



**Nyamai & 291 others v South Eastern University College & another (Environment & Land Case E001 of 2021) [2023] KEELC 21234 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21234 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT & LAND CASE E001 OF 2021  
LG KIMANI, J  
OCTOBER 31, 2023**

**BETWEEN**

**WILLIAM NYAMAI & 291 OTHERS ..... PLAINTIFF**

**AND**

**SOUTH EASTERN UNIVERSITY COLLEGE ..... 1<sup>ST</sup> RESPONDENT**

**UKAMBA AGRICULTURAL INSTITUTE LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Plaintiff/Applicants filed the Notice of Motion dated 11<sup>th</sup> May 2023 seeking the following Orders:
  1. Spent
  2. That this Honourable Court do review its orders of 6<sup>th</sup> December 2022 and set aside and/or vary the same on such terms as it deems fit and expedient.
  3. That pending the determination of prayer 2 above, this Honourable Court be pleased to grant orders of status quo that is, the plaintiffs should not be evicted, nor their houses demolished, crops destroyed, assaulted and harassed and/or their possession of the suit property be interfered with the respondents pending the hearing of this application interpartes.
  4. That the costs of this application be provided for.
2. The Applicants rely on the grounds that there has been a discovery of new evidence that would tilt the ruling of the court delivered on 6<sup>th</sup> December 2022. They state that the suit properties belong to Ukamba Agricultural Institute Limited a private limited company and that the 1<sup>st</sup> Respondent has no reasons whatsoever to evict the plaintiff from the suit land given the ownership by the 3<sup>rd</sup> Respondent.
3. The Application is supported by the affidavit of the 1<sup>st</sup> Applicant, William Nyamai, on behalf of the other Applicants, who deposed that by the ruling delivered by this Court on 6<sup>th</sup> December 2022 it was



determined that from the evidence provided that the suit property belongs to a public institution and thus declined to issue injunctive orders. It was claimed that the 1<sup>st</sup> Respondent embarked on evicting the applicants as a result of the ruling by demolishing their houses and cutting down crops besides harassing and intimidating them.

4. They claim that it was after the ruling that they discovered that the 1<sup>st</sup> Respondent was not the legal owner of the suit land which was owned by the 3<sup>rd</sup> Respondent as per the copy of the Certificate of Lease attached which was issued under the repealed *Registration of Titles Act* in the name of Ukamba Agricultural Institute Ltd.
5. According to the 1<sup>st</sup> Applicant, the orders were issued on an erroneous belief that the suit property belonged to the 1<sup>st</sup> Respondent, which is a public entity, and that there is no plausible explanation as to why the 1<sup>st</sup> Respondent would evict them since it is the 3<sup>rd</sup> Respondent who is the legal owner.
6. The 1<sup>st</sup> Applicant deposed that they have lived on the suit land all their lives and it would be unjust to evict them without affording them the opportunity to have their case determined on merit, through a full hearing, therefore they are praying that the status quo be maintained during the hearing and pendency of this application.

#### **The 1<sup>st</sup> Respondent's Grounds of Opposition.**

7. The 1<sup>st</sup> Respondent filed Grounds of Opposition dated 17<sup>th</sup> May 2023 on the grounds that the application is vexatious, frivolous and scandalous and serves the purpose of delaying expeditious disposal of the matter, considering that similar applications and orders had been previously filed and the Court pronounced itself on the same.
8. The 1<sup>st</sup> Respondent stated that the ruling of the Court dated 6<sup>th</sup> December 2022 issued orders after careful consideration and determination of the applicants' application dated 27<sup>th</sup> June 2022, and so, the Court cannot therefore review, set aside and/or vary its ruling. Instead, the applicants ought to have appealed against the same to a higher court if they felt aggrieved by this Court's decision as per the law. Similarly, the Court pronounced itself on the same issue.
9. They claim that the introduction of the 3<sup>rd</sup> Respondent, Ukamba Agricultural Institute Ltd in this application is premature, as they are not substantive parties to this suit, nor have the applicants formalized the directions of this Court by amending and filing their Originating Summons, enjoining them.

