



Ololabura & 2 others (Suing on their Own Behalf & on Behalf of Inkoirero Self Help Group) v Kilusu & another (Environment & Land Case E032 of 2021) [2023] KEELC 20729 (KLR) (17 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20729 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE E032 OF 2021
EM WASHE, J
OCTOBER 17, 2023**

BETWEEN

**MICHAEL LINKATOO OLOLABURA 1ST PLAINTIFF
OLE UNUA TONKEI 2ND PLAINTIFF
SAMUEL LEKAKENY 3RD PLAINTIFF
SUING ON THEIR OWN BEHALF & ON BEHALF OF INKOIRERO SELF HELP
GROUP**

AND

**DAVID LEOO KILUSU 1ST RESPONDENT
KILGORIS DISTRICT LAND REGISTRAR 2ND RESPONDENT**

RULING

1. The 1st, 2nd and 3rd Plaintiffs (hereinafter referred to as “the applicant”) filed a Notice of Motion Application dated 13th March 2023 (hereinafter referred to as “the present application”) seeking for the following Orders;-
 - i. That this Application be heard during the Easter vacation.
 - ii. That this application be certified as urgent and be heard on priority basis.
 - iii. That service of the application be dispensed with in the first instance.
 - iv. That the Honourable Court be pleased to review the Ruling delivered on the 6th of March 2023 by the Honourable Justice Emmanuel.M.Washe and the consequential orders be vacated, set-aside, varied and/or discharged.



- v. That the Plaintiff/Applicants Plaint dated 24th of May 2017 and further amended on the 7th April 2022 be reinstated.
 - vi. That the Plaintiff/Applicants suit be fixed for inter-parte hearing forthwith.
 - vii. Cost of this Application be in cause.
2. The grounds in support of the prayers outlined hereinabove are contained in the body of the present application as well as the supporting affidavit of 3rd Plaintiff/Applicant sworn on the 29th of March 2023 and can be summarised as follows;-
- a. This Honourable Court delivered a Ruling on the 6th of March 2023 in relation to the Preliminary Objection dated 31st October 2022.
 - b. In the said Ruling delivered on the 6th of March 2023, the Applicants suit against the Defendant/Respondent was struck out.
 - c. The main ground as to why the Plaintiff's suit was struck out was that the Title Deed issued on 31st March 2004 relating to the property known as LR No transmara/kimintet "D"/480 (hereinafter referred to as "the suit property") was in the name of a legal entity that was incapable of owning the suit property.
 - d. However, the Applicants have now discovered another Title Deed dated 19th of May 2011 over the same suit property issued in the names of the Applicants as Trustees of Inkoirero Self Help Group.
 - e. Pursuant to this discovery of the Title Deed dated 19th of May 2011, the Applicants are seeking this Honourable Court to review, vacate and/or rescind its Ruling of 6th March 2023 and allow the suit to be reinstated and proceed for full trial.
 - f. The Applicants have further indicated that the omission and/or failure to attach and/or present the Title Deed dated 19th of May 2011 in the name of the Trustees was as a result of the former Advocates mistake which should not be visited upon the Applicants herein.
 - g. The Applicants have made the present Application timely and without any delay whatsoever.
3. The Applicants duly served the present Application on the 1st Respondent who opposed the same by filing a Replying Affidavit sworn on the 10th May 2023 (hereinafter referred to as "the 1st Respondent's Affidavit").
4. The grounds of opposing the present application can be summarised as follows;-
- a. The present Application does not meet the threshold envisaged in an application for review under Order 45 of the *Civil Procedure Rules, 2010*.
 - b. The allegation that the Applicants have made a discovery of new evidence which they did not have prior to the striking out of this suit was misguided.
 - c. The purported Title Deed issued on the 11th of May 2011 in the names of the Applicants was were within their knowledge and/or information and it can not be deemed to be discovery of any new evidence.
 - d. The Applicants have simply not been diligent to and/or careful in their pleadings and therefore should not blame the previous advocates for the omission of not presenting the Title Deed of



11th of May 2011 instead of the one attached in the Complaint that was struck out issued on the 31st of March 2004.

