



REPUBLIC OF KENYA



KENYA LAW
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Kimilu (Suing as guardian ad litem of Kisii Children Home) & 3 others v Abuga & 6 others (Civil Suit 220 of 2017) [2023] KEELC 19955 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19955 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
CIVIL SUIT 220 OF 2017
M SILA, J
SEPTEMBER 21, 2023

BETWEEN

KELVIN KIMILU (SUING AS GUARDIAN AD LITEM OF KISII CHILDREN HOME) 1ST PLAINTIFF
CHILD WELFARE SOCIETY OF KENYA 2ND PLAINTIFF
CHILD WELFARE SOCIETY OF KENYA (KISII BRANCH) 3RD PLAINTIFF
HON ATTORNEY GENERAL 4TH PLAINTIFF

AND

JOSHUA ABUGA 1ST DEFENDANT
PAMELA ISENSI 2ND DEFENDANT
REBECCA MBOYA 3RD DEFENDANT
PETERSON ONDICHO 4TH DEFENDANT
FRED NYAKUNDI 5TH DEFENDANT
PETER OYARO 6TH DEFENDANT
SEVENTH DAY ADVENTIST CHURCH 7TH DEFENDANT

RULING

1. The application before me is that dated 20 April 2023 filed by the defendants. The substantive prayer in the motion is prayer (3) which seeks the following order :-

“That the Honourable Court be pleased to review its ruling delivered on November 3, 2022 and the subsequent order emanating therefrom and either dismiss the applicant’s



application dated May 14, 2020 or partially allow it with respect to the land parcel Kisii Municipality/Block III/153 measuring 0.6309 Ha.”

2. It will be observed that what the applicants seek is a review of the ruling delivered on 3 November 2022. Before I delve further into the application, I think it is important that I provide the background leading to the said ruling.
3. This suit was commenced through a plaint filed on 21 November 2017 by the State Law Office. The 1st plaintiff is an individual suing on behalf of all the children at Kisii Children’s Home. He is also the administrator and manager of the Children’s Welfare Society – Kisii Children’s Home; the second plaintiff is the Child Welfare Society of Kenya said to be a State Corporation; the 3rd plaintiff is the Child Welfare Society of Kenya, Kisii Branch; the 4th plaintiff is the Attorney General. The defendants are officials and employees of the Seventh Day Adventist Church (Millennium SDA, Kisii). It was pleaded that the core function of the 2nd plaintiff is to protect and provide care to vulnerable children and that it has numerous children under its care. It operates the Kisii Children’s Home which was said to have over 300 vulnerable children within the land parcel Kisii Municipality/Block III/153 (the suit land or simply land parcel No 153). It was pleaded that the 3rd plaintiff was the legal owner of the suit land which was acquired in 1974. It was pleaded that in the year 2010, the Millennium SDA Church approached the plaintiffs with a request to be afforded a temporary prayer shed within the premises of the Children’s Home which request was granted. It is averred that the Church was given a limited licence to construct a temporary prayer shed to be used on Saturdays only, with a caveat that the prayers would not interfere with the peaceful occupation of the children, and occupation was to be surrendered whenever requested. It was pleaded that in 2012, the defendants started engaging in illegal activities which contravened the terms of the limited licence, inter alia, improving the temporary shed to make it permanent; erecting new structures without consent; creating noise pollution; lobbying the County Government to force the plaintiffs to continue accommodating the church on the land; and engaging hooligans to threaten the workers of the plaintiffs. It was pleaded that the defendants destroyed the plaintiffs’ perimeter wall and tried to illegally transfer the land into their name. In the plaint, the plaintiffs inter alia sought an order of permanent injunction to restrain the defendants from the suit land and have them evicted.
4. Together with the plaint, the plaintiffs filed an application seeking orders of injunction pending hearing and determination of the case. A reply to that application was filed but there was never filed a defence to the suit. In the reply, the defendants seemed to contend that the suit land was allotted to them in the year 2001 and that they have never been licences of the plaintiffs. They displayed an allotment letter of an unsurveyed plot for Millennium SDA Church which allotment letter is dated 25 June 2001. When the application for injunction came up for inter partes hearing, Mr. Nyamurongi, learned counsel then on record for the defendants, urged that the defendants do not occupy the land parcel No 153 but other land outside it. Mutungi J, who was then handling the matter, took note of the contention that the defendants occupy other land, and directed the Kisii District Land Registrar and Surveyor to proceed to the ground and fix the boundaries for the Plot No 153 and file a report. This was done and the report presented to court on 26 July 2018. The court thereafter directed parties to file their observations on the report and counsel did file their written comments on the same. The court then delivered a ruling dated 13 May 2013.
5. In the ruling, Mutungi J, held that the position of the defendants, as outlined in the replying affidavit, was that they are not operating within the land parcel No 153 but outside it, and lay no claim to this land parcel No 153. He however found that the report of the Land Registrar and Surveyor demonstrated that there was a temporary structure built by the Church and occupied by it. He held that the report conclusively established that the Children’s Home is located on the suit land and that



it is on this plot that the Church has its temporary structure where they hold prayers. He adopted the report as establishing that the plaintiffs are the rightful legal owners of the suit land and was of opinion that the report disposes of the issues in contention. He proceeded to enter judgment for the plaintiffs in the following terms :-