#### **Applicant's Submissions**

10. Counsel for the Applicants made written submissions which the court has considered. He submitted that the application for review is made upon discovery, after carrying out due diligence, that the suit property does not belong to the 1<sup>st</sup> Respondent but to Ukamba Agricultural Institute Limited a body corporate registered under the *Companies Act* CAP 486 Laws of Kenya capable of owning assets. The Applicants state that the Court assumed that the 1<sup>st</sup> Respondent had acquired the assets of the company.
11. The application is brought under the provisions of Order 45 of the *Civil Procedure Rules*, which they submit gives wide discretion to make orders of review based on what the court would consider to be sufficient reasons. They rely on the ground of discovery of new and important evidence, which is sufficient for this court to review its ruling, particularly on the consideration that the said company has not denied the fact that the applicants have been in continuous, uninterrupted, and peaceful occupation of the suit property for the last 12 years.



## 1<sup>st</sup> Respondent's submissions

12. Counsel for the 1<sup>st</sup> Respondent filed written submissions and cited several authorities that the court has considered. She submitted that there is no discovery of new facts that warrants the Court to review its orders issued on 6<sup>th</sup> December 2022, because before filing this application, the applicants had filed an application dated 21<sup>st</sup> September 2022 seeking to enjoin the Ukamba Agricultural Institute as an interested party for the reason that the title document of the suit property is registered in its name.
13. The 1<sup>st</sup> Respondent contended that by Legal Notice 102 of 2008, the South Eastern University College (SEUCO) was established to succeed the Ukamba Agricultural Institute (UKAI), an institute established in 1976. All the property, rights, and liabilities held by UKAI were vested to SEUCO. Paragraph 4 of the Legal Notice made on 15<sup>th</sup> July 2008 states as follows:

“ All rights, liabilities and assets held by or by anybody on behalf of Ukamba Agricultural Institute, existing at the commencement of this Order, shall be automatically and fully transferred to the University College.”
14. The 1<sup>st</sup> Respondent relied on the case of *Sanitam Services (E.A.) Limited v Rentokil (K) Limited & another*(2019)eKLR and *Francis Njoroge v Stephen Maina Kamore*(2018)eKLR on the application of Section 80 and Order 45 of the *Civil Procedure Rules(2010)* as well as the elements necessary for an application for review to succeed.
15. It is the 1<sup>st</sup> Respondent's submission that from the inception of this suit, they attached the said Certificate of Lease in its pleadings. They cited the case of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others*(2021)eKLR for the submission that the power of review can be exercised only for the correction of a patent error of law or fact.
16. The 1<sup>st</sup> Respondent's view is that the Applicants have been approaching the court with frivolous applications to get unattainable orders, considering the circumstances and the use of the suit property where a government and a public university sit.
17. Relying on the case of *Julius Mukami Kanyoko & 2 others v Samuel Mukua Kamere & another*(2014) eKLR Counsel submitted that the application is irregular for failure to attach the Court order to be reviewed.

## Analysis and Determination.

18. The Applicants seek review of the Court's orders of 6<sup>th</sup> December 2022, where the Court dismissed their application for injunction dated 19<sup>th</sup> October 2021 and amended on 27<sup>th</sup> June 2022. The Court gave reasons for dismissal inter alia that taking into account the documents provided by the parties, the suit property, land parcel L.R. No. 13529 situated Kwa Vonza Location in Kitui County is likely public land and that the 1<sup>st</sup> Respondent is a public body or authority utilizing the suit land for a public purpose.
19. The Applicants claim that they have now discovered that the suit property is registered in the name of Ukamba Agricultural Institute Limited and not the 1<sup>st</sup> Respondent. They annexed a Certificate of Lease showing that the lease commenced its term on 1<sup>st</sup> October 1976.



