



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 1549 OF 2013**

**SULEIMAN MURUNGA .....PLAINTIFF/RESPONDENT**

**VERSUS**

**NILESTAR HOLDINGS LIIMITED .....DEFENDANT/RESPONDENT**

**GREEN VALLEY LIMITED ..... 2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

Before the court for determination is the 2<sup>nd</sup> Defendant's application dated 22<sup>nd</sup> July 2014 brought under sections 80, 63 (e) and 3A of the Civil Procedure Act and under Orders 40 Rule 1 and 45 Rule 1 of the Civil Procedure Rules. The application interalia seeks the following orders:

- i. That this Honourable court be pleased to order temporary stay of execution of the orders of the court made on 14<sup>th</sup> July 2014 pending the hearing and determination of this application and/or until further orders of the court.
- ii. That the Ruling and orders made on 14<sup>th</sup> July 2014 and all consequential orders be reviewed and/or set aside.
- iii. That such further or other relief be granted to the Defendants as this Honourable court deems fit and expedient in the circumstances.

The Applicant premises its application on the grounds that:-

- a. These is an error apparent on the face of the record.
- b. The Applicant knew of the existence of the letter of revocation dated 18<sup>th</sup> February 2014 from the National Land commission after delivery of the ruling when it sought to know whether the restriction ordered by **Apondi J**, had been complied with and then obtained a copy of the same.
- c. The application has been made without any unreasonable delay.
- d. The said letter of revocation demonstrates that the National Land Commission respects 2011 in **HCCC 439 of 2004** issued by **Apondi, J.**

The 2<sup>nd</sup> Defendant/applicant argues that the letter of 18<sup>th</sup> February 2014 constituted discovery of new and important evidence that was not within the knowledge of the applicant and is information and evidence that was not available to the court when the court made the ruling. The Applicant avers that the plaintiff being aware of this letter which revoked the letter of allotment to the plaintiff dated 3<sup>rd</sup> November 2011 concealed this information from the court and argues that had this information been made available to the court at the time of making the ruling the court could not have granted the orders that it did to the plaintiff. The Applicant further avers the court went ahead to grant orders in favour of the plaintiff when

there was in place the order issued by **Muga Apondi J** on 4<sup>th</sup> February 2011 barring the Commissioner of Lands from in any way dealing with the suit property thus the 2<sup>nd</sup> Defendant avers this constituted an apparent effort on the face of the record and in the circumstances there was sufficient cause to review the orders granted by the court on 14<sup>th</sup> July 2014.

The applicant's supporting affidavit sworn by one **Margaret Wairimu Magugu** on 21<sup>st</sup> July 2014 reiterates the above grounds and avers that the National Land Commission had the mandate under Article 67 of the Constitutional Land Commission Act 2012 to act in the manner that it did in withdrawing the allotment of the subject parcel of land to the plaintiff. The Applicant depones that the National Land Commission having withdrawn the letter of allotment dated 3<sup>rd</sup> November 2011 the court acted in error in placing reliance on the same to grant the plaintiff the orders complained of and thus contends there is justification for the review of the orders. The Applicant avers that as at 14<sup>th</sup> July 2014 when the court granted the orders in favour of the plaintiff, the plaintiff had no proprietary interest in the property to warrant the grant of the said orders in favour of the plaintiff.

The Applicant further depones that the orders made by **Muga Apondi, J** on 4<sup>th</sup> February 2011 barred the Commissioner of Lands from dealing with the suit property in any manner and thus the Commissioner of Lands lacked the authority to allocate the plaintiff the subject parcel of land in the face of the court order. The Applicant thus argues there is compelling new evidence to warrant a review of the orders made by the court on 14<sup>th</sup> July 2014.

