set aside, discharge and/or vary its judgement made on the 28<sup>th</sup> March 2019 and all consequential orders emanating therefrom.

b. That costs of the application be in the cause.

6. The said application was based upon the following grounds as set out on the face of the motion:

a. That there was an error apparent on the face of the record and that there was sufficient reason to warrant a review.

b. That the suit property was non-existent by the time the suit was heard hence the judgement was passed in vain.

c. That the Plaintiffs had failed to produce a surveyors' report at the trial to demonstrate their occupation of 8 acres out of the suit property.

d. That the judgement was incapable of execution hence it should be set aside.

7. The said application was supported by an affidavit sworn by the Defendant on 28<sup>th</sup> June 2019 which expounded upon the grounds set out in the said notice of motion. The Defendant contended in paragraph 9 of the affidavit that the process of sub-division was not in his control and that it was initiated in 2017 and only completed on 22<sup>nd</sup> January 2019 when the suit was pending judgement. The Defendant did not dispute that he was also known as Kithu Muchanje as indicated in the land register of the original suit property.

8. The 2<sup>nd</sup> Plaintiff filed a replying affidavit sworn on 5<sup>th</sup> July 2019 in opposition to the Defendant's said application for review of the decree. The 2<sup>nd</sup> Plaintiff reiterated that parcel No. 4645 was created upon sub-division of the original suit property as per the entry of 22<sup>nd</sup> January 2019 in the land register. It was contended that the Defendant, too, was obligated to disclose to the court that the process of sub-division was being undertaken at the trial of the action. It was further contended that some of the grounds relied upon by the Defendant could only be grounds of appeal and not review.

9. The Defendant filed a further affidavit sworn on 30<sup>th</sup> August 2019 in response to the 2<sup>nd</sup> Plaintiff's replying affidavit sworn on 5<sup>th</sup> July 2019. The Defendant reiterated that the original suit property was not in existence at the time of trial of the action. The Defendant also reiterated that the question of whether or not the Plaintiffs had proved their claim for adverse possession could be

canvassed in this application for review.

10. When the matter was listed for hearing of the Plaintiff's notice of motion dated 10<sup>th</sup> June 2019 on 8<sup>th</sup> July 2019, it was directed that both applications be canvassed through written submissions. The Defendant was granted 30 days to file a further affidavit and written submissions on both applications whereas the Plaintiffs were granted 30 days thereafter to file and serve theirs. The record shows that the Defendant filed his submissions on 5<sup>th</sup> September 2019 addressing his notice of motion dated 28<sup>th</sup> June 2019 only. The record further shows that the Plaintiffs filed written submissions on 8<sup>th</sup> October 2019 in reply to the Defendant's said submissions only. It would thus appear that none of the parties submitted on the notice of motion dated 10<sup>th</sup> June 2019.

11. Due to the nature of the orders sought by the Defendant, the court shall first consider and determine the application for review dated 28<sup>th</sup> June 2019. The Defendant's said application is based upon **Order 45 Rule 1(1) of the Civil Procedure Rules** which stipulates 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.”**

12. The Defendant contended that there was an error apparent on the face of the record in that the original suit property was not in existence at the time of trial. It was contended that the original suit property had long been sub-divided and new parcels created hence a review was warranted.

13. So, what is an error apparent on the face of the record and has the Defendant demonstrated such an error" In the case of **National Bank of Kenya Ltd Vs Ndungu Njau Civil Appeal No. 211 of 1996 (1997) eKLR** the Court of Appeal pronounced itself as follows regarding such an error:

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law ...”**

14. The court is not persuaded that there is an error of law apparent on the face of the record as contended by the Defendant. There was nothing untoward or defective about the proceedings which were conducted by the court before delivery of judgement. The material on record indicates that the original suit property was in existence by the time the hearing was concluded. The new parcel numbers were created only on 22<sup>nd</sup> January 2019 whilst the suit was pending judgement. Moreover, if it were true that the suit property was no longer in existence at the time of trial the Defendant could have brought that issue to the attention of the court.

15. The court does not agree that the failure by the Plaintiffs to produce a copy of the green card for the original suit property had any causal effect upon the sub-division. Even if the Plaintiffs had produced the relevant green card during trial on 18<sup>th</sup> October 2018 it would still have shown the existence of the suit property then.