- e. Lastly, the 1st Respondent stated that the present application was an abuse of the Court process and should be dismissed with costs.
5. The 2nd Respondent also filed their Replying Affidavit sworn on the 14th of June 2023 (hereinafter referred to as “the 2nd Respondent’s Affidavit”) which they stated as follows; -
- a. The suit property is registered in the names of the Applicants herein on behalf of the Inkoirero Self Help Group.
 - b. According to the Adjudication Record and the copy of the Green Card of the suit property, the names of the Applicants were duly registered on behalf on Inkoirero Self Help Group on the 07/01/2004 and a Title Deed issued to that effect on the 24.06.2011.
 - c. The reason why the second Title deed dated 24.06.2011 was issued was because Inkoirero Self Help Group did not have the legal status to be registered as the owner of the suit property.
 - d. The 2nd Respondent in concluding the Replying Affidavit stated that the property rightfully belongs to the Applicants and that the 1st Respondent had never been registered and/or issued with a Title Deed of the suit property.
6. Once all Respondents filed their responses, the Honourable Court directed the present application to be canvassed by way of written submissions.
7. The Plaintiffs filed their submissions on 8th July 2023 while the 1st Respondent and 2nd Respondents filed theirs on 27th June 2023 and 25th June 2023 respectively.
8. According to the Honourable Court, the issues for determination in the present Application can be summarised as follows;-

Issue No 1- Whether or not the applicants have proved the discovery of any new evidence to warrant a review under order 45 of the Civil Procedure Rules, 2010?

Issue No 2- Whether the applicants are entitled to the reinstatement of the suit herein?

Issue No 3- Who bears the costs of the present application?

9. The Honourable Court having duly identified the above issues for determination, the same will now be discussed hereinbelow.

Issue No 1- Whether or not the applicants have proved the discovery of any new evidence to warrant a review under order 45 of the Civil Procedure Rules, 2010?

10. The first issue for determination is whether or not the Applicants have proved the discovery of new evidence which would necessitate the reviewing of the dismissal orders issued on the 6th of March 2023.
11. The Applicants herein through the present Application under Order 45 Rule 1 (b) of the [Civil Procedure Rules, 2010](#) are seeking for the setting aside, vacation and/or discharge of the Ruling dated 6th March 2023.
12. The Applicants main ground for seeking the review is that the title deed dated 31st March 2004 which was presented in the Complaint was one in the name of Inkoirero Selp Help Group which is an entity that cannot hold any legal proprietary interest in land.



13. However, after the dismissal of the suit herein, the Applicants discovered that the previous Counsel had used an old Title Deed issued on the 31st of March 2004 in the name of Inkoirero Self Help Group instead of the correct Title Deed in the name of the Applicants issued on the 19th of May 2011.
14. According to the Applicants, the omission of presenting the old title deed issued on the 31st of March 2004 instead of the correct Title Deed issued on the 19th of May 2011 was caused by the previous advocates and should not be visited on the clients herein.
15. In essence therefore, by the time the current Counsel was taking over the conduct of the suit, the pleadings had been prepared and filed hence the failure to notice this fatal omission.
16. The Applicants concluded their submission with the position that the suit property is lawfully registered in their names and therefore the suit should be reinstated and heard on its merits.
17. The 1st Respondent on the other hand began his opposition to the present Application by pointing out that the second Titled Deed issued on the 19th May 2011 was in the possession and knowledge of the Applicants for over 11 years before filing of the Preliminary Objection that ultimately struck out the entire suit.
18. According to the 1st Respondent, the failure to present the correct Title Deed dated 19th May 2011 was actually occasioned by the negligence of both the Applicants themselves as well as their Counsel.
19. The 1st Respondent submitted that the Title Deed issued on the 19th of May 2011 was a public document which can not be said to have been hidden and only discovered in the year 2023 when the suit was struck out.
20. In essence therefore, the 1st Respondent was of the view that the Applicants had not presented any new evidence as pleaded to warrant the relief sought in the present Application.
21. The 2nd Respondent also confirmed that the suit property was initially titled on the 31st of March 2004 in the name of Inkoirero Self Help Group.
22. However, on the 19th of May 2011, another Title Deed was issued in the names of the Applicants herein and which has remained the same up to now.
23. In conclusion therefore, the 2nd Respondent reiterated that the suit property was the asset of the Applicants herein.
24. Having evaluated all the submissions by the parties herein, the first question to be addressed is what constitutes new evidence as envisaged in Order 45 of the Civil Procedure Rules.
25. In the case of *Anwar Ali & another v Monica Muthoni & another* (2021) eKLR, the Honourable Court made the following observation;-

“Thus, in an application for review based on discovery of new and important evidence, the court must exercise caution to prevent a party against whom a decision has been entered from procuring new evidence so as to strengthen or change the complexion of the case.