The plaintiff filed a replying affidavit in opposition to the 2<sup>nd</sup> Defendants application dated 22<sup>nd</sup> July 2014. The plaintiff deposes that he was never served with the letter from the National Land Commission dated 18<sup>th</sup> February 2014 until 23<sup>rd</sup> July 2014 when the same was handed over by his manager, one **Benson Jefenea Mumelo** at about 1.15p.m. the same having been delivered at the business premises on the same day at about 11.00a.m. when the manager received the same on behalf of the plaintiff. The said manager has sworn an affidavit dated 28<sup>th</sup> July 2014 explaining the circumstances under which the letter was delivered at the business premises by some person who described himself as a person from the Lands Office but declined to give his name. The manager states the person did not have a delivery book but left a letter in a brown A5 envelope which he handed over to the plaintiff when he came to the office that same day at about 1.15p.m. the plaintiff thus states he was not aware of the existence and/or the contents of the letter dated 18<sup>th</sup> February 2014 from the National Land Commission until the 23<sup>rd</sup> July 2014 and avers that the same must have been written and backdated with the object of assisting the 2<sup>nd</sup> Defendant/Applicant in these proceedings since the letter indeed forms the basis of the present application.

The plaintiff states he instructed his Advocates on record to respond to the letter from the National Land Commission on his behalf and that his Advocates wrote to the Chairman of the National Land Commission in response in terms of the letter dated 25<sup>th</sup> July, 2014 annexed to the plaintiff's replying affidavit and marked "**SN2**". The plaintiff's position is that the National Land Commission lacked the mandate to deal with private property as it is only mandated to deal with public property under the provisions of section 14 of the National Land Commission Act, 2012. Besides, the plaintiff argues the National Land Commission could not purport to withdraw or revoke an allotment to the plaintiff in regard to the suit property without following due process in terms of the principles set out under article 47 of the Constitution. The plaintiff avers the commission did not accord him a hearing before purporting to revoke/withdraw his extent of allotment and to that extent any purported revocation/withdrawal was null and void for being contrary to the rules of natural justice.

The plaintiff further stated that the court duly considered the order made by **Muga Apondi, J in HCCC No.439 of 2004** given on the 4<sup>th</sup> July 2011 but nonetheless proceeded to grant the injunction in favour of the plaintiff and hence the National Land Commission in basing its decision on that order by **Muga Apondi, J in HCCC NO. 439 of 2004** is no doubt attempting to circumvent the course of justice.

The Applicant filed a supplementary affidavit dated 7<sup>th</sup> August 2014 in response to the plaintiff's

replying affidavit which basically contests the plaintiff's averments in regard to the service of the letter dated 18<sup>th</sup> February 2014 from the National Land Commission and to a large extent is argumentative and provides no facts as to how and when the said letter was served on the plaintiff. The Applicant maintains the plaintiff had knowledge of the letter of 18<sup>th</sup> February 2014 but offers no evidence

The 1<sup>st</sup> Defendant through **Jamilleh Ebrahim** swore a replying affidavit on 14<sup>th</sup> August 2014 which was filed on 20<sup>th</sup> August 2014. The replying affidavit apparently was in support of the 2<sup>nd</sup> Defendant's application dated 22<sup>nd</sup> July 2014. The replying affidavit like the supporting affidavit by the 2<sup>nd</sup> Defendant averred that the plaintiff's letter of allotment had been withdrawn by the National Land Commission's letter of 18<sup>th</sup> February 2014 and that the plaintiff had notice of the said letter. The 1<sup>st</sup> Defendant further stated the plaintiff was allocated the suit property vide the letter of 3<sup>rd</sup> November 2011 in contravention of the court order by **Muga Apondi, J** of 24<sup>th</sup> February 2011 in **HCCC NO. 439 of 2004** and hence argued was misled to issue the orders it did on 14<sup>th</sup> July 2014 by failure to disclose the full facts on the part of the plaintiff.

The parties filed written submissions as directed by the court to canvass their respective positions. The Applicant's submissions were filed on 21<sup>st</sup> August 2014. The law firm of **Kinoti & Kibe Advocates** filed submissions on behalf of the 1<sup>st</sup> Defendant/2<sup>nd</sup> Respondent on 5<sup>th</sup> September 2014 and the plaintiff/1<sup>st</sup> Respondent filed his submissions on 10<sup>th</sup> October 2014.

