Mwarania v Ongaki & 7 others (Environment & Land Case 1253 of 2016) [2025] KEELC 2922 (KLR) (25 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2922 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 1253 OF 2016

M SILA, J

MARCH 25, 2025

BETWEEN

ELIMELITA NYAKOBOKE MWARANIA ..... PLAINTIFF

AND

SAMWEL MOMANYI ONGAKI ..... 1ST DEFENDANT

JAMES MUKO NYAMIRA ..... 2ND DEFENDANT

HELLEN NYABOKE NYABIOSI ..... 3RD DEFENDANT

EDWARD MWAMBA ..... 4TH DEFENDANT

FRANSCISCA MORAA ORESI ..... 5TH DEFENDANT

SUSAN KWAMBOKA ..... 6TH DEFENDANT

THE LAND REGISTRAR ..... 7TH DEFENDANT

HON ATTORNEY GENERAL ..... 8TH DEFENDANT

RULING

(Application by plaintiff for review of judgment; plaintiff having filed suit seeking cancellation of subdivisions to land that she contended was owned by her deceased husband; upon hearing, plaintiff's case dismissed; plaintiff now claiming to have new evidence that could not be availed at the hearing; the alleged new evidence having been available at the time the suit was heard; threshold for review not met; in any case court also found that the suit was time barred and further that the suit could not succeed as not all owners of the subdivisions of the parent title had been sued; application dismissed with costs)

1. The application before me is that dated 24 September 2024 but filed on 2 October 2024 by the plaintiff. It seeks the following orders :

i. That this application be heard ex parte in the first instance.

ii. That the firm of A.N Oeri & Co. Advocates be allowed to come on record after judgment.

iii. That the honourable court be pleased to review and set aside its judgment dated 15 May 2024 and all its consequential orders.

iv. That this honourable court be pleased to stay the execution of the judgment of this court pending the hearing and determination of this application.

v. That the court be pleased to issue an order that the DCI produce the adjudication report for Nyaribari Masaba/Bomobea/828 which they obtained through Miscellaneous Application 4 of February 2019 (sic) in Keroka Law courts and/or produce the investigation file for this parcel of land.

vi. That costs of this suit be in the course (sic).

2. The application is based on the following grounds :

a. That judgment in this suit was entered on 15 May 2024.

b. That the plaintiff is aggrieved with the decision of the court and now wants that the judgment of 15 May 2024 be reviewed.

c. That there is discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge or could not be produced by the plaintiff at the time when the order was made.

d. That the Honourable court did not consider crucial evidence which were not in the record that could have made the Honourable Judge rule otherwise.

e. That the Honourable Court did not consider a search issued from the Ministry of Lands dated 20 May 2014 as the plaintiffs after exercise of due diligence were not able to produce it in court.

f. That the forensic document examination report was not produced in this court showing that the signatures in the copy of title deed Nyaribari Masaba/Bomobea/1389 and a copy of green card Nyaribari Masaba/Bomobea/1389 are dissimilar and distinguishable.

g. That a letter from the ODPP to the CCIO Nyamira dated 13 October 2020 was not presented in court as it showed that key pieces of exhibits were left out unmarked during the initial forwarding of the ODPP file to Keroka warranting the dismissal of the Keroka suit.

h. That copies of a series of letters of inquiry to the Ministry of Lands and various government agencies that are associated with land issues were not produced in this court as they were not within the knowledge of the plaintiff.

i. That there is an eviction application seeking to evict the plaintiff from land parcel No. 1388.

j. That the plaintiff/applicant is desirous of being heard and it is just and fair that the judgment is reviewed.

k. That the defendants will not suffer any prejudice if this application is allowed.

l. That this application is in the best interest of justice.

m. That this application has been brought without unreasonable delay.

n. That this application is made in good faith and this Honourable Court has the powers to grant the same in the interest of justice.

3. The application is supported by the affidavit of the plaintiff and is opposed. Before I go to the details, it is best that I lay down the background to this suit.

4. The suit was commenced by the plaintiff/applicant through a plaint filed on 13 December 2007 and amended several times resting with the re-amended plaint filed on 8 October 2015. The applicant filed suit as administratix of the estate of the late Mwandagani Ongaki who died on 27 December 2000 (the deceased). The deceased was brother of the 1st defendant/respondent and the two of them were the first joint registered proprietors of the land parcel Nyaribari Masaba/Bomobea/828.

