Nderitu v Attorney General & 12 others (Environment & Land Petition 2 of 2023) [2023] KEELC 21262 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21262 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ENVIRONMENT & LAND PETITION 2 OF 2023

YM ANGIMA, J

OCTOBER 26, 2023

(FORMERLY NYAHURURU ELC PET. 4 OF 2022)

(FORMERLY ELC NYERI PETITION NO. 4 OF 2012)

IN THE MATTER OF ARTICLES 20, 21 & 23 OF THE CONSTITUTIONAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 3, 10, 40 & 259 OF THE CONSTITUTION OF KENYA

BETWEEN

BETWEEN

VINCENT NYINGI NDERITU ..... PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

CHIEF, NYAKEO LOCATION ..... 2ND RESPONDENT

DISTRICT OFFICER, KINANGOP DIVISION ..... 3RD RESPONDENT

OFFICER COMMANDING STATION HARAKA POLICE STATION .... 4TH RESPONDENT

JOSEPH NDERU WANGECHE ..... 5TH RESPONDENT

GRACE WAIRIMU ..... 6TH RESPONDENT

NGARUIYA KIRIKA ..... 7TH RESPONDENT

GACHERU KANYARA ..... 8TH RESPONDENT

KABURA MUTUABU ..... 9TH RESPONDENT

HANNAH WAMBUI ..... 10TH RESPONDENT

NGURE MUTHINJI SAMUEL ..... 11TH RESPONDENT

KARIUKI MUCHIRI ..... 12TH RESPONDENT

MARIA WANJIKU MUCHAI ..... 13TH RESPONDENT

RULING

A. Introduction

1. By a judgment dated 11.02.2015 the court (Hon. Justice A. Ombwayo) allowed the Petitioner's petition and entered judgment in his favour in the following terms:

    a. The Claim for adverse possession by the 5th to 13th Respondents is not valid because they have not been in open and quiet possession of the suit property, being Land Title Number Nyandarua/Njabini/656, as the whole claim has been characterized by dispute after dispute.

    b. The 5th to 13th Respondents have been in illegal possession of the Petitioner's land being Land Title Number Nyandarua/Njabini/656 and have no reason whatsoever to remain on the said parcel of land.

    c. A declaration is hereby made that the Petitioner's right to land being Land Title Number Nyandarua/Njabini/656 is protected by article 40 of the Constitution of Kenya.

    d. The District Land Registrar and the District Land Surveyor, Kinangop District is hereby ordered to visit the suit land and reinstate the beacons marking the boundaries of the said land being Land Title Number Nyandarua/Njabini/656.

    e. An order is hereby made directing the 5th to 13th Respondents to forthwith vacate any portion of land being Land Title Number Nyandarua/Njabini/656 that they currently unlawfully occupy.

    f. The 5th to 13th Respondents and all persons claiming under them or at par with them are hereby restrained from entering, remaining on or ill any other manner trespassing to or interfering with the Petitioner's ownership, and exclusive quiet occupation and enjoyment of all that parcel of land known as Land Title Number Nyandarua/Njabini/656.

    g. An order is hereby issued directing the 1 st to 4th Respondents to ensure compliance with the above orders.

    h. The court declines to grant an order directing the Respondents jointly and severally to pay the Petitioner general or exemplary damages as claimed due to the fact that the violator of rights and freedoms envisaged under article 40 of the Constitution is the state and not individuals.

    i. An order is hereby made directing the 5th to 13th Respondents to pay damages in the nature of mesne profits at 12% of the value of the property for the number of years that they have used the Petitioner's parcel of land from 1972 till the time of vacation.

    j. The prayer for an order directing the 5th to 13th Respondents to pay damages for the dent in reputation of the Petitioner as a result of their libeling him as a land grabber is rejected as the same was not proved to the satisfaction of the Court.

    k. Costs of this Petition are awarded to the Petitioner.