16. The court is unable to decipher any error apparent on the face of the record. The mere fact that the Defendant caused a closure of the original title and creation of new titles on 22<sup>nd</sup> January 2019 whilst the suit was pending judgement cannot, by itself, constitute an error apparent on the face of the record. An apparent error must be something which the court could have rectified had its attention been drawn thereto. It could not be said that the sub-division and closure of the original title was something which the court could have remedied on 22<sup>nd</sup> January 2019 had its attention been drawn thereto.

17. The next ground for review sought to challenge the court's finding of fact that the Plaintiffs had proved their claim for adverse of 8 acres out of the original suit property. It was contended that the Plaintiffs had failed to call a surveyor or produce a surveyor's report to demonstrate their occupation of 8 acres. Clearly, this cannot be a ground upon which a court can review and set aside its own decree. It can only be a ground of appeal.

18. The Defendant's contention that the decree should be reviewed because it is incapable of execution does not hold water. This is a clear case of a party seeking to frustrate the execution of a decree and to defeat the cause of justice by sub-dividing the subject matter of litigation whilst the matter is pending judgement. The court is of the opinion that a judgement debtor should not be allowed to defeat the cause of justice through self-induced circumstances. The court should refuse to lend him a helping hand in his mischievous scheme by refusing to review or set aside the decree.

19. The court thus finds no merit whatsoever in the Defendant's notice of motion dated 28<sup>th</sup> June 2019. The court is of the opinion that the Defendant has failed to demonstrate any genuine grounds of review known to law. The Defendant is simply trying to turn the judicial process into a comical circus.

20. The court now turns to the Plaintiff's notice of motion dated 10<sup>th</sup> June 2019 filed under **section 3A of the Civil Procedure Act (Cap. 21)**. The court has considered the affidavits and annexures filed by the parties on the said application. The court is satisfied on the basis of the material on record that the Defendant caused the original title (i.e. *Title No. Mbeti/Gachuriri/5*) to be closed upon sub-division on or about 22<sup>nd</sup> January 2019 whilst the suit was pending judgement. The court does not agree that the process of sub-division and closure of the original title was outside the control of the Defendant. The material on record shows that it was the Defendant who initiated the process between 2017 and 2018. In any event, it was not demonstrated that such process was undertaken without the knowledge and consent of the Defendant who was the registered owner at all material times.

21. The court is of the opinion that the Defendant's attempt to shake off the rights of the Plaintiffs through sub-division and closure of the original title was ineffectual. This is because the Plaintiffs' claim for adverse possession is in the nature of a prescriptive right. A right of prescription runs with the land regardless of any intervening circumstances such as sub-division or even change of ownership. See **Wasui V Musumba [2002] 1KLR 396** and **Githu V Ndeete [1984] KLR 776**. By sub-dividing the subject matter of litigation, the Defendant might make it difficult for the Plaintiffs to identify on which of the three parcels i.e *parcel Nos. 4643, 4644 & 4646* the claimed portion falls, but their rights will not be defeated only by reason of such sub-division. The court is thus of the opinion that the Plaintiffs are still entitled to recourse against any of the three (3) sub-divisions of the suit property.

22. The question of the Defendant's identity is a straightforward issue. Although the Defendant was sued as Gerald Kithu Muchanje it would appear that the original suit property was registered in the name of Kithu Muchanje. The Defendant has not disputed that the name appearing in the land register is his. The court shall therefore direct that the decree herein shall be executed against Gerald Kithu Muchanje *alias* Kithu Muchanje.

23. The upshot of the foregoing is that the court finds no merit in the Defendant's notice of motion dated 28<sup>th</sup> June 2019 whereas the court finds merit in the Plaintiffs' notice of motion dated 10<sup>th</sup> June 2019. Consequently, the court makes the following orders for disposal of the said applications:

- a. The Defendant's notice of motion dated 28<sup>th</sup> June 2019 be and is hereby dismissed with costs to the Plaintiffs.
- b. The Plaintiffs' notice of motion dated 10<sup>th</sup> June 2019 be and is hereby allowed with costs to be borne by the Defendant.

24. It is so ordered.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **28<sup>TH</sup>** DAY of **NOVEMBER, 2019**.

In the presence of Mr. Njagi for the Plaintiffs and Mr. Gachie for the Defendant.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**28.11.19** \_\_\_\_\_



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