From the above authorities, to qualify to be new evidence so as to fall within the ambit of Order 45 Rule 1 of the *Civil Procedure Rules*, the new evidence must be of such a nature that it could not have been within the knowledge of the applicant despite the exercise of due diligence.”



26. In another case of *Republic v Advocates Disciplinary Tribunal Ex-parte Apollo Mboya* (2019) eKLR, the Honourable outlined the core principles that should guide a Judicial officer in the determination of an Application for Review under Order 45 of the *Civil Procedure Rules*:-

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1."



27. Lastly, in the case of *Evan Bwire v Andrew Aginda*, Civil Appeal No 147 of 2006, the Court of Appeal expressed itself as follows:-
- “An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”
28. Turning to the present Application, the Applicants are relying on the discovery of the Title Deed issued on the 19th of May 2011 to seek a review of the Ruling pronounced on the 6th of March 2023.
29. According to paragraph 14 of the Supporting Affidavit sworn on the 29th of March 2023, the Applicants have stated as follows:-
- “That on the 19th of May 2011, the Title Deed to the land parcel known as LR No Transmara/ Kimintet “D”/480 measuring 136.52 Ha was re-issued in the names of Michael Linkato Ololabura, ole Unua Tongei and Samuel Lekakeny Kinanta.”
30. The Applicants have on oath confirmed that the title deed issued on the 19th of May 2011 was indeed collected by themselves and has been in their possession ever since.
31. The Applicants seem to blame the previous Counsel for presenting the previous title deed issued on 31st of March 2004 instead of the correct one issued on 19th May 2011.
32. While this Honourable Court does not want to doubt the averments of the Applicants herein, the Verifying Affidavit sworn on the 11th of July 2012 in paragraph 4 states as follows:-
- “I have read and understood the plaint and pleadings filed herein and do swear this affidavit to verify the correctness and veracity of the averments contained herein.”
33. The import of this paragraph in the Verifying Affidavit by the applicants is a confirmation to the effect that the averments and/or documents presented in Court as part of the pleadings are the true and correct documents.
34. In essence therefore, the failure to present and/or file the Title Deed issued on the 19th of May 2011 can not be blamed on the previous advocates alone but also on the Applicants negligence to confirm that the correct title deed is submitted in Court by their Counsel.
35. The title deed which the Applicants are seeking to rely upon is one which was issued on the 19th of May 2011 was within their knowledge and in fact in their possession at the time of filing this suit in the year 2012 and all through the many years of litigation.
36. It can only be said that the failure to present the correct title deed in Court was through the negligence of Applicants and/or their Counsel.
37. It is therefore this Honourable Court’s view that there is no new evidence that has been discovered by the Applicants which was not within their knowledge at the time of filing this suit or the determination of the Preliminary Objection dated 31st October 2022 to warrant a review of the ruling pronounced on the 6th of March 2023.



Issue No 2- Whether the applicants are entitled to the reinstatement of the suit herein?

38. The second issue is whether the Applicants are entitled to the reinstatement of this suit which was struck out on the 6th of March 2023.
39. Indeed, this Honourable Court having exhaustively discussed the issue of discovery of new evidence hereinabove, the other issue for determination in an application under Order 45 of the Civil Procedure Rules, 2010 is the presence of a mistake or error on the face of the record.
40. In the present application, the Applicants have not identified and/or proved any mistake or error on the face of the record that would persuade this Honourable Court to exercise its discretion in favour of the prayer for review.
41. In essence therefore, this Honourable Court is of the considered view that the only way the Applicants can litigate about the title known as LR No transmara/kimintet “D”/480 is through filing of a fresh suit with the correct documents and not through a review as attempted in the present application.
42. In other words, the ruling pronounced on the 6th of March 2023 was properly arrived at and the present Application is not merited.

Issue No 3- Who bears the costs of the present application?

43. The last issue for determination in the present application is that of costs.
44. Costs usually follow the event unless otherwise ordered.
45. In the present application, the Applicants will bear the costs of the same.

Conclusion.

In conclusion, this Honourable Court hereby makes the following Orders as appertains the application dated 13th March 2023;-

- A. The notice of motion application dated 13th March 2023 be and is hereby dismissed.
- B. The costs of the notice of motion dated 13th March 2023 will be borne by the applicants.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON THE 17th OCTOBER 2023.

EMMANUEL M WASHE

JUDGE

In the presence of:

Court Assistant: Mr. Ngeno

Advocates for the Applicant: Mr. Ngeno H/b Dr. Nyaundi

Advocates for the Respondents: Mr. Momanyi

