



REPUBLIC OF KENYA



**Kanja v Kanja; Kanja & 6 others (Applicant) (Environment & Land
Case 150 of 2013) [2022] KEELC 12655 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 12655 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 150 OF 2013**

L WAITHAKA, J

MAY 19, 2022

BETWEEN

DAMARIS WANJIKU KANJA PLAINTIFF

AND

JOHN MUTHEE KANJA DEFENDANT

AND

EVERLYN WAKIURU KANJA APPLICANT

WAIKUNU MUTHEE APPLICANT

JACKSON GACHUNGU RUICHIRIA APPLICANT

PETER MAINA MUTHEE APPLICANT

PAUL MURIITHI RUICHIRIA APPLICANT

WILSON MWANGI MUTHEE APPLICANT

MARTIN KINGA MUTHEE APPLICANT

RULING

1. By a judgment delivered on December 11, 2014, this court found that the land in dispute (Ruguru/Kiamariga/464) was registered in the defendant's name as a trustee. The court also observed that the land had been occupied by the family for more than 50 years. Consequently, the court determined that the defendant holds land parcel No. Ruguru/Kiamariga/464 in trust for himself and the plaintiff and the said trust should be terminated for the plaintiff to get two acres out of the suit land. Because the other members of the family had not moved the court, the court did not say anything about them.
2. Aggrieved by the decision of the court, the 1st to 7th applicants herein who were not parties to this suit, filed the notice of motion dated October 8, 2018 seeking to set aside the judgment and all



consequential orders therefrom. The applicants also seek to be added to the suit as interested parties and cancellation of the subdivision of the original LR No Ruguru/Kiamariga/464 into new LR Nos Ruguru/Kiamariga/2852 and 2853 so as to revert it to the original status.

3. The application is premised on the grounds that the 2nd to 7th applicants have an interest in the suit property (entitled to a share thereof) but were not aware of the existence of this suit; that the applicants became aware of the suit when the plaintiff brought surveyors to subdivide the suit property in execution of the decree issued in this case and that the applicants have effected massive developments of the portions of the suit property they are in occupation of.
4. The application is supported by the affidavit of the 3rd applicant, Jackson Gachungu Mwirichia, sworn on October 8, 2018. In that affidavit, the deponent has reiterated the grounds on the face of the application and added that the property was acquired by the defendant from his own sweat and blood during land consolidation and demarcation and should therefore be shared by the defendant's family. The deponent has further deposed that he personally saved the suit property from auction by Kenya Finance Corporation limited.
5. Explaining that they are at the risk of being evicted from the suit property, the deponent has deposed that its fair and just that the judgment hereto be set aside.
6. In reply to the application, the plaintiff/respondent, through the replying affidavit she swore on November 25, 2018 has deposed that the applicants are the wife and children of the defendant/respondent and that the applicants by virtue of being family members were all along aware of this case. The plaintiff/respondent has also deposed that the dispute between her and the defendant was in public domain, reported in the Daily Nation Newspaper of March 29, 2018.
7. Terming the application herein an afterthought and a scheme meant to deny her the fruits of her judgment, the applicant/respondent has *inter alia* conceded that the applicants have developments in the suit property but stated that the structures are semi-permanent and can be brought down and relocated to their rightful portion, parcel number Ruguru/Kiamariga/1253.
8. The sole issue for determination herein is whether the applicants have made up a case for being granted the orders sought.
9. With regard to that question, on account of the averment contained in paragraph 5 of the affidavit sworn in support of the application, to the effect that the 2nd to 7th applicants are the wife and children of the 2nd defendant/respondent, and there being no evidence capable of showing that the applicants were unaware of this suit, I agree with the plaintiff/respondent's contention that by virtue of being members of the defendant/respondent family, the applicants were aware of this suit. The defendant as the head of their family represented their interest or otherwise put had the opportunity to represent them or draw the attention of the court to their interest if any so that the court could have catered for them.
10. I further note that the applicants are trying to appeal the judgment hereto through the back door. That fact is discernible from paragraph 5 of the affidavit sworn in support of the application where the applicants are implicitly challenging the determination that the suit property is subject of a trust in favour of the plaintiff/respondent. That contention can only be a ground of appeal and not a ground for setting aside the judgment.
11. I also find that in the circumstances of this case, there was inordinate and improperly explained delay in filing the application for setting aside the judgment of the court. The applicants waited for close to four