5. This land parcel Nyaribari Masaba/Bomobea/828 (simply referred to herein as parcel No. 828) measuring 0.8 Ha, was first registered in the names of Mwandagani Ongaki (the deceased) and Momanyi Ongaki (1st defendant) at the time of adjudication. On 7 September 1979, an application was made to subdivide this land into two parcels and consent to subdivide was obtained. The land was thereafter subdivided into the land parcels Nyaribari Masaba/Bomobea/1272 measuring 0.62 Ha and the parcel Nyaribari Masaba/Bomobea/1273, measuring 0.1 Ha (simply referred to herein as parcels No. 1272 and 1273). The 1st defendant and the deceased retained co-ownership of the parcel No. 1272 and the land parcel No. 1273 was transferred to James Muko Nyamira (2nd defendant) who got registered as proprietor on 7 September 1979. Subsequently on 20 May 1980, the land parcel No. 1272 (registered in the names of the 1st defendant and the deceased) was further subdivided into three, being the parcels Nyaribari Masaba/Bomobea/1387 measuring 0.13 ha, No. 1388 measuring 0.29 ha, and No. 1389 measuring 0.2ha. The deceased and the 1st defendant retained ownership of the land parcel No. 1387; the parcel No. 1388 was transferred to George Nyamacharara Openda who got registered as proprietor on 1 July 1980; and the land parcel No. 1389 was transferred to Joseph Oriku Omari who got registered as proprietor on 25 September 1980. Following this, the only land that the 1st defendant and the deceased retained was the parcel No. 1387 measuring 0.13 ha. As to the parcel No. 1388, the transferee, George Openda, died and was succeeded by his wife Francisca Moraa Oresi, who got registered as proprietor on 27 October 2008. On 8 April 2010, the land got registered in the four names of Francisca, and her three children but the children are not parties to this suit. For the parcel No. 1389, the transferee Joseph Oriku Omari died and was succeeded by Susan Kwamboka Omari (6th defendant) who obtained title in her name on 9 July 2008. On 31 May 2010, the land was subdivided into the land parcels Nyaribari Masaba/Bomobea/ 2196 and 2197 (parcels No. 2196 and No. 2197). She retained proprietorship of the parcel No. 2196 and transferred the parcel No. 2197 to Christopher Ondieki. Christopher Ondieki is not a party to this suit.

6. For the parcel No. 1273, carved out of the original parcel No. 828, and which it will be recalled was transferred to the 2nd defendant on 7 September 1979, it got subdivided into the parcels Nyaribari Masaba/Bomobea/1441 and 1442 (parcels No. 1441 and 1442). The 2nd defendant transferred the parcel No. 1441 to Joseph Nyabiosi Nyakundi (original 3rd defendant) who got title on 6 June 1986 and the parcel No. 1442 to Edward Mwamba (4th defendant)who got title on 15 September 1982. On 12 July 2011 the land parcel No. 1441 was transferred to the widow of the original 3rd defendant, Hellen Nyaboke Nyabiosi (current 3rd defendant) upon succession. The 3rd defendant, on 15 July 2011, subdivided the said land parcel No. 1441 into the land parcels Nyaribari Masaba/Bomobea/2461 and 2462 (parcels No. 2461 and No.2462). She retained the parcel No. 2461 and transferred the land parcel No. 2462 to Aligesi Sitanga Omari on 15 July 2011. Aligesi is not a party to this suit.

7. The applicant contended that between 1970 and 2007 the 1st defendant , who is brother to the deceased, undertook various fraudulent transactions that affected the said land parcel No. 828. Inter

alia it was alleged that the transactions were carried out without notice to the deceased and that the signature of the deceased was forged. In the plaint the applicant sought the following prayers :

(a) Declaration that the parcel No. 828 lawfully belonged to and was registered in the joint names of the deceased and 1st defendant and a declaration that the transactions touching on the parent title, including subdivision and transfers of the resultant titles, were irregular, illegal and fraudulent.

(b) Revocation of the subdivisions arising from the parent title No. 828 and the other subdivisions of the resultant titles and restore the parent title No. 828.

(c) Eviction of the 2nd – 6th defendants from the land parcels No. 1387, 1388, 1389, 1441, and 1442, together with the subsequent subdivisions thereof.

(d) Permanent injunction to restrain the 2nd – 6th defendants from trespassing and using the land parcels No. 1387, 1388, 1389, 1441 and 1442 and the subsequent subdivisions.

(e) General damages for trespass.

(f) Costs.

(g) Such other orders that may be deemed expedient.

8. The defendants refuted the claims of the applicant, and notably, the 5th defendant/respondent filed a counterclaim for the eviction of the plaintiff from the land parcel No. 1388.

9. At the hearing, it emerged that the applicant got married to the deceased prior to 1967. She however moved out of the home in 1973 and surfaced after her husband died in the year 2000, which was 27 years later. She acknowledged that she did not know what was happening to the land between the years 1973 and 2000. She claimed that the land parcel No. 828 was wholly owned by her late husband despite the first record showing that it was registered in his name and that of the 1st defendant.