The court has reviewed the pleadings and the 2<sup>nd</sup> Defendant's Notice of Motion dated 22<sup>nd</sup> July 2014 the affidavits in support and in opposition and the parties written submissions. The issues that arise for determination by the court is whether the Applicant has satisfied the conditions under which the court can review its order under the provisions of Order 45 of the Civil Procedure Rules. The applicant in the present application principally relies on the letter of 18<sup>th</sup> February 2014 which she claims revoked and/or withdrew the letter of allotment to the plaintiff dated 3<sup>rd</sup> November 2011 a fact she claims was not within her knowledge and or the court's knowledge at the time the ruling was made on 14<sup>th</sup> July 2014. Her contention is that if the fact was disclosed to the court, the court's ruling may have been different. The Applicant also contends the ruling of the court was counter to the order of **Muga Apondi, J** which had barred the Commissioner of Lands from dealing with the suit property in the matter he did by allocation the property to the plaintiff and hence there is an apparent error on the face of the record to entitle the order being reviewed.

Sections 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules under which the application is brought provide as follows:

Section 80 provides:-

Any person who considers himself aggrieved-

- a. **By a decree or Order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or**
- b. **By a decree or order from which no appeal has been preferred, or**

**And who from the discovery of new and important after 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.**

Under Order 45 Rule 1 of the Civil Procedure Rules it is clear that a court can only review its decree or order when either of the order when either of the following conditions are satisfied:-

- i. There is discovery of new and important matter or evidence which after the exercise of due diligence was not available and/or could not be produced at the time the decree was passed and order made.
- ii. There was some mistake or error apparent on the face of the record.
- iii. There is some other sufficient cause.
- iv. In all the instances the instances the application must be made without unreasonable delay.

The plaintiff/1<sup>st</sup> Respondent has taken issue that the applicant did not annex the copy of the order sought to be reviewed and that in effect rendered the application to be fatally defective. The plaintiff referred the court to the cases of **Wilson Saina –vs- Joshua Cherutich T/a Chirutich Company Ltd (2003) eKLR where Alnashir Visram, J** (as he then was) while considering whether the order sought to be reviewed ought to be annexed stated as follows:-

**“I respectively agree. In order to succeed on an application for review under Order XLIV of the Rules (presently Order 45), one must show that he is aggrieved by a decree or an order. This cannot be done without annexing the decree or order for the court to determine that point. I therefore, agree with my learned sister the Honourable Lady Justice Jessie Lesiit’s conclusion in Gatimu Farmers Ltd –vs- John Njoroge Ndungu Nakuru HCC NO.197/2001 that failure to annex the order or decree sought to be reviewed renders an application for review fatally defective. On this conclusion alone, I do not see the need to consider the Defendant’s application further as no useful purpose will be achieved thereby.**

In the case of **Belgo Holdings Ltd –vs- Robert Kotich Otach & Another (2009) Eklr Lady Justice Lesiit** yet again considered an objection that the order sought to be reviewed had not been annexed to the application as in the present case and the Applicant had argued the order was within the court record and needed not to be attached to the application. The learned Judge in her ruling cited with approval the decision of **Nyarangi, J** (as he then was in the case of **Bernard Githii** on behalf of **Mutathini Farmers Co. –vs- Kihoto Farmers Co. Ltd HCCC Nairobi 32 of 1974** where **Nyarangi, J** stated thus:-

**“There is no decree drawn up and attached to the application. It is not as clear as it ought to be what aggrieves the applicant. There has to be a decree or order in discovery of new and important matter or evidence-----before an application may be made for a review of a judgment”.**

Lesiit, J for her part stated:-

**“I respectively agree with the views of Nyarangi, J. it is trite that the decree or order sought to be reviewed must be annexed or attached to the application in order for the Applicant to clearly show what has aggrieved it. Before making the application, there must have been a decree or an order drawn which aggrieved the Applicant and that is the order or decree that it ought to have annexed to this application in its support. Failure to annex that decree or order is fatal to the application”.**

This court has added its voice to the debate whether or not failure to annex a formal decree or order to an application for review is fatal. In the case of **Julius Mukami Kanyoko & 2 others –vs- Samuel Mukua Kamere & Another (2014) eKLR** while considering the application of Order 45 to an application for review while no formal order was annexed. I rendered myself as follows:-

**“The plain reading of the above provision (referring to order 45 Rule 1) is that an applicant for review ought to have annexed a formal extracted decree or Order in respect of which the review is sought. In essence judgment and/or ruling. Thus where an applicant fails to annex is sought to be reviewed such an application is defective. In the Defendant’s present application the order that the Defendants sought to be reviewed was not annexed with the result that the Defendants application was fatally defective. I agree that a formal decree and/or order is a pre requisite before an applicant can bring himself/herself within the ambit of order 45 of the Civil Procedure Rules as relates to review of the decree and/or order”.**

I do not suppose that the position has changed and to the extent that the Applicant in the present application did not annex or attach the order that she sought to be reviewed the application was fatally defective and would be unsustainable.