2. It would appear that vide Nyeri J.R. Misc. Application No.3 of 2015 the 5th – 13th respondents (the respondents) sought leave of court to challenge the said judgment. The material on record shows that

the application for leave to apply for judicial review was refused on 24.01.2017. There is no indication on record to show whether the respondents challenged the denial of leave before the Court of Appeal.

B. Respondent's Instant Application

3. Vide a notice of motion dated 21.06.2023 grounded upon Articles 40 & 159(2)(d) of the Constitution of Kenya, 2010, Sections 1A, 1B, 3, 3A & 8 of the Civil Procedure Act (Cap.21), Order 45 and Order 51 rule 1 of the Civil Procedure Rules, 2010 (the Rules) and all other enabling provisions of the law the respondents sought the following orders:

    a. Spent;

    b. This honourable court be pleased to grant leave to the firm of M/S Osur & Associates Advocates to come on record after judgment in place of Ndegwa Wahome & Co. Advocates.

    c. Spent;

    d. Pending hearing and determination of this application, this honourable court be pleased to enjoin the Nyandarua Land Registrar, County Government of Nyandarua, the Inspector General of Police, Nyandarua County Police Commander as interested parties.

    e. Pending the interpartes hearing and determination of this application, this honourable court be pleased to issue a stay of execution of it's judgment and decree dated 19th February, 2015 and all consequential orders issued thereof.

    f. Pending the interpartes hearing and determination of this application, this honourable court be pleased to review, and/or vary and/or set aside its decree dated 31st March, 2015 and orders of 31st May, 2023, and allow the Land Registrar Nyandarua County, (hereinafter "the intended 14th respondent") to conduct a re-surveyance of not only the suit property being Nyandarua/Njabini/656 but also the adjacent lands being plots number 57, 56, 58, 62, 63, 131, 129, 127, 125 and 99.

    g. Pending the interpartes hearing and determination of this application, this honourable court be pleased to direct that a re-survey is conducted with regards to Njabini Plot numbers 57, 58, 62, 63, 131, 129, 127, 125 and 99, subject to the 1963 Njabini settlement scheme nominal roll.

    h. Costs of this application be provided.

4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Grace Wairimu on 21.06.2023 on behalf of the respondents. The main grounds were that, first, the petitioner had commenced an illegal and unprocedural eviction of the respondents from their respective parcels of land. Second, that the judgment and decree the petitioner was seeking to execute was statute barred under Section 4(4) of the Limitation of Actions Act (Cap.22). Third, that there was an error apparent on the face of the record. Fourth, that the application had been filed within a reasonable time. Fifth, that the decree should be reviewed for "any other reason".

5. The court has noted that the respondents did not in their supporting affidavit render any justification for seeking the joinder of the proposed four (4) interested parties in the proceedings long after delivery of judgment. The respondents did not also indicate what claims they had against them and how their joinder would be of assistance to them in the proceedings.

C. Petitioner's Response

6. The petitioner filed a lengthy 93 paragraph replying affidavit sworn on 24.07.2023 in opposition to the application on several grounds. He denied that he intended to evict the respondents from their respective parcels of land as alleged or at all. It was denied that the decree passed on 11.02.2015 was statute barred under the Limitation of Actions Act. It was also denied that the petition was seeking enforcement of the judgment dated 13.05.1992 or the ruling and order dated 18.03.1994.

7. The petitioner disputed that there was any error apparent on the face of the record as alleged or at all, or that there was any other sufficient reason on which the judgment dated 11.02.2015 could be reviewed. He further contended that there was unreasonable delay in filing the application for review which had not been explained. The court was consequently urged to dismiss the application with costs.

D. Attorney General's Response

8. There is no indication on record of the Attorney General for the 1st – 4th respondents having filed any response to the respondents' said application.

E. Directions on Submissions

9. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the respondents' submissions were filed on 27.09.2023 whereas the petitioner's submissions were filed on 11.10.2923. The Attorney General did not file any submissions in the matter.

