



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mosigisi & another v Republic (Criminal Revision E040 of 2021)  
[2022] KEHC 16546 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16546 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL REVISION E040 OF 2021  
JN KAMAU, J  
DECEMBER 20, 2022**

**BETWEEN**

**JACKSON ONSERIO MOSIGISI ..... 1<sup>ST</sup> APPLICANT**

**WESLEY MONYENYE MOSIGISI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Introduction**

1. In their application for Revision dated 23<sup>rd</sup> August 2021 and filed on 26<sup>th</sup> August 2021, the Applicants herein sought for revision of the orders made by Hon W.C Waswa in the case Nyamira CMCR No 1092 of 2019 on 11<sup>th</sup> August 2021. The said orders were as follows:-
  - a. All the entries made on properties known as Nyaribari Chache/B/B/Boburia/4068 and Nyaribari Masaba/Bonyamasicho/1008 purportedly transferring their properties from Johnson Mosigisi Machuki are hereby declared null and void ab initio.
  - b. The property is (sic) known as Nyaribari Chacche/B/B/Boburia/4068 and Nyaribari Masaba/Bonyamasicho/1008 to remain in the names of Johnson Mosigisi Machuki as the registered owner pending further orders from a court of law.
2. It was their case that the above orders were in civil nature and that the Learned Trial Magistrate erred in cancellation of the said properties (sic) and in purporting to rectify the property register by ordering that the same be maintained in the name of Johnson Mosigisi Machuki which was not subject of the criminal trial. They pointed out that at no point was the issue of cancellation of titles canvassed before court for arbitration (sic) and determination and that the impugned orders were beyond the Trial Court's jurisdiction.



3. They argued that Section 80 of the Registration of Land Act provides that it was only the Environment and Land Court which could make such orders. They added that the relevant parties had filed ELC Case No 386 of 2015 Wilfred Ogero Mosigisi vs Julius Ogero & Douglas Mayore in 2015 which was dealing with the issue of ownership amongst other issues.
4. They were emphatic that the Criminal Procedure Code did not envision a situation where a trial court could order for cancellation of title belonging to proprietors who were not in trial before it and that by doing cancelling the titles, the Trial Court denied the proprietors of the said properties a chance to defend themselves and ventilate their case as to why Titles to the said properties should not have been cancelled. They urged the court to revise, review and set aside the impugned orders of the Learned Trial Magistrate pursuant to Section 362 of the Criminal Procedure Code.
5. When the matter came up for hearing on 2<sup>nd</sup> November 2021, parties agreed to canvass the revision application by way of Written Submissions.
6. Despite having been given ample time to file its Written Submissions, the Respondent did not do so and on 31<sup>st</sup> May 2022, this court declined to extend time for it to file the same. The Applicants' Written Submissions were dated 26<sup>th</sup> November 2021 and filed on 29<sup>th</sup> November 2021. This Ruling is therefore based on the Applicant's Written Submissions only.

### **Legal Analysis**

7. The Applicants invoked Article 165 (6) and (7) of the Constitution of Kenya, 2010 and Section 362 of the Criminal Procedure Code which provisions they argued gave powers and jurisdiction for this court to revise the orders of the Trial Court and grant the reliefs they had sought.
8. They submitted that the basis of granting the impugned orders was allegedly due to alleged irregularities which none of them committed. They added that the subject properties were owned by persons who were not the subject of the criminal trial. They were emphatic that the orders that the Learned Trial Magistrate gave were civil in nature and were not subject of the criminal matter.
9. They cited Section 177 and 178 of the Criminal Procedure Code which provides for restitution of property and argued that the Trial Court did not elucidate the provision of law it relied on to make the subject orders touching on the cancellation of titles. They further submitted that the scope of restitution as provided by Section 177 of the Criminal Procedure Code did not extend to land and/or cancellation and rectification of title which was the exclusive jurisdiction of the Environment and Land Court.
10. They reiterated that Section 80 of the Registration of Land Act provides that the court may order the rectification of the register where it was satisfied that the registration was obtained, made or omitted by fraud or mistake. They were categorical that "court" meant the Environment and Land Court which has jurisdiction on matters relating to land.
11. Article 165(6) and (7) of the Constitution of Kenya, 2010 vests in the High Court supervisory jurisdiction over subordinate courts in the following terms:-
  6. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
  7. For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.



12. Further, Section 362 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

13. A perusal of the proceedings of the lower court showed that the Learned Trial Magistrate acquitted the Applicants herein on the ten (10) Counts they had been charged with. The charges were in respect of forgery contrary to Section 345 as read with Section 349 of the *Penal Code* Cap 63 (Laws of Kenya), making a document without authority contrary to Section 347 as read with Section 357 (a) of the Penal Code and uttering a document with intent to defraud contrary to Section 357(b) of the Penal Code.

14. Having acquitted the Applicants herein, the Learned Trial Magistrate became functus officio and could not make any further orders and ought to have downed his tools at that juncture. He could not purport to proceed under Section 177 and 178 of the Criminal Procedure Code.

15. While the alleged fraudulent acts in respect of Nyaribari Chache/B/B/Boburia/4068 and Nyaribari Masaba/Bonyamasicho/1008 (hereinafter referred to as “the subject properties”) may have been subject of the criminal proceedings, they remained criminal in nature. At no point was the issue of cancellation of titles canvassed by the owners of the said subject properties. They were not party to the criminal proceedings and had a right to be heard in another forum to ventilate their issues. Their right for fair hearing was enshrined in Article 50 (1) of *the Constitution* of Kenya.

16. Going further, it was clear that the Learned Trial Magistrate did not have jurisdiction to rectify the land register because at the material time, he was hearing a criminal case and not a civil case under the environment and land court regime.

17. Notably, Section 80 (1) of the *Land Registration Act* Cap 300 (Laws of Kenya) provides that:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

18. Under Part I of the said Act, “court” means the Environment and Land Court established under the Environment and Land Court Act of 2011. Indeed, the Applicants submitted that there was ELC Case No 386 of 2015 Wilfred Ogere Mosigisi vs Julius Mogere & Another which had been instituted and was dealing with the issue of ownership.

19. The purported rectification of the register by the Learned Trial Magistrate in criminal proceedings in respect to the subject properties was thus unlawful, illegal and had no legal basis as he had no jurisdiction to make the said determination.

20. Section 367 of the Criminal Procedure Code stipulates that:-

“When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.

21. The aforesaid Section empowers the Court to make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.



## **DISPOSITION**

22. For the foregoing reasons, the upshot of this court's decision was that the Applicants' application for Revision dated 23<sup>rd</sup> August 2021 was merited and the same be and is hereby allowed.
23. Accordingly, this court found that orders (a) and (b) that were issued by Hon C. W. Waswa in Nyamira Chief Magistrate's Criminal Case No 1092 of 2019 Republic vs Jackson Onserio & Another on 11<sup>th</sup> August 2021 were illegal and improper. The said orders be and are hereby set aside and/or vacated as provided under Section 362 of the Criminal Procedure Code.
24. It is so ordered.

**DATED AND DELIVERED AT NYAMIRA THIS 20<sup>TH</sup> DAY OF DECEMBER 2022**

**J. KAMAU**

**JUDGE**

