



REPUBLIC OF KENYA



**Ngiria v Ouko & 2 others (Environment & Land Case
397 of 2011) [2023] KEELC 18331 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18331 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 397 OF 2011**

**LN MBUGUA, J
JUNE 22, 2023**

BETWEEN

JOSEPH KAMAU NGIRIA PLAINTIFF

AND

ROSELYN DOLA OUKO 1ST DEFENDANT

AARON TAFARI OUKO 2ND DEFENDANT

ANDREW ATINDA OUKO 3RD DEFENDANT

RULING

1. Judgment was entered in this matter on February 21, 2019. The Plaintiff then filed the instant Notice of Motion application dated February 5, 2020 seeking review and/or setting aside of the said judgment. The application is premised on grounds on its face and on the Plaintiff's supporting affidavit sworn on February 5, 2020. He avers that he claims adverse possession to Land Reference No 3589/52 and 3589/53 being subdivisions parceled out of Land Reference No 3589/6 registered at the Land Titles Registry, Nairobi as IR No 23229/1 under the RTA.
2. He further avers that in his judgement, the Honourable Judge held that applicant had failed to prove quiet possession of the suit property and yet he has been living thereon since 1984 and has made developments thereon without the Defendants raising any objections to his dealings.
3. He adds that the judge indicated that he had not attached a copy of title for the parcels of land for which he was claiming adverse possession. He urges the court to consider Deed Plan No 165208 for parcel Number 3589/52 and Deed Plan No 165209 for parcel Number 3589/53 which he annexed as KN1 and KN2. He states that these documents are new found evidence that was not annexed to his originating summons and his supporting affidavit and urges the court to review the case a fresh.



4. The Plaintiff also swore a further affidavit on May 22, 2023 where he avers that on August 20, 2016, his neighbor one Marcella Omwenga went to the police and caused the arrest of his 2 sons John Gakuru Kamau and James Ngiria Kamau. In 2018, his sons were convicted of the charges of malicious damage to property.
5. Marcella Omwenga then filed ELC Case No 1028 of 2016 claiming LR 3589/53 against him and produced the deed plan marked JNK/2 for LR 3589/53 but he only got it after this suit was determined, thus the deed plan was not available to him prior. The Defendants herein had also applied to be joined in ELC Case No 1028 of 2016 but the Plaintiff in that matter died and the suit abated leaving him as the sole adverse occupier of the tittle to LR 3589/53 which he is still pursuing.
6. The application is opposed by the Defendants vide the 2nd Defendant's replying affidavit sworn on June 28, 2022. He avers that the Plaintiff has not sufficiently met the minimum threshold upon which the Honourable Court can review its judgement of February 21, 2019. He also avers that the application is an afterthought filed a year after judgement was entered and that mere discovery of new or important evidence is not sufficient ground for review, the Plaintiff has to show that such matter /evidence was not within his knowledge. He also contends that since the Plaintiff argues that the learned judge did not consider crucial evidence, the same is a ground for appeal and not review.
7. I have duly considered the arguments advanced herein including the rival submissions. The key issue for determination is whether the Plaintiff has met the criteria for review of a judgment. The provisions of Section 80 of the Civil Procedure Act gives power of review while Order 45 of the Civil Procedure Rules sets out the rules.
8. The rules were emphasized by the Court of Appeal in Christopher Musyoka Musau v N P G Warren & 8 others [2017] eKLR, where it was held that:

“This Court has repeatedly held that the jurisdiction and scope of review is not the same as that of an appeal and that the jurisdiction of review can be entertained only if the three conditions stipulated in Order 45 rule 1 are met, that is, where, one, there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made, or, two on account of some mistake or error apparent on the face of the record, or three, for any other sufficient reason.”
9. The Plaintiff's application is based on ground that it has discovered new and important evidence that was not available at the time of hearing the suit. He has annexed the said evidence as KN1 and KN2 which are deed plans for Parcel No 3589/52 and 3589/53 to his affidavit in support of the motion.
10. On their part, the Defendants argue that the Plaintiff has not demonstrated to the court that the new documents he intends to introduce were not within his knowledge at the time of filing suit.
11. While courts have discretion to grant review orders, the same should not be used to aid parties who seek to fill in gaps in their evidence. In Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR, the Court held that;

“The discretion of the law to grant an order of review cannot be used to help a party who has shown lack of diligence.”
12. Courts have held that a party relying on discovery of new evidence as a ground for review has to prove that the evidence sought to be introduced was not available to them.



13. In *Pancras T Swai v Kenya Breweries Limited* [2014] eKLR The Court of Appeal held as follows: “In Francis Origo & another v Jacob Kumali Mungala (CA Civil Appeal No 149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them.
14. The Court of Appeal reiterated this position in *Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & Another* (2018)eKLR Where it stated;
“We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.”
15. In his further affidavit sworn on May 22, 2023, the Plaintiff avers that the deed plan for Land Reference No 3589/52 dated July 29, 1992 was an annexed to the documents filed in 2016 in Nairobi ELC Case No 1028 of 2016, *Marcella Omwenga v Joseph Kamau Ngiria*. It follows that the said document was known to the applicant before judgment was delivered herein. The other deed plan is for LR 3589/53; the Plaintiff avers that it was produced in Criminal Case No 4600 of 2016 in *R V John Gakuru Kamau and James Ngiria Kamau*, where his sons were convicted in 2018. Similarly the applicant was aware of the same before judgment in the current suit was delivered.
16. In view of the above analysis, I find that there are no sufficient grounds to warrant a review of the said Judgment. In the circumstances, I find that the application dated February 5, 2020 is not merited, the same is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Lukoye for Defendant/Respondent

Court assistant: Kajuju

