



**Ngomeni Swimmers Limited v Said & 8 others; St. Patrick School Limited (Interested Party) (Civil Suit 15 of 2010) [2022] KEELC 3048 (KLR) (13 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3048 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
CIVIL SUIT 15 OF 2010  
MAO ODENY, J  
JUNE 13, 2022**

**BETWEEN**

**NGOMENI SWIMMERS LIMITED ..... APPLICANT**

**AND**

**ZEDI AHMED SAID ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR KILIFI ..... 3<sup>RD</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**DIRECTOR OF SURVEY ..... 5<sup>TH</sup> DEFENDANT**

**DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .... 6<sup>TH</sup> DEFENDANT**

**REGISTRAR OF TITLES MOMBASA .. 7<sup>TH</sup> DEFENDANT**

**TABU TUVA KHONDE ..... 8<sup>TH</sup> DEFENDANT**

**KAHINDI KAINGU GONDA ..... 9<sup>TH</sup> DEFENDANT**

**AND**

**ST. PATRICK SCHOOL LIMITED ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 9<sup>th</sup> November 2021 by the plaintiff/applicant seeking the following orders: -

1. Spent.



2. That this Honourable Court be pleased to grant leave to the firm of Murgor & Murgor Advocates to come on record for the Plaintiff/applicant.
  3. That this Honourable Court be pleased to arrest and/or stay the delivery of the ruling in respect of the Application dated 22<sup>nd</sup> March 2021, currently pending in this matter scheduled for delivery in November 2021.
  4. That this Honourable Court admits into evidence and considers the Supporting Affidavit and the annexures thereto and filed herewith in while writing its ruling.
  5. That this Honourable Court calls for and considers the Ministry of Lands records in respect of Plot No. 20119 Mambui; Plot No. 20130 Mambui, Plot No. 24845 Mambui and Plot No. 24846 Mambui being grant Nos. CR 21651; CR 33295; CR 33298 and CR 33297 respectively, while writing its ruling.
  6. That this Honourable Court do make such further orders as may be expedient in the circumstances.
  7. That the cost of this application be provided for.
2. A brief background to this case is that on 19<sup>th</sup> February 2021 this court vide its Judgment dismissed the Plaintiff/Applicant's suit for lack of sufficient evidence. The Plaintiff/Applicant in its suit had sought orders inter alia: -
- a. A permanent injunction do issue to restrain the 1<sup>st</sup> Defendant, his servants, agents, workmen and by any other persons whomever (sic) from entering into and/or remaining) upon or encroaching into any of the Plaintiff's properties comprised in Grant Nos. 33295 and 33298 respectively that is to say all (those) piece(s) of land known as LR No. 24845 and LR No. 24846 respectively and from in any manner otherwise interfering with the Plaintiff's quiet possession, use and enjoyment (thereof).
  - b. ....
  - c. (i) An order directed at the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to cause and effect a cancellation of all titles overlapping on the Plaintiff's parcels of land being Plot No. 20119 Mambui; Plot No. 20130 Mambui; Plot No. 24845 Mambui and Plot No. 24846 Mambui.
  - d. (ii) A declaration that the Plaintiff is the lawful owner and proprietor of a leasehold interest in Plot No. 20119 Mambui; Plot No. 20130 Mambui; Plot No. 24845 Mambui and Plot No. 24846 Mambui being Grant Nos. CR 21651; CR 33295; CR 33298 and CR 33297 respectively."

3. In the judgment the court held as follows:

"82. In the matter before me, nothing was placed before the Court to demonstrate how the Plaintiff's sister companies acquired the titles which they then purported to transfer to the Plaintiff. At any rate, while the Plaintiff gives a detailed list of alleged overlaps to its parcels of land at paragraph 9 (vii) of its Plaint as further amended on 2<sup>nd</sup> March 2015, no survey Report was produced in Court and no surveyor was called as a witness to shed light on the alleged overlap and/or the extent thereof.

83. While it is indeed a truism that this Court has a duty to uphold *the Constitution* of Kenya as submitted by the Plaintiffs herein, this Court can only protect such rights that



are recognized and demonstrated to exist. There was no such demonstration in the matter before me.

84. Accordingly, and without more, the Plaintiff's suit must fail. I dismiss the same with costs."

4. Aggrieved by the decision, the Plaintiff/Applicant filed a Notice of Appeal dated 5<sup>th</sup> March 2021, while the 8<sup>th</sup> and 9<sup>th</sup> Defendant filed an application for review dated 22<sup>nd</sup> March 2021 asking this Court to make a determination on the 1<sup>st</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendant's defence and counterclaim. That application was heard and fixed for ruling in November 2021. Before the said ruling could be delivered, the Plaintiff/Applicant filed the present application dated 9<sup>th</sup> November 2021 seeking the orders above.
5. The 1<sup>st</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendant/Respondents opposed the application. They filed replying affidavits on 26<sup>th</sup> January 2022 and 17<sup>th</sup> December 2021 respectively. The Interested Party equally opposed the application and filed grounds of opposition dated 23<sup>rd</sup> November 2021.
6. Counsel agreed to canvas the application vide written submissions which were duly filed.