1. That land parcel Kisii Municipality/Block III/153 belongs to the 2nd and 3rd plaintiffs and they are entitled to its exclusive use.
 2. That the defendants have occupied a portion of land parcel Kisii Municipality/Block III/153 as licencees of the 2nd and 3rd plaintiffs.
 3. That the defendants have acted inconsistently with the licence granted to them by staking ownership claims to the portion they were permitted to use and accordingly the licence stands cancelled and/or revoked.
 4. The defendants shall vacate the premises they occupy on the plaintiffs' land and deliver vacant possession within 90 days from the date of this ruling failing which an order for the forcible eviction will issue on the application of the 2nd and 3rd plaintiffs.
 5. The parties will bear their own costs of the suit.
6. Subsequent to the above ruling, the defendants filed an appeal to the Court of Appeal, being Kisumu Civil Appeal No 152 of 2019 which was dismissed in a judgment delivered on 18 December 2020. Through an application dated 14 May 2022, the 1st – 3rd plaintiffs filed an application seeking orders of eviction of the defendants from the land parcel No 153 so as to enforce the decree. Within that application, it was said that the land parcel No 153 had been converted into LR No Kisii Municipality/Block III/649. The court was also informed of the fact that the defendants had filed an appeal which was dismissed. It was also stated that to circumvent the judgment, the defendants filed another suit, being Kisii ELC No 9 of 2021, which was struck out on 2 February 2022 as res judicata. A replying affidavit opposing the motion for eviction was filed. Inter alia, it was averred that the plaintiff had filed suit seeking eviction orders on the Plot No 153 and that they were now seeking eviction on the plot No 649 which they argued was a different plot. It was contended that no basis had been provided upon which parcel No 153 became parcel No 649 and judgment for parcel No 153 cannot be applied to parcel No 649. It was also urged that parcel No 649 measures 1.429 Hectares whereas parcel No 153 measured 0.6309 hectares.
7. The application was heard by Onyango J, who delivered ruling on 3 November 2022. In her ruling, she held that the issue regarding the land parcel No 649 was what was in issue in the suit Kisii ELC No 9 of 2021 and the court could not allow the defendants to introduce new issues touching on the change of character of land parcel No 153 to 649 to circumvent the orders of the court. The court allowed the application for eviction.
8. It will be recalled that it is this ruling which the defendants now seek to review.
9. The applicants seek review on the grounds that the defendants were issued with a letter of allotment dated 25 June 2011 to a plot measuring 0.132 Ha; that the land they were allotted shares a boundary with the land parcel No 153 which measures 0.6309 Ha; that judgment was in favour of the plaintiff for this land parcel No 153 measuring 0.6309 Ha; that the order of eviction was over the land parcel No 649 measuring 1.429 Ha; that the defendants were never given opportunity to be heard with regard to this parcel No 649; that it is unfair for eviction to issue over the parcel No 649 which is bigger in size.



10. To oppose the motion, the plaintiffs filed a replying affidavit sworn by Irene Mureithi, the Executive Director of the Child Welfare Society of Kenya. She has referred to the Court's rulings of 13 May 2019, the Court of Appeal judgment of 18 December 2020 vide which the applicant's appeal was dismissed, and the ruling of 2 February 2022 in the suit Kisii ELC No 9 of 2021. She avers that litigation must come to an end.
11. I directed parties to file submissions and I have taken note of the submissions filed by counsel for the applicants and the submissions filed on behalf of the 1st – 3rd plaintiffs.
12. What I have before me is an application for review and the same is governed by Order 45 of the Civil Procedure Rules. Order 45 Rule 1 provides as follows :-
- 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.
13. From the above it will be noted that a party aggrieved by an order from which an appeal is allowed but not preferred, may seek review on the following grounds :-
- i. Discovery of new and important matter or evidence which was not available to the applicant and could not be produced by him at the time the order was made.
 - ii. Mistake or error apparent on the face of the record; or
 - iii. Other sufficient reason.
14. In this application, I have not seen any new evidence being shown. The application cannot therefore be on account of any new evidence. If it is mistake or error apparent on the face of record, this court has not been informed what mistake or error is apparent on the face of record. What the applicants are doing is simply repeating what they informed the court when hearing the application for eviction, i.e that eviction ought to issue only with regard to the parcel No 153 and that there is no basis upon which eviction should issue over the land parcel No 649. That argument was considered and dismissed. The court did not, out of the blue, order the plaintiff to issue an eviction over the parcel No 649, mistaking it for the parcel No 153. It does not thus qualify to be an error apparent on the face of record.



15. The applicants clearly appear aggrieved by the reasoning of the court in extending eviction to the parcel No 649, but then, if that is their gripe, what they need to do is file an appeal against that decision, not lodge a review. This court cannot sit on appeal against the decision of Onyango J, for I am merely a successor of the same judge sitting in Kisii. It must be understood that review is not a substitute for appeal. If a person is aggrieved by the reasoning of the court when making a decision, then that person ought to file an appeal, not ask for the court to rehear the same application by lodging a review, in the hope that if the court rehears the application then it will come to a different finding. The court has no mandate to hear the same matter or same application twice for this will violate the res judicata rule.
16. Review is only restricted to discovery of new matter or an error that is apparent on the face of record or other sufficient reason. I have already mentioned that I have not seen any new evidence or error apparent on the face of the record for the court did consider whether or not the eviction should be restricted to what is described as parcel No 153 or it should extend to what is the parcel No 649. That, as I have said was fully interrogated and this court cannot try to reverse that on its own reasoning.
17. I have also not been persuaded that there is any other sufficient reason to warrant a review of the ruling of the court. The issues regarding the suit land have been litigated all the way to the Court of Appeal and the applicants lost. They lodged another case which is the case Kisii ELC No 9 of 2021 and they also lost. Litigation must come to an end and there needs to come a time when a party must accept defeat.
18. I really see no point of saying more. XZC There is no merit in this application and it is hereby dismissed with costs. The orders of eviction can be executed.
19. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 21ST DAY OF SEPTEMBER 2023.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

