Wafulai v Lusindalo (Environment and Land Case 102 of 2013)
[2023] KEELC 21841 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21841 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND CASE 102 OF 2013

FO NYAGAKA, J

NOVEMBER 30, 2023

BETWEEN

DAVID KAYAJA WAFULAI ..... PLAINTIFF

AND

JOSEPH KHALEA LUSINDALO ..... DEFENDANT

RULING

1. The Plaintiff brought the instant Application, dated 07/06/2023 against the Defendant. It was a post-judgment Application, judgment having been delivered on 31/05/2018. The Application was brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 45 Rules 1, 2, 3, 4, and 5 of the *Civil Procedure Rules, 2010*. They prayed in the Application for orders. suit against the Defendants who are alleged to be brothers. The Plaintiff amended his Plaint on 06/12/2021. It was filed on even date. In it he sought the following reliefs:

    1. That this Honourable Court be pleased to review its orders of 29th June, 2021 and substitute the same with orders allowing the application dated 29th January, 2021.

    2. Spent

    3. Spent

    4. Costs be provided for.

2. The Application was based on the grounds that there was a mistake apparent on the face of the record; that there was discovery of new and important matters which were not within the knowledge of the applicant at the time of hearing the application; and it was necessary and in the interest of justice to grant the orders sought.

3. It was supported by the Affidavit of the Plaintiff which he swore on 07/06/2023. Briefly, he deponed that on 02/06/2023 he was served with a letter from the Defendant's Advocate which alleged that his

parcel of land being Kiminini/Matunda Block 7 (Masaba)1196 was (herein known as parcel No. 1196) vacant and that he should vacate the same. He annexed and marked as DKW1 the copy of the letter. That following the letter he visited the lands office and discovered that the Defendant had purported to change the position of his land to an adjacent one by altering the mutation forms without involving him. He annexed and marked DKW2 the copies of the mutation forms and map.

4. He deponed further that he took the aerial view of the purported parcel and noted that it was completely different and vacant. He annexed and marked DKW3 a copy of the Google Map. He stated further that he had fully developed his plot with a residential house and other amenities. He annexed and marked as DKW5 a photograph of his house.

5. He deponed that the County Surveyor visited the site on 23/01/2024 and the report confirmed that his parcel of land was fully developed. That the county surveyor then developed mutation forms which were duly signed by the Deputy Registrar of this court. He annexed and marked as DKW6 a copy of the letter. He accused on oath the Defendants who was using backdoor means to evict him from his rightful land.

6. The Defendant responded to the application through a Replying Affidavit sworn on 23/06/2023. In it he deponed that the application was misconceived, frivolous, vexatious, devoid of merit, bad on law, incurably defective and an abuse of the process of the court. He began by deponing that failure by the Applicant to annex a copy of the order sought to be reviewed rendered the application incurably defective. Again, he swore that the instant application was made in bad faith and amounted to an abuse of the process of the court because he had made an application dated 29/01/2021 on the same issues and it was dismissed for want of merit.

7. His further deposition was that there was no new and important matters not within the applicant's knowledge as given that the contest in the application of 29/01/2021 was the same as the one in the instant one, and it was the registration of title numbers Kiminini/ Matunda Block 7 (Masaba)/1195 (herein known as parcel No. 1195) and parcel No. 1196.

8. That he and the original owner of parcel number Kiminini/Matunda/ Block 7 (Masaba)/159 from which he sold part to the Plaintiff showed him his portion. That the Plaintiff was unhappy with the road he was to use moved the Court for him to sign mutation forms to give the Plaintiff an access road to his farm.

9. Following the institution of the suit, judgment was delivered on 31/05/2018. He annexed and marked as JK-1 a copy of the judgment. That he duly complied with paragraph 11 of the judgment by signing mutation forms and filling the transfer forms. He annexed and marked JKL-2 (a) and (b) a copy of the transfer forms and the letter of consent. That the Plaintiff refused to receive the transfer documents he forwarded to him and filed the application dated 29/01/2021. He sought the nullification of the resultant titles, being numbers parcel Nos. 1195 and 1196. He annexed and marked JKL-3 a copy of the application.

10. That on 29/06/2021 the Court dismissed the Application for lack of merits and directed the Plaintiff to embark on developing his parcel of land, being No. 1196. He disputed the Plaintiff's deposition that his parcel of land was developed since the structures referred to were wrongfully and forcefully developed on the Defendant's parcel of land no. 1195. That the Plaintiff ignored the Defendant's plea not to build on the land hence he should not blame anyone.

11. He deponed that it was ironical for the Plaintiff to file this case for an access road to parcel no. 1196 and even before the could pronounce itself on it he develops on parcel no. 195 without any justifiable cause. That the judge rightly pointed out in the ruling of 29/01/2021 the Plaintiff seemed to be asking

the court to cause another mutation to be prepared to suit has desires. He denied that the instant application met the requirements for review since it was a replica of the one dated 29/01/2021 but clothed with the word "review" as the subject was the same. He deponed that the application was an abuse of the process of the court.