#### **Plaintiff/applicant's Submissions**

7. Counsel relied on the case of *Robert Tom Martins Kibisu v Republic* [2018] eKLR and Section 26 of the *Land Registration Act*, 2012 and submitted that this Court should protect the Plaintiff/Applicant's constitutional right by calling for the necessary evidence to determine the issue of ownership.
8. Mr. Ouma submitted that the Applicant seeks orders to bring into court evidence that would show that its titles, which the Respondents seek to have summarily cancelled, have proper grounding, and unrelated to the 1<sup>st</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondent claims and that the information is crucial for the determination as the documents will show the legitimacy, ownership and history and root of the titles by the Applicant.
9. Counsel submitted that this application is not a backdoor review of the Judgment as alleged by the Respondents and urged the Court to allow the Application as prayed.

#### **1<sup>st</sup> Respondent's Submissions**

10. Counsel relied on the replying affidavit by the 1<sup>st</sup> Respondent and the grounds of opposition and submitted that the orders the Applicant is seeking for are an exercise in futility as the application is a disguise to review the Judgment of the court.
11. Counsel also submitted that the Applicant's only option is to wait for the ruling to be delivered then act on it depending on the outcome. The Applicant will have an option to review or file an appeal.
12. It was Counsel's submission that the Applicant has already filed a Notice of Appeal therefore this application which is disguised as an application for review cannot be tenable and relied on Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 and 2 of the *Civil Procedure Rules* and the case of *Otieno Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR.
13. Ms Thuku further submitted that a Notice of Appeal amounts to an appeal irrespective of whether a record of appeal has been filed or not and relied on the case of *Eco Bank Ltd v David Njoroge Njogu & another* (2016) eKLR where the Court in dismissing an application for review on the ground that the Applicant had already filed an appeal held that once such a notice has been filed the jurisdiction of the Court of Appeal over the matter in issue is thereby activated and by the same token, the jurisdiction of the High Court on the same subject is deactivated.



14. It was Counsel's submission that the Applicant wants to bring in evidence of records in respect of Plot Number 20119 Mambui, 20130 Mambui, 24845 Mambui and 24846 Mambui from the Ministry of Lands which evidence could have been readily availed to the Court by the Applicant during the hearing of the main case. That there is no mention of the reason as to why the Applicant did not avail the said evidence at the hearing neither has the Applicant informed the court that any due diligence was done by the Applicant in trying to avail the evidence at the time of the hearing to no avail and urged the Court to dismiss the application with costs.

### **8<sup>th</sup> and 9<sup>th</sup> Defendants/respondents Submissions**

15. Counsel for the 8<sup>th</sup> and 9<sup>th</sup> Defendants/Respondents also opposed the application and submitted that the application is disguised as an application for review of the Judgment of this court. And that the remedies for review could not be available to a party who has already filed an appeal. Counsel urged the court to dismiss the application with costs.

### **Analysis and Determination**

16. This is an application by the Applicant to arrest a ruling pending in this case and to be allowed to tender additional evidence after Judgment which dismissed the Plaintiff's case for lack of sufficient evidence.
17. The Applicant seeks to be allowed to introduce new evidence to establish ownership of Plot Nos. 20119, 20130, 24845 and 24846 Mambui, in a bid to stop this court from exercising its powers to hear and determine the Respondents' application on review.
18. The court found that the Plaintiff had not tendered sufficient evidence to prove ownership of the suit parcels of land hence dismissed the Plaintiff's case. I agree with the Respondents that the present application is indeed an application for review disguised as an application to arrest the delivery of a ruling hence the only order that the court can issue is the dismissal of this application with costs.
19. It should be noted that the Applicant has also filed an appeal in the Court of Appeal and it is trite law that an application for review is not available to an Applicant who has filed an appeal as per Subrule (2) of Order 45 of the Civil Procedure Rules which provides as follows: -

"A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review."
20. The court is looking at these provisions as they apply to the orders that the Applicant is seeking even though it has been disguised. The application is essentially an application for review of the court's Judgment and set it aside to allow for further evidence. This would be an abuse of court process and if a party is aggrieved by a decree of the court is either to apply for review if it meets the threshold of Order 45 or appeal which the Applicant has already done. There is no middle ground for this as the procedures laid down are clear.
21. In the case of *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR the court held that where a party opts to apply for review such a party cannot after the review is rejected exercise the option to appeal against the same order he sought to review.
22. If the court were to entertain the application for review, the Applicant has not established the evidence or documents sought to be introduced were not within its knowledge as the same forms part of the primary documents that a party needs to rely on to prove ownership.



23. Similarly, in the case of *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR the court held that:

"Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others* [8] had this to say:-

"... A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule."

24. I have considered the application, the submissions by Counsel and relevant authorities and find that the application lacks merit and is therefore dismissed with costs to the Defendants.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 13<sup>TH</sup> DAY OF JUNE, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