20. The statutory provisions that govern the review of orders and decrees are Section 80 of the *Civil Procedure Act* CAP 21 and Order 45 of the *Civil Procedure Rules, 2010*. Section 80 of the Act provides that:

“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, 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”

21. Order 45 Rules 1 of the *Civil Procedure Rules (2010)* provides that:

“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.”

22. The requirements necessary for orders of review to be granted have been widely elaborated by the Courts. In the case cited by the Respondent, *Francis Njoroge v Stephen Maina Kamore* [2018] eKLR the Court held that:

“Therefore, Order 45 of the *Civil Procedure Rules, 2010* is very explicit that a court can only review its orders if the following grounds exist:-

- (a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- (b) There was a mistake or error apparent on the face of the record; or
- (c) There were other sufficient reasons; and
- (d) The application must have been made without undue delay.”

23. Have the applicants shown that the certificate of lease for the suit land is a new discovery of an important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced at the time when the order was passed? Have the applicants shown that there has been a mistake or error apparent on the face of the record, or for any other sufficient reason as submitted?

24. The Court record shows that the Certificate of Lease issued to Ukamba Agricultural Institute Limited on 28<sup>th</sup> September 1999 and attached to the Application herein was presented to the court long before this application by the 1<sup>st</sup> Respondent when they annexed the said certificate of lease to the replying



affidavit of Prof. Geoffrey Muluvi sworn on 28<sup>th</sup> October 2021 and filed in court on 29<sup>th</sup> October 2021 in reply to the Applicant's application dated 19<sup>th</sup> October 2021.

25. The court record further shows that based on the certificate of title, the applicant applied to amend the Originating Summons herein by an application dated 3<sup>rd</sup> December 2021 allowing them to cite the correct land reference number.
26. Further, the said copy of the certificate of title was presented by the applicants in support of their application dated 21<sup>st</sup> September 2022 seeking to join Ukamba Agricultural Institute Limited as a Respondent in the suit. The said application was allowed. In their replying affidavit, the 1<sup>st</sup> Respondent also attached the same certificate of title and stated just as they have reiterated in this application, that they inherited all property, rights and liabilities of Ukamba Agricultural Institute (UKAI) after the Legal Notice 102 of 2008 was issued.
27. In the court's view, the certificate of title presented by the applicants does not amount to new and important evidence as it was presented before the hearing and determination of the Notice of Motion dated 19<sup>th</sup> October 2021 that led to the court's ruling dated 22<sup>nd</sup> December 2022. Further, it has not been shown that the existence of the said certificate of title was not within the knowledge of the Applicants or could not after the exercise of due diligence have been discovered at the time the order was made.
28. In the ruling dated 6<sup>th</sup> December 2022, the court considered the application filed, the supporting affidavit and the documents attached, the replying affidavits and the attached documents and submissions by Counsel. The Court bears in mind that a review is not an appeal in disguise whereby an erroneous decision is reheard and corrected and the court while exercising the power of review cannot sit in appeal over its judgment/decision.
29. The court agrees with the authority cited by Counsel for the 1<sup>st</sup> Respondent [Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others](#)(2021)eKLR where the court stated as follows;

“As the Supreme Court of India in the case of *Ajit Kumar Rath v State of Orisa & others*, 9 Supreme Court Cases 596 at Page 608. stated: -

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason " ..... means a reason sufficiently analogous to those specified in the rule”
30. The court finds that the certificate of lease the subject matter of the application herein was on the court's record and the same was considered at the time when the ruling dated 6<sup>th</sup> December 2022 was made.
31. The 2<sup>nd</sup> prayer in the application herein is indeed an abuse of the court process since similar orders have been sought and dismissed in the applications dated 19<sup>th</sup> October 2021 and 20<sup>th</sup> December 2022.



32. For the foregoing reasons, the court finds that the application dated 11<sup>th</sup> May 2023 lacks merit and the same is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 31<sup>ST</sup> DAY OF OCTOBER 2023**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

The ruling read in open court in the presence of-

Kalwa ..... for the Applicants

Ms Wambui.....for the 1<sup>st</sup> Respondent