12. The Plaintiff filed a Supplementary Affidavit that he swore on 11/07/2023. He deponed that the new and important matter was that he discovered that the parcel the Defendant created for his favour as parcel No. 1196 was actually vacant while No. 1195 was fully developed.

13. He denied filing the instant suit for a claim of an access road. Rather, that it was for a title to hid parcel of land. Further, that the Defendant had mischievously prepared a wrong mutation forms which now show that what was purported to be his parcel was vacant yet he had now fully developed his land. Lastly, that he admitted that the Defendant had showed him his portion, and that was where he developed. He deponed that the structures referred to were wrongfully and forcefully developed on his land. Lastly, that he never moved the court for orders of an access road to parcel No. 1196.

14. The Applicant filed his written submissions on 20/07/2023 and insisted on highlighting them. Thus, both learned counsel made oral submissions on 18/09/2023.

15. In the filed submissions the Applicant summarized the facts and payers of in the Application. He then submitted by singling out paragraphs 13 and 7 of the Replying Affidavit and argued that they showed that indeed parcel No. 1195 was fully developed. He relied on Kisumu Court of Appeal Civil Appeal No. 60 and 62 of 2017, *Otieno Ragot & Company Advocates vs. National Bank of Kenya Limited* (sic) which discusses the situations where a review under Section 80 of the *Act* and Order 45 of the *Rules* may be made. He summed it that discovery of a new important matter is one of the grounds for review.

16. In highlighting their submissions, the Applicant submitted that there were two parallel mutation forms one which showed that of parcels Nos. 1195 and 1196 he occupied the parcel of land which is developed and the other which showed that he occupied the one not developed. He then argued that the County Surveyor confirmed that the Mutation forms drawn by the Defendant were not correct and that the Defendant admitted that he was the one and the original owner who showed him the place he developed.

17. On his part the Defendant submitted that the issue of parallel mutation forms was addressed by the honourable judge in his ruling. Further, that particularly at paragraph 7 of the Replying Affidavit he indicated that he showed the Plaintiff his portion but he developed a wrong one, during the pendency of the suit. Therefore, the Plaintiff should move to his land because the issue of the discovery of a new matter is neither here nor there.

18. I have considered the facts of the Application, the law and the submissions by both parties. The only issue before me is whether the application is merited or not, after which the attendant one is who to meet the costs of the application.

19. On whether or not the application is merited, the beginning point is the understanding of the issue and the law. The issue before the Court is that the ruling the Court delivered on 29/06/2021 was made absent a new and important matter which could, with due diligence be within the knowledge of the Applicant, not be known by him which has been discovered after it was made hence it should be reviewed.

20. The law on review of orders and decrees of courts is governed by Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. 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 Rule 1 of the *Rules* gives more details regarding when an application for review may be made, pursuant to the previous provision. It 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. Therefore, for a party to succeed in an application for review and setting aside of a judgment, decree, ruling or order of a Court, he/she must prove that:

i. There is discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicants' knowledge and which could not therefore produce at the time the order was made or,

ii. Some mistake or error apparent on the face of the record or,

iii. Any other sufficient reason

23. And further, the application has to be brought without undue delay. The starting point is the definition of any other sufficient reason. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 Mativo J. (as he then was) culled out the following principles from a number of authorities: -

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.

24. Even as this Court embarks on the determination of the merits of the Application it is important to note that both the applicant and the respondent did not take up their argument on the delay between 29/06/2021 when the impugned ruling was delivered when the instant application was made, which was almost two years. Since it was not, I would take it that all along the Applicant has been peacefully residing on the parcel of land he alleges to be his and developed until 02/06/2023, annexture DKW1 whose issuance by the Defence counsel was not denied, when he received the letter from the Defendant's learned counsel that he vacates the parcel. It was the letter that rattled him.

25. When a fact is stated on oath by a party and the it is not responded to on oath or clarified to be in any other way by another on oath, it is taken to be the truth of that fact. It cannot be refuted by way of submissions. Thus, it was upon receipt of the letter dated 02/06/2023 that the Applicant discovered that things were different from what he knew them to be. Thus, even though he did not explain in the submissions that issue, he gave a good reason for the delay.

26. I have now to turn to the facts of this case and compare them with the law. The Plaintiff deponed that the discovery of another mutation made by the Plaintiff was a new and important matter which he did not have knowledge of at the time the determination of the ruling was made. The Defendant refuted that and stated that my predecessor judge determined the issue in the impugned ruling and that this application was the same as the one 29/01/2021.

27. I have carefully analysed the facts argued in relation to the application dated 29/01/2021. In the Application the question that was in issue was that the two title deeds, Nos. 1195 and 1196 were obtained by the Defendant, using a private surveyor, and were wrong ones hence there was need to nullify the titles.

28. In my humble view the issue of the different mutation by the Defendant was a matter that was squarely before the court in the Application dated 29/01/2023 on which the Court ruled on 29/01/2021. It is not a new matter which would warrant a review of the ruling under the limb the applicant brought it.