10. DW-1 was the 1st defendant, who testified that it was the deceased who sold the land. DW – 2 was the 3rd defendant. His evidence was that he purchased the land parcel No. 1442 in 1980 and he obtained title on 17 September 1982. DW – 3 was the 6th defendant. Her evidence was that her late husband, James Omari Oriku purchased the land parcel No. 1389. DW-4 was Francisa Moraa Oresi, the 5th defendant. Her evidence was that her late husband George Openda, purchased the plot No. 1388 in 1979 and obtained title in his name. He died in 2004. She had a counterclaim as the plaintiff resides on her land.

11. In my judgment, I found that despite the applicant claiming that there was fraudulent subdivision, the applicant brought nil evidence to prove such. I pointed out that in her pleadings she had pleaded that her husband's signature was forged but no evidence of forgery was presented. There was no document referred to that was alleged to be the document forged. I found no evidence to demonstrate that the subdivision of the original land parcel No. 828 into the land parcels No. 1272 and 1273 was fraudulent. This subdivision was done in 1977 and the consent to subdivide was issued on 21 October 1977. I found nothing that would enable me disturb this subdivision or disturb the parcel No. 1273, or its downstream parcels of land i.e the parcels No. 1441, 1442, 2461 and 2462.

12. Regarding the further subdivision of what the two proprietors retained, i.e parcel No. 1272, I observed that the subdivision was done in 1980 into the three parcels No. 1387, 1388 and 1389. I saw that the two proprietors retained the parcel No. 1387 in their joint names. The parcels No. 1388 was sold to George Openda on 21 July 1979 and I saw no issue with that title. On the remaining parcel, i.e parcel No. 1389, I saw that it was transferred to Joseph Oriku Omari and he obtained title on 25 September 1980. I saw nothing that would impugn that title. I therefore found no reason to disturb that title

or its subdvisions i.e parcels no. 2196 and 2197. I found that the parcel No. 1387 which is what the two proprietors had left for themselves, was wholly transferred into the name of the plaintiff by the 1st defendant. I found nothing left for the applicant to claim, now that she had been given proprietorship of the parcel No. 1387. I indeed wondered where the applicant got the impression of any illegal sale as she was not there between 1973 till the year 2000 when her husband died. I saw no evidence that her late husband had any issue with the subdivisions and transfers of the land to the respondents. In any event, I found that the suit would be time barred as the issue could as well have been pursued by her late husband but he did not. I allowed the counterclaim of the 5th respondent and ordered the applicant to give vacant possession of the land parcel No. 1388 within 14 days of the judgment.

13. In the supporting affidavit to this application, the applicant claims that she has now obtained new and important evidence which was not within her knowledge despite exercise of due diligence and she could not produce it during trial. The evidence she refers to is a search dated 20 May 2014; an application for Land Control Board consent (for subdivision of the land parcel No. 828); , a search dated 11 September 2017 for the land parcel No. 1272 which shows her name as proprietor; an exhibit Memo form dated 23 October 2020; a forensic report dated 19 January 2021; an exhibit memo dated 8 January 2021; an affidavit dated 7 May 2015 from the 1st defendant more or less saying that he has no interest in the parcel No. 828, and that it was wholly owned by the deceased; a letter dated 11 November 2020 from the Directorate of Criminal Investigations (DCI) which she alleges shows that the resulting numbers after subdivision did not conform with the initial acreage of the original title and the error was propagated on subsequent subdivisions; a forensic document examination report allegedly showing that the signatures in the copy of title deed of parcel No. 1389 and green card are dissimilar; a letter from the ODPP to the CCIO Nyamira dated 13 October 2020 showing that some key evidence and exhibits were left out leading to dismissal of the case in Keroka; copy of transfer dated 6 June 1986; copy of letter regarding refusal to give crucial investigation report to the office of the ODPP; a certificate of confirmation of grant dated 26 May 2016; some letters of inquiry to the Ministry of Lands and various Government agencies associated with the land issue; mutation to subdivide the parcel No. 828 into the parcels No. 1272 and 1273; and copy of search dated 1 October 2018. She claims that all these were not within her knowledge and she could not produce them at the hearing.

14. The application is opposed by the 5th defendant/respondent who filed a replying affidavit. She deposes that the trial was conducted and parties given a fair hearing. She avers that the applicant could have preferred an appeal to the Court of Appeal and seek to produce new evidence that was not within her knowledge and this court has no powers to re-open the case. She has further deposed that the applicant has not given sufficient reason as to why she was withholding the search dated 20 May 2014 at the time of hearing and has not stated how crucial the search is to persuade the court to alter its decision. She believes that the documents that the applicant has mentioned is an afterthought and that she had every opportunity to present them since 2007 when she filed the suit. She avers that the case has been pending for 14 years now and will take longer if the application is allowed. She adds that the applicant has filed a notice of appeal and is not sure of what she is seeking. She contends that the applicant is guilty of laches as the judgment was delivered in May 2024 and no explanation given why the application is being filed four months later.

