REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ENVIRONMENT AND LAND COURT

CIVIL CASE NO.113 OF 2002

ELIUD MURAGE WAMBU.....PLAINTIFF

VERSUS

JOSEPH MURIITHI STANLEY)

D. WACHIRA KARANI)

JOHN K.J. MWAI)..... DEFENDANTS

R U L I N G

The applicant has come to this court for a review of its judgment dated 26/11/2007 to enable the matter be heard on merit. The application is grounded on reasons that the judgment did not take into serious consideration the question of the failure of the Land Control Board to give consent for the transfer of the said land to the 1st respondent who then fraudulently transferred the same to the 2nd respondent and that the Magistrate's Court at Kerugoya had no powers to deal with the registered land matters like this one and therefore the principle of Res-judicata could not have been applied to dismiss the applicant's case in the said judgment of 26/11/2007. The applicant contends that the Magistrate at Kerugoya in the said case No.P.M.C.C. 22 of 2002 was aware that he had no powers to deal and/or adjudicate upon a Registered Land and that was the reason why he referred the applicant to the High Court Nyeri, to enjoin the 1st respondent and such reference was totally ignored by this judgment.

In his supporting affidavit, the applicant states that that the 1st respondent/defendant in this case took his land parcel No.INOI/KAMONDO/969 by means of fraud without his knowledge or consent during the year 2001.The Land Registrar Kirinyaga District confirmed in his letter to the Chief Land Registrar dated 23/7/2008 that the Land Registry Kirinyaga could not find any documents regarding the consent of transfer of the said land from the applicant to the 1st respondent/defendant. He confirms that in his judgment dated 26th November 2007, the judge did not mention any date that they attended the relevant Land Control Board and argues that there should be a date when he allegedly took the 1st respondent to the said relevant Kirinyaga Central Divisional Land Control Board which he totally denies because according to him he did not do it and believes that if there was proof that the Land Control Board gave its consent to the transfer of his said land to the 1st respondent/defendant, then there was a date and minutes properly recorded by the clerk of the relevant Land Control Board. On the issue of the inordinate delay he states that the matter went to the Kituo cha Sheria who advised him to file an Appeal which was later struck out vide civil appeal No.93 of 2010 Nyeri.

The respondent filed a replying affidavit stating that the application was res judicata. Moreover in reply to paragraphs 2 and 3 of the supporting affidavit he avers that the applicant sold to him land parcel No.Inoi/Kamondo/969 as per the agreement of sale dated 5/11/2001 which he duly thumb printed and the issue of fraud does not arise. That in furtherance thereof, he verily believes that there is no land transfer which can be effected before consent from relevant Land Control Board is obtained. He strongly states that the Land Registrar Kirinyaga vide his letter dated 23/7/2008 only confirmed that the transfer documents in respect of transfer of the suit land were just misplaced but not otherwise. That in reply to paragraph 5 and 6 of the surpporting affidavit , he states that transfer of such land can only be effected only if the Land Control Board has consented.

He states that the Honourable court's judgment dated 26/11/2007 was proper and cannot be reviewed as there is unexplained delay of about 6 years. That in reply to paragraphs 8 and 9 thereof he contends that the same does not cure the inordinate delay thereof and the applicant must be warned that he cannot sell the suit land and start spreading lies that he did not attend the Land Control Board as the law must be followed to the letter.

In reply to paragraphs 10 and 11 thereof, he states that the applicant truly attended the Kirinyaga Central Land Control Board as consent thereof could not be granted during his absence. In reply to paragraphs 12, 13, 14 and 15 he contends that relevant laws were followed to effect the transfer of the suit land and all the allegations thereof are afterthoughts and the delay in bringing the application is inordinate.

In reply to paragraphs 16 and 17 of the supporting affidavit, he states that the applicant could have applied for summons to witness to the Land Registrar if he indeed wanted him to testify and he must be put to understand that, ignorance is never a defence. He contends that relevant provisions of the law were duly followed interalia Cap 302 of the Laws of Kenya.