F. Issues for Determination

10. The court has perused the notice of motion dated 21.06.2023, the petitioner's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following are the key issues which arise for determination herein:

    a. Whether leave should be granted to the firm of M/S Osur & Associates Advocates to come on record in place of M/S Ndegwa Wahome & Co. Advocates.

    b. Whether the respondents have made a case for the joinder of the proposed Interested Parties in the petition.

    c. Whether the judgment dated 13.05.1992 and the ruling dated 18.03.1994 are statute barred and, if so, what remedial action the court should take.

    d. Whether the respondents have made out a case for review or setting aside of the judgment and decree dated 19.02.2015.

    e. Who shall bear costs of the application.

G. Analysis and Determination

a. Whether leave should be granted to the firm of M/S Osur & Associates Advocates to come on record in place of M/S Ndegwa Wahome & Co. Advocates

11. The 1st – 13th respondents sought leave to change advocates after judgment on the basis of Order 9 rule 9 of the Rules which requires that either leave of court be sought or the consent of the outgoing

advocate be obtained and filed. The petitioner did not raise any objection to the leave sought and there was no objection by the outgoing advocates.

12. The court has, however, noted that there is no evidence on record to demonstrate that the said application was ever served upon the firm of M/S Ndegwa Wahome & Co. Advocates as required by the Rules. The court is, nevertheless, of the opinion that representation of parties or a change of advocates is a procedural issue hence the court is obligated to dispense substantive justice without undue regard to technicalities of procedure. Consequently, the court is inclined to grant the leave sought for change of advocates after judgment.

b. Whether the respondents have made out a case for a stay of execution of the decree dated 19.02.2015

13. In their own notice of motion, the respondents prayed for stay of execution of the decree dated 19.02.2015 together with all consequential orders pending hearing and determination of the application dated 21.06.2023. It would appear that the order for stay is really spent because it was to last until the hearing and determination of the application. The respondents contended that in the absence of a stay the petitioner shall continue destroying their properties to their detriment. It was further contended that their intended eviction from their properties was unlawful as the petitioner had not complied with the mandatory requirements of Sections 152B, 152E and 152E of the Land Act, 2012 as amended in 2016.

14. The court takes the view that an order for stay should only be granted for a limited period pending either review or appeal, or pending resolution of an existing dispute. The record shows that the dispute between the parties was conclusively resolved vide the judgment dated 19.02.2015. There is no pending appeal against that judgment. The only application for review which has been pending is being determined by this ruling. An order for stay of execution cannot be granted at large when there is no pending appeal or proceedings.

15. Moreover, a perusal of the application does not reveal that any warrants of eviction have been issued for the eviction of the respondents from their parcels of land. The material on record simply shows that the Land Registrar visited the petitioners' property and reinstated the beacons therein whereas the police service provided the necessary security. It is also strange for the respondents to ask for issuance of a notice of 3 months when they have been aware of the terms of the decree for the past 8 years or so. In the result, the court finds no justification for granting a blanket stay of the decree dated 19.02.2015.

c. Whether the respondents have made a case for the joinder of the proposed Interested Parties in the petition

16. The court has considered the material and submissions on record on this issue. In their notice of motion, the respondents sought the joinder of the County Land Registrar – Nyandarua, the County Government of Nyandarua, the County Police Commander – Nyandarua and the Inspector General of the National Police Service. The respondents did not, however, either in the motion or the supporting affidavit lay any basis or justification for their joinder as interested parties.

17. It is not clear why the respondents wanted those persons to be joined in the proceedings long after the hearing and determination of the petition. It was not contended that their joinder was necessary for the purpose of resolving the instant application for review. It was not demonstrated that they had any legal or identifiable stake in the proceedings as required by law. It is also noteworthy that none of those persons applied to be joined as interested parties in the proceedings.