Although on that ground alone the application ought to be dismissed, I have also considered the substantive grounds put forth in support of the application and I am not persuaded even on merits the applicant has demonstrated the discovery of any view matter or evidence which was not available at the time the ruling was made which would have any bearing on the ruling. Equally I am not satisfied there was any error apparent on the face of the record to justify a review of the order of injunction granted in favour of the plaintiff.

There is no evidence that the letter dated 18<sup>th</sup> February 2014 from the National Land Commission was delivered to the plaintiff on any other date other than the 23<sup>rd</sup> July 2014 when the plaintiff states it was delivered and received by him. There is in my view a high probability that the letter was generated after the delivery of the ruling on 14<sup>th</sup> July 2014 otherwise there is no explanation why the letter only surfaced after the ruling was delivered yet it was not only addressed to the Plaintiff but was also copied to the 1<sup>st</sup> Defendant/Respondent.

The court has perused the contents of the letter dated 18<sup>th</sup> February 2014 and notes that the purported decision to revoke/withdraw the letter of allotment to the plaintiff is predicated on the ground that there was an order issued by the High Court of Nairobi on 4<sup>th</sup> February 2011 which order prohibited any further registration in ownership, leasing, subleasing, allotment, user occupation or possession over **L.R.NO.209/908** and **L.R.NO.209/918**.

With respect to the National Land Commission the court had in granting the injunction in favour of the plaintiff been keenly aware of the pendency of the court order but had held that the plaintiff was not a party to the suit where the order was issued and neither was the Commissioner of Lands and it was not shown the Commissioner of Lands had been served with the said Court Order issued on 4<sup>th</sup> February 2011. The National Land Commission in my view could not purport to rely on the order of 4<sup>th</sup> February 2011 to revoke the letter of allotment made to the plaintiff which the court had ruled the Commissioner of Lands was perfectly entitled to make in the circumstances of the matter the lease of the property having expired on 31<sup>st</sup> October 2009 and not having been renewed and/or extended in favour of the Defendants. The National Land Commission would further not properly be entitled to deal with a matter that was pending before the court unless the parties by mutual agreement agreed to have the matter referred to the Commission to deal with.

In the circumstances of this matter, if the Defendants were aggrieved by the decision of the court to grant an injunction in favour of the plaintiff their recourse perhaps ought to have been to appeal the decision as it cannot be a mistake or an error on the face of the record where the court consciously deals with an aspect of a matter and makes a decision on it. In the instant matter the court deliberately considered and dealt with the order made by **Hon. Justice Muga Apondi** and determined the same could not preclude the court from granting the injunction sought by the plaintiff. The court cannot be asked to review the same situation in the same matter as it cannot sit on appeal on its own decision. The letter of 18<sup>th</sup> February 2014 in my view does not introduce any new matter as it states the letter of allotment to the plaintiff dated 3<sup>rd</sup> November 2011 was being revoked/cancelled in view of the pending order by the court. The Commission in my view did not have the power or mandate to do so and should have allowed the process of the court to take its course.

The upshot is that I find no merit in the 2<sup>nd</sup> Defendants application dated 22<sup>nd</sup> July 2014. The same is ordered dismissed with costs to the plaintiff.

**Ruling dated, signed and delivered this 10<sup>th</sup> day of September 2015.**

**J. M. MUTUNGI**

**JUDGE**

**In the process of:**

MS NYAMWATA..... For the Plaintiff

MS NGUNJU..... For the 1<sup>st</sup> Defendant

Mr. Omboga .....For the 2<sup>nd</sup> Defendant