He finally states that the said application is frivolous, vexatious and an abuse of the process of the honourable court. He prays that the court should dismiss the said application with costs to each of the respondents as court orders are never made in vain.

The respondent also filed grounds of opposition to the effect that the application was frivolous, vexations and an abuse of the court process as the same was res judicata.

In the judgment dated 26/11/2007 the judge found that the transaction involved in this matter was aboveboard and therefore the claim on damages could not succeed. Moreover, the court found that the plaintiff was not entitled to general damages because he did not prove the same. Moreover, special damages were neither pleaded nor proved contrary to the legal requirement that they should be specifically pleaded and proved. The suit was dismissed.

Applications of this nature are normally brought under order 45 rule (1). According to this rule, any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred or by a decree or order from which no appeal is allowed and who from the discovery of new and important matter or evidence which, after the exercise of due deligence,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 record or for any other sufficient reason,desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.

I have considered the application, supporting affidavit and further affidavits and the replying

affidavit including the grounds of opposition and do find that the ***first test*** to be applied is whether there is no appeal preferred in this matter in respect to the judgment. The applicant herein filed a Notice of Motion on 19/12/2011 in the Court of Appeal seeking for an extension of time to file a Notice of Appeal in HCCC No.119 of 2002 against the judgment of Makhandia J. of 26/11/2007. he claimed that the parcel of land was transferred fraudulently to the 1st respondent, and then to the 2nd respondent without going through the normal Land Control Board process. The application was heard and dismissed by the Court of Appeal Lady Justice M.K. Koome. The import of this is that the applicant has already tested the waters in the Court of Appeal in respect of the judgment of Justice Makhandia of 26/11/2007 and has found them to be so deep.

Having found the waters so deep, he has made a very fast retreat to this court for a review under order 45. Though the applicant has not filed a Notice of Appeal but any attempt to challenge the decision of Justice Makhandia in the Court of Appeal as done on the 19/12/2011 automatically denies the applicant the right to return to the High Court for review.

Furthermore, filing an application in the Court of Appeal and being heard by the same court was a right of the applicant but filing another application for review in the High Court after the dismissal of the one in Court of Appeal was an abuse of the court process.

The ***second test*** is the discovery of new and important matter or evidence which after exercise of due deligence was neither in his knowledge nor could be produced by him at the time when the decree was passed or the order made.

With due respect the applicant,the application is frivolous as no new material has been brought to review the decision of the honourable court made on 26/11/2007.

The ***third test*** is on account of some mistake or error apparent on the fact of the record. I listened to the applicant and read his documents and did not see any error apparent on the face of record in the judgment of Justice Makhandia. His complaint is the same, that was entertained and dismissed by Justice Makhandia in his judgment on 26/11/2007 and therefore this court finds that the application herein is in-fact an appeal and not a review envisaged under order 45 of the Civil Procedure Rules. It is trite law that the High court cannot sit on appeal on its own decision.

Lastly, but most ***important***, the applicant should demonstrate to the court that there is no unreasonable delay. On this issue, the court finds that the judgment was delivered on 26/11/2007. He filed an application for review which he withdrew by consent of parties on the 29/11/2009. He filed a Notice of Appeal by mistake against the order of 29/11/2009. In Civil Appeal No.93 of 2010 the Notice of Appeal was struck out with costs to the 2nd respondent. On 19/12/2011 he filed a Notice of Motion in the Court of Appeal for extension of time to file a Notice of the Appeal the same was rejected on the 11/7/2013.

This application is filed almost 4 years after withdrawal of the initial application of review. The court finds that the application is filed with unreasonable and inexcusable delay of 4 years.

The upshot of this is that the application is dismissed with costs to the respondents.

Dated, signed and delivered at Nyeri this 8th day of November 2013.

A. OMBWAYO

JUDGE