



**Malombe v Munyalo (Environment & Land Case 1202 of 2007)  
[2023] KEELC 18083 (KLR) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18083 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1202 OF 2007**

**SO OKONG'O, J  
JUNE 12, 2023**

**BETWEEN**

**COSMAS MULWA MALOMBE ..... PLAINTIFF**

**AND**

**WANGO MUNYALO ..... DEFENDANT**

**RULING**

1. The full facts of this case are set out in the judgment of this court delivered on January 31, 2019. In summary, the defendant is the widow and administrator of the estate of one, Samuel Munyalo Mulandi, deceased (hereinafter referred to only as “the deceased”). The deceased and his two brothers Mukunga Mulandi and Kavulu Mulandi were at all material times registered as proprietors in equal shares of all that parcel of land known as Matinyani/Kisaini/533. On October 21, 1977, the plaintiff and the deceased entered into an agreement for sale pursuant to which the deceased sold to the plaintiff his 1/3 share in Matinyani/Kisaini/533 (hereinafter referred to only as “Plot No 533”) at a consideration of Kshs. 95,000/-. The plaintiff paid to the deceased the purchase price in full between October 21, 1977 and October 21, 1978 for the said portion of Plot No 533. Plot No 533 was agricultural land. No consent was obtained from the Land Control Board for the transaction between the plaintiff and the deceased and the said portion of Plot No 533 was never transferred to the plaintiff by the deceased.
2. The plaintiff however took possession of the said property and used the same for grazing cattle until 1992 when he was prevented from accessing the same by the deceased who purported to repudiate the agreement for sale between them on the ground that his sons had raised objection to the same. The plaintiff later learnt that the deceased had purported to sell the same parcel of land to a third party who had entered into the same and commenced construction and other activities thereon.

Following the invasion of the property by the said third party, the plaintiff filed a suit at the Senior Resident Magistrate’s Court at Kitui, namely Kitui SRMCC No 115 of 1992 against the deceased



and one, Mukai Musyoka (hereinafter referred to as “the Kitui case”). In the Kitui case, the plaintiff sought a declaration that he was the legal and equitable owner of the portion of Plot No 533 that he had purchased from the deceased and general damages. In the alternative, the plaintiff sought a sum of KShs.120,000/- being a refund of the purchase price he had paid to the deceased inclusive of interest and damages he was likely to incur as a result of losing the property. The Kitui case was defended by the deceased and the said Mukai Musyoka to whom the deceased was said to have re-sold the property. The case was heard and a judgment was delivered on 24<sup>th</sup> February 1998. The Kitui court made a finding that the plaintiff had purchased a portion of Plot No 533 from the deceased and had occupied the same from 1997. The court made a declaration that the plaintiff had acquired equitable title under the *Limitation of Actions Act*, Chapter 22 Laws of Kenya over the portion of Plot No 533 which he purchased from the deceased. The court however declined to make an order for the transfer of the said property to the plaintiff on the ground that the order could only be made by the High Court under Section 38(1) of the *Limitation of Actions Act* and Order XXXVI rule 3D of the old *Civil Procedure Rules*. The court directed the plaintiff to make an appropriate application to the High Court for that purpose. The claim against the deceased’s co-defendant Mukai Musyoka was dismissed with costs. The plaintiff was awarded the costs of that suit against the deceased.

3. The plaintiff brought the present suit against the deceased and his two brothers who were co-proprietors of Matinyani/Kisaini/533 (“Plot No 533”) on October 24, 2003 seeking a declaration that the title that was held by the deceased in respect of 1/3 portion of Plot No 533 was extinguished by the plaintiff’s adverse possession of the said parcel of land for more than 12 years and that the deceased’s claim in respect thereof was statute barred under Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. The plaintiff sought a further order that he be registered as the proprietor of 1/3 portion of Plot No 533 (hereinafter referred to as “the suit property”) in place of the deceased and that the deceased and his co-proprietors be ordered to cause the sub-division of Plot No 533 into three portions so that the deceased’s 1/3 portion thereof (hereinafter referred to only as “the suit property”) could be transferred to the plaintiff. The plaintiff’s suit before the court which was brought by way of Originating Summons was supported by the plaintiff’s affidavit sworn on October 21, 2003 in which the plaintiff stated how he acquired the suit property from the deceased and occupied the same from 1977 to 1991 continuously and peacefully. The deceased and his co-proprietors of Plot No 533 entered an appearance and filed separate replying affidavits to the Originating Summons. In his replying affidavit sworn on March 18, 2004, the deceased admitted that he sold the suit property to the plaintiff in 1977. He contended however that the plaintiff delayed in the payment of the purchase price as a result of which he was forced by the circumstances to resell the same property to a third party, one Mukai Musyoka who had already taken possession and settled on the land. The deceased denied that the plaintiff had taken possession of the suit property and had occupied the same continuously between 1977 and 1991. The deceased denied that the plaintiff had acquired the suit property by adverse possession. The deceased contended that his co-proprietors of Plot No 533 had supported the plaintiff’s claim because of the differences he had with them concerning Plot No 533.
4. The deceased brothers, Mukunga Mulandi and Kavulu Mulandi who were also co-proprietors of Plot No 533 filed a replying affidavit on December 11, 2003 sworn by Mukunga Mulandi on December 6, 2003 in which they both supported the plaintiff’s claim against the deceased.