- years to move the court. The evidence adduced in this court to the effect that the applicants had moved the court for leave to appeal but lost the application shows that the applicants were aware of the suit.
12. For the foregoing reasons, I am not convinced that the applicants have made a case for being granted the orders sought. Consequently, I dismiss their application with costs to the plaintiff/respondent.
 13. Everlyn Wakiuru Kanja, the 1st applicant in the application of October 8, 2018 had filed a separate application to wit the notice of motion dated February 6, 2018. In that application, the 1st applicant sought orders for review or setting aside the judgment hereto.
 14. The application is premised on the grounds that she had an interest in the subject matter of the suit; that she was neither made a party to the suit nor made aware of the suit and that the judgment and decree has substantially affected her interest in the subject matter of the suit.
 15. The application is supported by the affidavit of the applicant, sworn on February 6, 2018. In that affidavit, the deponent has reiterated the grounds on the face of the application and added that she is a sibling (sister) to the two parties to this suit; that she was aware of this case but not its proper subject and that besides the parties to this suit there are other persons (5) herself included, interested in the subject matter of the suit.
 16. Terming the orders issued in the judgment inequitable, the applicant blames the plaintiff/respondent of having failed to make her a party to the suit while knowing that she was equally entitled to the suit property.
 17. Explaining that she may not be able to file a fresh suit to claim her beneficial interest in the suit property, the applicant urges the court to grant her the orders sought.
 18. The application was not defended.
 19. The sole issue for determination is whether the applicant has made up a case for being granted the orders sought.
 20. Apart from the issue of the applicant being a sibling to the plaintiff and defendant in the main suit, I do find the issues raised in the application to be similar to those raised in the application of August 10, 2018, which I have dismissed for the reasons stated herein above.
 21. Whilst I entertain no doubt concerning the applicant's interest to the suit property, from her own averments in the supporting affidavit it is clear that she was aware of the dispute between the plaintiff and the defendant. Being a sibling to the two, she never bothered to find out what the dispute was. Even after the case ended, she took over 3 years to file an application to review and/or set aside the judgment.
 22. Under order 45 rule 1 of the [Civil Procedure Rules](#), an application for review must be made timeously. In the circumstances of this case, where there was a delay of over three years, I find the delay in filing the application for review to have been inordinate and not properly explained. For that reason, I decline to grant the prayers sought.
 23. I now turn to the application by the plaintiff/respondent dated October 12, 2018. In that application the plaintiff/applicant seeks the following orders:-
 - i. The defendant/respondent be ordered to give vacant possession of land parcel number Ruguru/Kiमारिगा/2852 to the plaintiff/applicant;
 - ii. An eviction order against the defendant/respondent, his agents, assignees and or anybody claiming under or in his name to remove all houses, structures and homes from land parcel number Ruguru/Kiमारिगा/2852;



- iii. An order directing and compelling the defendant/respondent, his agents, servants, assignees and/or anybody claiming under or in his name to remove all houses, structures and homes from land parcel number Ruguru/Kiamariga/2852.
 - iv. The OCS Kiamariga police station to ensure compliance with this order;
 - v. Costs of this application be paid by the applicant.
24. The application is premised on the grounds that the applicant is the registered owner of Ruguru/Kiamariga/2852; that the applicant obtained title to the property pursuant to a judgment and decree of this court and that the respondent has refused to give her vacant possession of the suit property.
 25. Pointing out that the respondent has built wooden houses, cowshed and toilet for his three children namely Peter Maina, Wilson Mwangi and Paul Muriithi in the suit property, the applicant laments that owing to the respondent's refusal to give her vacant possession of the suit property, she has been unable to enjoy the fruits of her judgment.
 26. The application is supported by the affidavit of the plaintiff/applicant sworn on October 12, 2018.
 27. When the application came up for hearing, the plaintiff/applicant relied on the grounds on the face of the application the affidavit she swore in support of the application.
 28. Counsel for the respondents, Mr King'ori, informed the court that the persons sought to be evicted were not parties in this suit and stated that the plaintiff/applicant should file a fresh suit for their eviction.
 29. I have carefully considered the case urged by counsel for the respondent to the effect that the people sought to be evicted were not parties to the suit and the contention that the plaintiff/applicant should file a fresh suit for eviction. Cognizance of the special circumstances of this case where the persons in occupation of the suit land are sons of the defendant and further considering that the persons in occupation have failed in the bid to set aside the judgment given in favour of the plaintiff/applicant, I am of the view that the plaintiff/applicant has made up a case for being granted the orders sought, which I hereby grant as prayed. However, on account of the evidence given by the plaintiff/applicant showing that three of the defendants' children are in use and occupation of the suit property, I order stay of execution of the orders issued in favour of the plaintiff/applicant for 90 days to give the persons in occupation of the suit ample time to voluntarily remove the structures they have erected and to vacate the suit property. If the at the end of the ninety (90) days the persons in occupation shall not have moved out of the suit property, then they shall be forcibly evicted therefrom.
 30. I also award the costs of the application to the plaintiff/applicant.
 31. Orders accordingly.

DATED AND SIGNED AT ITEN THIS 9TH DAY OF MAY, 2022.

L. N. WAITHAKA

JUDGE

READ, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF MAY, 2022.

J. O OLOLA

JUDGE

