



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. MISC. APPLN. NO. 22 OF 2015

IN THE MATTER OF AN APPLICATION UNDER SECTION 38 OF THE LIMITATION OF ACTIONS ACT.

AND

IN THE MATTER OF THE LAND PARCEL NUMBER L.R. NO. 337/488 ATHI RIVER

BETWEEN

SAMMY MUTUA MUSWII.....PLAINTIFF

VERSUS

NJOKI ELIZABETH WAMBUGU.....DEFENDANT

RULING

1. In the Notice of Motion dated 6th June, 2019, the Plaintiff has sought for the following orders:

a) That this Honourable Court does review its Judgment delivered on the 24th May, 2019.

b) That cost of this Application be in the cause.

2. The Application is supported by the Affidavit of the Plaintiff's advocate who has deponed that this court delivered a Judgment on the Applicant's suit on 24th May, 2019 dismissing the Plaintiff's suit and that the suit was dismissed on the ground that the Plaintiff had not produced a certified complete title document to prove that the Defendant was the registered owner of the suit property.

3. The Plaintiff's counsel deponed that upon perusal of the court file, she confirmed that indeed the copy of the Title Deed produced in court lacked the last page of the title; that this was entirely a mistake which occurred during photocopying and filing of the list of documents in court whereby the last page of the title was not attached by error and that during trial, the Plaintiff was in possession of the original document and the court directed that the Plaintiff need not produce the original documents as the documents already filed were sufficient.

4. The Plaintiff's counsel finally deponed that she was not aware that the copy filed in court did not have the last page since the copy with the Advocate was complete and so was the original; that what happened was an error and that the court should review its Judgment based on the complete available title. The Application was not opposed.

5. The Plaintiff is seeking to review the Judgment of this court delivered on 24th May, 2019. In the said Judgment, the court struck out the suit on the ground that the Plaintiff did not avail the complete title document.

6. Order 45 of the Civil Procedure Rules provides the circumstances under which the court may review its Judgment. The said Order 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.”

7. It is true that the Plaintiff’s suit which was not defended, was struck out on the sole ground that the copy of the title document that was filed in court was incomplete. The filing of an incomplete title document was a *bona fide* error on the part of the Plaintiff’s advocate, which in my view is a sufficient reason to entitle this court to review its Judgment.

8. A proper, complete title document is now before the court. Indeed, the Plaintiff’s claim that he purchased the suit property from the Defendant on 9th July, 1988, and that he has been in occupation of the land since then was not controverted.

9. The law pertaining to adverse possession is now settled. Section 7 and 38(1) of the Limitation of Actions Act states as follows:

“7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

38(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

10. The courts have put the above provisions of the law and the doctrine of adverse possession into context. In the case of *Kimani Ruchine vs. Swift Rutherford & Co. Ltd [1980] KLR*, the court held as follows:

“The Plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario...The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by any recurrent consideration.”

11. The Defendant having not controverted the Plaintiff’s evidence, and the complete title document having been placed before this court, I allow the Plaintiff’s Originating Summons dated 23rd February, 2015. The Judgment of this court of 25th September, 2019 is therefore reviewed as follows:

a) The Plaintiff has acquired registrable interest in land known as L.R. No. 337/488, IR 34879 by adverse possession.

b) The title for L.R. No. 337/488, IR 34879 to be registered in favour of the Plaintiff.

c) Each party to bear his/her own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 27TH DAY OF NOVEMBER, 2020.

O.A. ANGOTE

JUDGE



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