18. The status of an interested party was considered by the High Court in the case of Kenya Medical Laboratory Technicians & Technologists Board & 6 Others –vs- Attorney General & 4 Others [2017] eKLR as follows:

> " A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights.[4] In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established.[5] It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty in the proceedings directly identifiable by examining the questions involved in the suit. From my analysis above, the applicant has demonstrated a legal and identifiable interest and also a duty to participate in the proceedings. An interested party may also be added to the case by the court itself, where it appears to the court that it is desirable to do so to resolve a dispute or an issue. I hold the view that the presence of the applicant will assist the court to resolve the issues raised in this petition."

19. The court is thus far from satisfied that the respondents have demonstrated a sound basis for the joinder of the 4 persons as interested parties in the proceedings. It is also evident from the petition that the Attorney General is a party to the petition hence it is not clear why the respondents wanted the 4 government officers to be specifically joined in the proceedings more than 6 years after the decree was passed. In the premises, the court is not inclined to grant the order for joinder of those persons.

d. Whether the judgment dated 13.05.1992 and the ruling dated 18.03.1994 are statute-barred and, if so, what remedial action the court should take

20. The court has considered the material and submissions on record on this issue. It is evident from the material on record that the judgment dated 13.05.1992 and was rendered in NBI HCCC No. 2766 of 1976 – Francis Mwangi Gitonga & 9 Others –vs- Vincent Nyingi Nderitu & Another. It is clear from the record that the said judgment merely dismissed the respondents' claim over Parcel 656. The court is thus unable to appreciate how a dismissal order can become time barred after the lapse of 12 years from the date of dismissal.

21. The court has perused a copy of the ruling dated 18.03.1994 which was also delivered in the same suit. It is evident that the said ruling merely dismissed the respondents' chamber summons seeking an injunction and stay of execution pending appeal. It is thus unclear how a dismissal order of an application rendered more than 12 years ago can become time barred under the Limitation of Actions Act (Cap.22).

22. The court does not agree with the respondents' contention that the judgment dated 19.02.2015 in the instant petition was "hoisted" upon the two dismissal orders of 1992 and 1994. The court is unable to accept that the instant petition was a suit for enforcement of the 1992 judgment and the 1994 ruling. It would be turning logic on its head to insist that the petition was an action for "enforcement" of the two dismissal orders. The court takes the view that once a party's suit or application is dismissed by a court of competent jurisdiction there is nothing to enforce or execute.

23. Even if the court had found that the decree of 1992 and the order of 1994 were statute-barred the court would not have been inclined to take any remedial action such as reviewing them. Those orders were

not made in the instant suit or proceedings. The proper forum for the respondents to seek remedial action would be NBI HCCC No. 2766 of 1976 and not the instant petition. The only significance of the 1992 decree in this petition is perhaps to demonstrate that the respondents were granted a fair opportunity to canvass their claim over parcel 656 and that they failed to prove their claim.

e. Whether the respondents have made out a case for review or setting aside of the judgment and decree dated 19.02.2015

24. Whereas the respondents submitted that they had demonstrated grounds for review of the decree the petitioner contended otherwise. The respondents submitted that there was an error apparent on the face of the record because the judgment of 19.02.2015 was based upon the expired decree of 1992 and expired order of 1994. They further contended that the judgment should be reviewed for "any other sufficient reason" to enable them to participate in the survey of all the properties.

25. Order 45 rule 1 of the Rules on review stipulates 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."

26. Although a judgment or decree may be reviewed on the ground of an error apparent on the face of the record, it is the duty of the applicant for review to demonstrate the existence of such error. The respondents contended that there existed such error because the earlier decree of 1992 and the order of 1994 were statute-barred hence they could not form the basis of the judgment and decree dated 19.02.2015.

27. The court has already found that the decree dated 13.05.1992 was in respect of dismissal of the respondents' suit of 1976. It was not, and it was not capable of being, time barred under Section 4(4) of the Limitation of Actions Act (Cap.22). Similarly, the court has also found that the order of 18.03.1994 was a dismissed order which was not capable of being statute-barred. Even if the decree of 1992 and the order of 1994 were statute-barred as claimed by the respondents, such expiry would be of no consequence to the instant petition since the petitioner's claim was heard on merit and allowed vide the judgment dated 19.02.2015.