While this suit was pending hearing, Plot No 533 was sub-divided and the portion thereof that was sold by the deceased to the Plaintiff was given a land reference number Matinyani/Kasaini/1305 (also referred to as “the suit property”) and registered in the name of the deceased on October 5, 2011. The sub-division was carried out after the death of the deceased on April 9, 2006. The Grant of Letters of Administration in respect of the estate of the deceased was issued to his wife, Wango Munyalo on November 8, 2011.



5. On October 14, 2015, the plaintiff amended the Originating Summons and substituted the deceased's wife, Wango Manyalo as the defendant in place of her deceased husband, Samuel Munyalo Mulandi. The plaintiff also discontinued his claim against the hitherto co-proprietors Plot No 533, Mukunga Mulandi and Kavulu Mulandi. In the amended Originating Summons, the plaintiff's adverse possession claim was directed at the new parcel of land, Matinyani/Kasaini/1305 ("the suit property"). The amended Originating Summons was served upon the deceased's wife, Wango Munyalo who was now the sole defendant but she did not respond to the same. When the suit came up for hearing on February 22, 2018, the deceased wife, Wango Munyalo (hereinafter referred to only as "the defendant") did not appear in court despite service having been effected upon her. The plaintiff gave evidence and called one witness, Charles Musya Kikungu (PW 2).

In a judgment delivered on 31<sup>st</sup> January 2019, the court entered judgment for the plaintiff against the defendant on the following terms;

1. That a declaration is hereby issued that the interest and/or title held by the deceased in respect of 1/3 portion of Title No Matinyani/Kasaini/533(which after subdivision was assigned Title No Matinyani/Kasaini/1305) was extinguished by the plaintiff's adverse possession of the said parcel of land for more than 12 years and that the deceased's claim in respect thereof was statute barred under Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
2. That the plaintiff be registered as the proprietor of Title No Matinyani/Kasaini/1305 under section 38 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
3. That each party to bear its own costs.

In the said judgment the court stated as follows in part:

"On the evidence before me, I am satisfied that the plaintiff has proved his claim against the defendant. The plaintiff led evidence that he bought the suit property from the deceased in 1977. He paid the purchase price in full. The deceased gave him vacant possession of the property. He took possession and remained in occupation until 1991 when the deceased purported to rescind the agreement for sale and to resell the suit property to a third party who moved to the property and dispossessed the plaintiff of the same. This development led to the filing of the Kitui Case by the plaintiff against the deceased and one, Mukai Musyoka to whom the deceased was said to have resold the suit property. In the judgment that was delivered on 24<sup>th</sup> February, 1998, the Kitui Court made a finding of fact that the plaintiff had purchased the suit property from the deceased in 1977 and that the plaintiff had been in occupation of the property from 1977 up to the time the suit was filed. The Kitui court also made a finding that the plaintiff had established that he was the equitable owner of the suit property having occupied the same since 1977 and made a declaration to that effect. These findings by the Kitui court have neither been varied nor set aside. Upon assessment of the evidence before me, I have reached the same conclusion. The plaintiff has established that he entered the suit property in 1977 after purchasing the same from the deceased, he fenced the same, put up a temporary structure thereon for his herdsman and used the property for grazing his cattle until 1991 when he was dispossessed of the property by a third party to whom the deceased is said to have resold the suit property. I am satisfied that the plaintiff has established the ingredients of adverse possession claim that were set out in the cases of *Ann Iumbi Kiseli v James Muriuki Muriithi* (2013) eKLR, *Wambugu v Njuguna* (1983) KLR 173 and *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR which were cited by the plaintiff in his submissions."