15. Counsel filed written submissions to argue the application and I have taken note of the submissions filed. I have submissions of Mrs. Morara for the applicant, Mr. Anyona for the 5th respondent and of Mr. Sagwe for the 1st, 3rd, 4th and 6th respondents though there was no reply filed by Mr. Sagwe on behalf of his clients. I take the following view of the application.

16. I have no issue with allowing the firm of M/s A.N Oeri & Company Advocates to come on record for the plaintiff/applicant after judgment and that prayer is allowed.

17. The core prayer in the application is for review so as to open up the case and receive additional evidence. The principles for consideration in an application for review are set out in Order 45 Rule 1 of the Civil Procedure Rules which provides as follows :

Application for review of decree or order [Order 45, rule 1.]

(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review

18. From the above, it will be seen that to succeed in an application for review, one needs to demonstrate the following :

(i) That he has not preferred an appeal from the judgment or order;

(ii) That the application has been filed without unreasonable delay;

(iii) That there is discovery of new and important matter that could not be produced by the applicant at the time the order was made despite exercise of due diligence;

(iv) That there is an error apparent on the face of the record;

(v) That there is other sufficient reason to review the judgment or order.

19. The application herein is more or less based on the claim that there is discovery of new and important evidence which the applicant has outlined.

20. It is not enough to show that there is some evidence which was not produced during trial. What an applicant needs to demonstrate is that this evidence was not within his/her knowledge or could not be produced when the order was made, even after exercise of due diligence. Thus, it is critical in an application for review, based on discovery of new evidence, for the applicant to inform the court when he first came to know of the new evidence and how he came across it. That is the only way that a court can assess whether the evidence was not available, and that it could not be availed by the applicant, and whether the applicant had actually undertaken due diligence at the time of trial. It will also determine if the application has been made without unreasonable delay.

21. In our case, the applicant is completely silent on when she came across the evidence now said to be new and how she came about it. Without disclosing the time that she came across the evidence now sought to be introduced, it cannot be said that it is proven that the evidence was not available and could not be produced at the time of trial. For that reason the application must fail.

22. In fact, much of what the applicant now claims to be new evidence was fully available at the time the trial was conducted only that the applicant chose not to avail it. Some of the documents that she has attached to her application were in fact documents that she had filed but did not produce as exhibits, or documents that were filed by the other parties in the case. For example, the application for consent to subdivide the land parcel No. 828 into two portions was actually listed and displayed in the list of documents filed by the Attorney General. The search dated 11 September 2017 for the parcel No. 1272 was also listed by the applicant in her list of documents filed on 6 November 2017. The exhibit Memos that the applicant refers to are documents of the year 2020 and I can see that they were prepared in respect of a criminal complaint lodged by the applicant. It emerged at the hearing that the criminal case was dismissed. On exhibiting the adjudication report, it is said that it was got after the case Keroka Miscellaneous Application No. 4 of 2019 though it is not said when the order was made. If the applicant thought it important, she could have produced the adjudication report when the hearing was done, or if the order had not been made, ask the court to stay the matter pending the determination of the case Keroka Miscellaneous Application No.4 of 2019. No such application was made.

23. What all this means is that these documents were available to the applicant at the time the hearing was conducted and if she had wished to rely on them, nobody stopped her from producing them. During the hearing, the applicant only produced a certificate of confirmation of grant dated 4 April 2008. Even when I inquired whether she is producing any other exhibit, I was told that she is not producing anything else. It was the applicant's deliberate choice not to produce the documents that she is now mentioning. That being the case, I am afraid to inform the applicant that she does not meet the test of new and important evidence that could not be availed at the hearing.

24. But I do not even see what would change even if we introduce what is now being touted as new evidence. Part of my judgment was a finding that the suit is time barred. It would still be time barred even if we bring in the evidence now said to be new. My other finding was that not all holders of the titles emanating from subdivision of the parcel No. 828 were sued. Without suing all title holders I do not see how the applicant would have succeeded in reverting the land back to the parcel No. 828. But all this is besides the point. What is important is that I have found that this is not evidence that was not available to the applicant and could not be produced at the hearing.

25. I am not therefore persuaded that this application is merited and it is hereby dismissed with costs.

26. Orders accordingly.

DATED AND DELIVERED THIS 25 DAY OF MARCH 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Delivered in the presence of :

Mrs. Morara for the plaintiff/applicant

Mr. Sagwe for the 1st , 3rd, 4th & 6th defendants

Mr. Anyona for the 5th defendant

Mr. Rana h/b for Mr. Wabwire, State Counsel for the 7th & 8th defendants