29. The above notwithstanding, there is an issue which is important which this Court has to consider, under Section 3A of the *Civil Procedure Act*. Given the deposition by the Applicant that the Defendant informed him vide a letter dated 02/06/2021 that the parcel of land he occupied was not his because parcel No. 1195 which was apparently registered in the Defendant's name but which the Plaintiff had developed resulted from the mutation which the Defendant caused to be made of parcel No. 195 by a private surveyor, and it made it impossible for the County Surveyor to implement the Court's decree, the court needs to consider whether the fact that the road of access which the Court found to have been provided in the mutation actually led to where position on the ground where the Plaintiff was settled by both the original owner of parcel No. 195 and the Defendant.

30. In the Ruling delivered on 29/06/2021 the Court was satisfied that a road of access had been provided to the Plaintiff. The Defendant has sworn on paragraphs 7 of the Replying Affidavit that indeed the Plaintiff was shown by both the Defendant and the original owner where he was to occupy. At paragraph 13 the Defendant depones that the Plaintiff deliberately ignored the Defendant's plea to build on his now suit land during the pendency of the suit. But I have carefully looked at the Pleadings, particularly, the Plaint at paragraph 5. The Plaintiff averred that upon purchase of the portion of land he occupies he took possession thereof and started developments thereon. That was, as per his written witness statement which was adopted in evidence, that it was in 2013. At paragraph 8 the Plaintiff pleaded that the Defendant was insistent that the Plaintiff does have an access road to the portion he occupied by it being curved from a neighbouring plot.

31. The Defendant filed a Defence dated 23/08/2013 on the same date. At paragraph 5 of the pleading admitted that the Plaintiff was in occupation of the portion he was on but had not developed it. He did not plead at any one given time that the Plaintiff had occupied a wrong portion on the original suit land, No. 195 or done so contrary to his permission or that of the original owner. Further, the Defendant did not raise a counterclaim that the Plaintiff vacates the portion he occupied then and that there was need for him to move from there to the portion which now the Defendant alleges the Plaintiff should move to. And in the entire of his evidence, whether in his written statement adopted as evidence or the oral testimony given on 14/02/2018, he did not state that the Plaintiff had not developed the part he had settled on.

32. In any event the original owner was not a party to the agreement between the Plaintiff and the Defendant. The only issue of contention was the road of access to the portion where the Plaintiff occupied then. Moreover, the Plaintiff had prayed in prayer (b) of the Plaint for an order directing the District Surveyor, Trans Nzoia County Surveyor to give effect to the drawing on the mutation form. The form was given in evidence. Then in paragraph 16 of the judgment delivered on 31/05/2018 the Court gave judgment in favour of the Plaintiff in terms of, among others, the prayer (b) mentioned above.

33. The question then that arises is, was the mutation forms which was used by the Defendant to give rise to the title deeds in issue given effect by the Surveyor of in charge of Trans Nzoia County? It is admitted by the parties that it was not: it was done by a private surveyor. That was contrary to the judgment of the court. The said judgment was not appealed against and has never been reviewed to date.

34. The above being the position, and given the fact that the issue that the mutation form which was used by the surveyor gave rise to a position of the titles issued which was different from the reality on the ground, and that as a result the Plaintiff is now being required to vacate from where he was originally

shown by the Defendant himself to settle and he did settle and develop it, although the mutation form was in issue before the court in the Application of 29/01/2021, the fact of the it giving rise to different positioning of the parcels on the ground than as the court knew it and the parties testified thereon was new knowledge not available to the learned judge at the time of the determination of the application hence the ruling of 29/06/2021.

35. Moreover, even if the question of the mutation forms was not new, the implementation of the judgment of the court by the Defendant contrary to the judgment itself is sufficient reason in terms of Order 45 Rule 1 of the *Civil Procedure Rules, 2010*, to grant the prayers sought. And by virtue of Sections 1A and 1B of the *Civil Procedure Act*, the overriding objective and duty of the Court is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Thus, by the inherent powers of the Court as envisioned under Section 3A of the *Act*, this Court cannot close its eyes to the fact that the purported implementation of the giving effect of the mutation for was done contrary to the judgment herein and important information as to its end result of displacement and contradiction was withheld from the learned judge and therefore it arrives at the view of sufficient reason to grant the orders sought. In any event the mutation carried out on the original parcel of land No. 195 contrary to the order of the court was and is hereby declared null and void, and of no effect.

36. The upshot is that the Application herein succeeds. The orders of 29/01/2021 are hereby reviewed. The titles issued pursuant to the mutation prepared and signed contrary to the judgment of the Court are hereby cancelled. The County Surveyor in charge of Trans Nzoia County give effect to the mutation form contemplated in paragraph (b) of the judgment herein.

37. The Respondent shall bear the costs of this application.

38. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA EMAIL THIS 30TH NOVEMBER, 2023.

HON. DR.IUR FRED NYAGAKA

JUDGE