6. What is now before me is the Notice of Motion application dated February 19, 2020 seeking the following orders;
  1. That this court be pleased to review and set aside the judgment delivered herein on January 31, 2019 and the decree issued thereafter on October 2, 2019.
  2. That the costs of the application be provided for.
7. The application that was supported by the affidavit of the defendant sworn on January 19, 2019 was brought on several grounds. The defendant contended that this suit is *res judicata* since the dispute between the parties over the suit property was fully and finally determined in Machakos High Court Civil Appeal No 23 of 1998 (hereinafter referred to as “the Appeal Case”) and as such this suit was irregularly filed and the impugned judgment should be set aside. The defendant averred that the Appeal Case was determined in favour of the deceased on June 20, 2003. The defendant averred that the application was brought without unreasonable delay soon after the defendant learnt of the judgment of the court. In her affidavit in support of the application, the defendant annexed a copy of the Appeal Case judgment as an exhibit.
8. The application was opposed by the plaintiff through a replying affidavit sworn on June 26, 2020. The plaintiff averred that the judgment in the Appeal Case was not a new or important matter or evidence that was not within the knowledge of the defendant when the impugned judgment was made. The plaintiff averred that since the judgment in the Appeal Case was known to the defendant all along, it did not qualify as new evidence. The plaintiff averred that the defendant did not explain why the said judgment in the Appeal Case was not brought to the attention of the court before the delivery of the impugned judgment. The plaintiff averred that the decision in the Appeal Case was made on the basis that the lower court (Kitui case) did not have jurisdiction to entertain the plaintiff’s claim before it. The plaintiff averred that the issues in dispute between the plaintiff and the defendant were not determined on merit in the Appeal Case judgment and as such this suit was not *res judicata*. The plaintiff averred further that the judgment in the Appeal Case dealt with Title No Matinyani/Kasaini/533 which measured 43.0 hectares while this case after amendment dealt with Title No Matinyani/Kasaini/1305 measuring 11.74 hectares.
9. The plaintiff averred further the defendant took up to 13 months to bring the present application after the judgment sought to be reviewed. The plaintiff averred that the inordinate delay was not explained. The plaintiff averred that the conduct of the defendant militated against the exercise of the court’s discretion in her favour. The plaintiff averred that after she was substituted in this suit as a defendant, the defendant chose to ignore the court and never participated in the proceedings. The plaintiff averred that it was unjust for the defendant to wait until a judgment was made in this suit which had been in court since 2003 for her to wake up and seek a review of the same.
10. The defendant’s application was heard by way of written submissions following the directions that were given by the court on July 30, 2020. The defendant never filed submissions while the plaintiff filed submissions dated March 7, 2022. The plaintiff cited *Republic v Public Procurement Administrative Board & 2 others* [2018]eKLR, and submitted that review jurisdiction can only be exercised; on the ground of discovery of new and important matter or evidence, on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The plaintiff submitted that the application must also be made without unreasonable delay. Starting with the last condition, the plaintiff submitted that a delay of 4 months to bring an application for review after learning of the existence of the judgment was inordinate. The plaintiff cited several cases in which a delay between 4 to 7 months in bringing an application for review was found by the courts to be inordinate. The plaintiff submitted that no explanation was given for the delay. On the issue of *res judicata*, the plaintiff



submitted that even if this suit was res judicata which was not admitted, that would not be a valid ground for the review sought. The plaintiff submitted that that fact was not a new matter or evidence which was not in the defendant's knowledge. The plaintiff submitted that the defendant was duly served with the court papers and the deceased participated in the suit through an advocate. The plaintiff submitted that after the death of the deceased and the substitution of the deceased with the defendant, the defendant was served with hearing notices on several occasions. The plaintiff submitted that the defendant did not seize the opportunity to bring to the attention of the court the alleged important evidence.

11. The plaintiff submitted that in any event, the judgment in the Appeal Case did not make this suit res judicata. The plaintiff submitted that on the face of the said judgment, it was clear that the appeal was not determined on merit. The plaintiff submitted that the issue of whether or not adverse possession had been established was not determined in the said judgment in the Appeal Case. The plaintiff submitted that this suit could not therefore be res judicata.

In conclusion, the plaintiff submitted that the defendant's application was without merit as it was not brought timeously and there was no new and important matter or evidence which had been discovered by the defendant.

#### **Analysis and determination:**

12. I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the plaintiff in opposition to the application and the submissions by the plaintiff since the defendant did not file any. The only issue arising for determination in the application before me is whether a sufficient basis has been laid by the defendant to justify a review of the judgment delivered herein on January 31, 2019. The court's power to review its orders and decrees is provided for in section 80 of the [Civil Procedure Act](#) under which the defendant's application has been brought as follows:

"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 is allowed by this Act.
13. May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

Order 45 of the [Civil Procedure Rules](#) lists specific grounds upon which an application for review can be made as follows:

- a. "Where there is a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed.
  - b. Where there is a mistake or error apparent on the face of the record.
  - c. For any other sufficient reason."
14. The Court of Appeal set out the requirements to be satisfied by an applicant seeking review in [Francis Origo & another v Jacob Kumali Mungala](#), Eldoret CA No 149 of 2001[2005]eKLR as follows:

"...it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be



produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay.”