28. The respondents also wanted a review for any other "sufficient reason" because they wanted to participate in the survey of all the properties, that is, including their own parcels adjoining the petitioner's Parcel 656. The court finds the respondents' contention quite baffling because their own parcels were never the subject of either the 1976 suit or the instant petition. The subject of the 1976 suit was the petitioner's Parcel 656. The property in dispute in the instant petition is also Parcel 656. There was never a dispute or litigation about the respondents' own parcels. It is thus strange for the

respondents to ask that their own parcels should be surveyed when they were never the subject of the instant petition.

29. The court has noted from the judgment dated 19.02.2015 that the trial judge did not direct a general survey but only directed that the Land Registrar and Land Surveyor should reinstate the beacons of Parcel 656. The restoration or reinstatement of boundaries would not necessarily require the expertise of the respondents to undertake. All that the respondents may ask for is to be present or represented during the exercise. There is, however, no indication that the respondents ever made an application to that effect for the 8 or so years the decree has been in place even though they were represented by advocates all along.

30. Be that as it may, the court finds the respondents' belated desire to be represented in the survey to be an afterthought. The court also finds that the respondents' belated application to have been overtaken by events since the Land Registrar has already undertaken and completed the task of reinstating the beacons of Parcel 656. The court is thus far from satisfied that the respondents have demonstrated their pleaded grounds for review as required by law hence the court is not inclined to grant the prayer for review or setting aside any of the decrees and orders sought to be reviewed.

31. Even if the respondents had demonstrated the grounds for review the court would still have declined to grant the application on account of unreasonable delay in seeking the review. The law requires that such application should be filed without unreasonable delay under Order 45 rule 1 of the Rules. There is no dispute that two of the decrees sought to be reviewed were passed in 1992 and 2015 respectively. The order sought to be reviewed was made in 1994.

32. The respondents have not rendered any or any reasonable explanation for the lengthy delay in filing the instant application for review. The respondents' attempt to render an explanation in their application dated 09.06.2023 which was withdrawn on 22.06.2023 failed in an embarrassing manner. In their earlier supporting affidavit sworn by Grace Wairimu on 09.06.2023 the respondents had sworn that they were not aware of the decree dated 19.02.2015 until 02.06.2023 since their previous advocates had never notified them of the same. However, it transpired through the petitioner's replying affidavit that upon delivery of the judgment in 2015, the respondents had sought leave to challenge it through judicial review proceedings which application was dismissed on 24.01.2017.

f. Who shall bear costs of the application

33. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court finds no good reason to deprive the successful party of the costs of the application. Consequently, the petitioner shall be awarded costs of the application.

H. Conclusion and Disposal Order

34. The upshot of the foregoing is that save for the respondents' prayer for leave to change advocates, the court finds no merit in the 5th – 13th respondents' application dated 21.06.2023. Accordingly, the court makes the following orders for disposal thereof:

    a. Leave be and is hereby granted for the firm of M/S Osur & Associates Advocates to come on record for the 5th – 13th respondents in place of M/S Ndegwa Wahome & Co. Advocates.

    b. Save as aforesaid, the rest of the orders sought in the notice of motion are hereby refused.

c. The petitioner is hereby awarded costs of the application to be borne by the 5th – 13th respondents.

It is so ordered.

RULING DATED AND SIGNED AT NYANDARUA AND DELIVERED THIS 26TH DAY OF OCTOBER, 2023 VIA MICROSOFT TEAMS.

In the presence of:

Mr. Ongoya for the Petitioner

Mr. Gilbert Rotich for the Attorney General for the 1st – 4th Respondents

Mr. Musyoka for the 5th – 13th Respondents

C/A - Carol

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Y. M. ANGIMA

JUDGE