



REPUBLIC OF KENYA



**Kihara (Suing as Legal Representative of Priscilla Wangui Kihara)
v Mbagu & another (Environment & Land Case 1265 of 2016)
[2023] KEELC 21771 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21771 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1265 OF 2016
LN MBUGUA, J
NOVEMBER 21, 2023**

BETWEEN

**PAULINE WANGUI KIHARA (SUIING AS LEGAL REPRESENTATIVE OF
PRISCILLA WANGUI KIHARA) PLAINTIFF**

AND

BEATRICE MUKERI MBAGU 1ST DEFENDANT

JOSEPH KAMAU MBAGU 2ND DEFENDANT

RULING

1. Judgement was entered by this court on 30.9.2022 of which the court issued an order of specific performance compelling the Defendants to complete sale of the suit parcel known as Title Number Nairobi/Block 82/3602 to the Plaintiff. Thereafter, the Plaintiff extracted the decree dated 13.1.2023.
2. Subsequently, two applications have been filed, one dated 5.9.2023 brought forth by the plaintiff and the other is dated 11.10.2023 filed by the defendants. This ruling relates to the aforementioned applications.

Application dated 5.9.2023

3. The Plaintiff seeks the following orders in the above mentioned application; That the court reviews its judgement by amending Order ii to read;

“If order (i) above is not adhered to, the Chief Land Registrar Nairobi vide this order is hereby directed to cancel the title deed over Nairobi/Block 82/3602 that is in the names of Beatrice Mukeri Mbagu and Joseph Kamau Mbagu; and register the land in the name of Priscilla Wambui Kihara. For purposes of effectuating the said order, the Deputy Registrar of this



court is hereby granted authority to sign all requisite documents necessary to facilitate the transfer of the land from the Defendants to Pricilla Wambui Kihara.”

4. The applicant avers that she is unable to effect the decree for the reason that the Defendants have declined to avail the title to the suit land in order to effect registration despite being requested to do so by her advocates *vide* letters dated 25.7.2023 and 23.8.2023. She contends that she sought the assistance of the office of the Chief Land Registrar over the transfer, who indicated that the original title deed can be availed or the decree could be amended to provide for a specific order directing that he cancels the current title deed.

Application dated 11.10.2023

5. In response to the plaintiff's application, the 2nd Defendant filed the above application seeking orders that the order of specific performance issued in the judgement dated 30.9.2022 be set aside or reviewed. In his supporting affidavit, the 2nd Defendant avers that his matter was brought to Court in the year 2016, in respect of a contract entered into between the Defendants and the other parties in the year 2008.
6. That the prayer of specific performance granted by the court is an equitable right which ought not to be granted where it would occasion hardship upon the Defendants. He contends that they were never paid the purchase price for the suit property.
7. Both applications were canvassed orally on 25.10.2023. Counsel for the Plaintiff reiterated the Plaintiff's averments set out in her application. Counsel for the Defendants submitted that the decree herein contravenes Article 40 (2) (a) of the Constitution as it purports to arbitrarily deprive the Defendants of their property. He also argues that a contract cannot suffice after 6 years.
8. Both applications are calling for this court to review and vary its judgement delivered on 30.9.2022. A court becomes functus officio after issuing judgement. See the case of Menginya Salim Murgani v Kenya Revenue Authority [2014] eKLR.
9. However, this court has power to review its judgement under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.
10. Order 45 Rule 1 (b) of the Civil Procedure Rules contextualizes grounds for review to be; (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within ones knowledge, (II) on account of some mistake or error apparent on the face of the record, or (iii) for any other sufficient reason.
11. In their Notice of Motion application dated 11.10.2023, the Defendants argue that the order of specific performance issued in the judgement herein dated 30.9.2022 should be reviewed since the order deprives them of their property contrary to Article 40 of the Constitution. That is however not a ground that would warrant this court to invoke its jurisdiction of review. It is a ground for an appellate forum.
12. In Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR, the court stated as follows;

“I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.”



13. The net effect is that the application by the 2nd defendant is not merited.
14. For the application made by the plaintiff, I discern that the same does not vary the import of the judgement. The net effect of the judgment dated 30.9.2022 was to divest the rights and interests of the defendants in the suit property in favour of the plaintiff. Apparently the defendants have failed to avail the subject title. Thus the orders sought by the plaintiff are meant to give effect and facilitate the implementation of the aforementioned judgment. To this end, I find that the application of the plaintiff is merited.

Final orders

15. . The application dated 5.9.2023 is allowed, while the application dated 11.10.2023 is dismissed. The 2nd defendant shall meet the costs of the two applications.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mwaura for the Plaintiff

Muigai for Defendants

Court Assistant: June