15. Similarly, in *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints*, Nairobi C.A 132 of 2014[2016]eKLR, the requirements were set out as follows:

“To qualify for a review there are stringent requirements to be met. For instance the applicant must demonstrate that as a matter of right he can appeal but has not exercised that option; that no appeal lies from the decree with which he is dissatisfied; or that he has discovered a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced when the order was made; or that there is a mistake or error apparent on the face of the record; or that there are sufficient reasons to warrant the review. It is also a requirement that the application for review must be brought without unreasonable delay.”

16. The scope of the court’s jurisdiction to review its own orders was defined in *John Kamau Rubangi v Kenya Reinsurance Corporation*, Civil Appeal No 208 of 2006[2012]eKLR as follows:

“It is important to bear in mind that Order 44 Rule 1 of the Civil Procedure Rules sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground of review. All these are grounds of appeal.”

17. The defendant did not come out clearly in the application as to the basis or ground upon which the review was sought. The fact that she did not file submissions did not help the situation. The issue raised as the basis for the application was that this suit was res judicata and as such the same ought not to have been entertained by the court. I will assume that the review was sought on the grounds of discovery of new and important matter or evidence and for sufficient reasons. On the discovery of new important matter or evidence, I am in agreement with the plaintiff that the judgment in the Appeal Case was all along within the knowledge of the defendant. The judgment was delivered on June 26, 2003 a few months before the filing of this suit on October 24, 2003. The said Appeal Case was filed by the deceased who was substituted herein by the defendant and the judgment was in his favour. When this suit was filed, the deceased who won the Appeal case was still alive and defended this suit through an advocate. The issue of the judgment in the Appeal Case was not raised although it was within the knowledge of the deceased. After the death of the deceased and his substitution herein by the defendant, the defendant for reasons only known to her failed to participate in the hearing of this suit despite several notices served on her. In the circumstances, she also did not raise the issue of the said judgment in the Appeal Case which the court presumes was within her knowledge as a legal representative of the deceased. I am in agreement with the submission by the plaintiff that the said judgment was therefore not a new important matter or evidence that was not within the knowledge of the defendant after due diligence. It is therefore not a ground for review.
18. I am also in agreement with the plaintiff that even if the said judgment was a new and important matter or evidence, it would not justify a review of the judgment made herein on January 31, 2019. This is because the said judgment in the Appeal Case did not render this suit res judicata. As correctly submitted by the plaintiff, the deceased appeal in the Appeal Case succeeded on the single ground that the Magistrate’s Court at Kitui in the Kitui case did not have jurisdiction to determine the



issue of adverse possession. In the judgment of this court sought to be reviewed, the issue that the court determined was whether the plaintiff had acquired the suit property by adverse possession. The Magistrate's Court did not determine the issue as it had no requisite jurisdiction. The court in the Appeal Case did not also determine the issue save for the finding that the Magistrate's Court had no jurisdiction to deal with the issue. This suit which was filed by the plaintiff to assert his adverse possession claim over the suit property was in the circumstances not res judicata. I therefore find no merit in the defendant's res judicata argument as a basis for review of the judgment made herein. I have held that the said judgment in the Appeal Case is not a new and important matter or evidence and that the same did not render this suit res judicata. I am also not persuaded that the said judgment in the Appeal Case is a sufficient reason to review the judgment delivered herein. The defendant's application therefore fails on both grounds on which it was brought.

19. The defendant's application also fails for the reason that the same was brought after an inordinate delay that was not explained. The judgment sought to be reviewed was delivered on January 31, 2019. The application before the court was filed over 1 year later on February 19, 2020. The defendant averred that she learnt of the judgment made herein in October 2019. Even if that was the case, no explanation was given for the delay of 4 months before the filing of the application. It is therefore my finding that the defendant's application was filed after inordinate delay and that also disentitles the defendant to the relief sought.

In the final analysis, I find no merit in the Notice of Motion application dated February 19, 2020 which I hereby dismiss. I will deny the plaintiff the costs of the application because he concealed to the court the existence of the judgment in the Appeal Case which was within his knowledge. If he had disclosed the same, the court would have considered its effect in the judgment of January 31, 2019 and the present application would not have been filed. Each party shall bear its own costs of the application.

**DELIVERED AND DATED AT KISUMU THIS 12<sup>TH</sup> DAY OF JUNE 2023**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

N/A for the Plaintiff

N/A for the Defendant

Ms. J. Omondi-Court Assistant

