



**Chemutai v Njoroge (Environment & Land Case E075 of 2021)  
[2022] KEELC 3960 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3960 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E075 OF 2021  
LA OMOLLO, J  
JULY 28, 2022**

**BETWEEN**

**EUNICE CHEMUTAI ..... APPLICANT**

**AND**

**SULEIMAN KARUGA NJOROGE ..... RESPONDENT**

**RULING**

**Introduction**

1. This ruling is in respect to the Plaintiff/Applicant’s Notice of Motion dated March 14, 2022.
2. The application seeks the following orders:
  - i. Spent.
  - ii. Spent.
  - iii. That the Honourable Court be pleased to review vary and/or set aside the Ruling and orders issued on the February 24, 2022 (Honourable LA Omollo Judge).
  - iv. That the Honourable Court do issue an Order directing the Nakuru County Land Registrar to amend and/or rectify or cause to be amended the Registry Index Map (RIM) for Nakuru/Kapsita parcels of land known as Nakuru/Kapsita/1131 and Nakuru/Kapsita1113 to confirm and concur with the ground positioning of the 2 parcels of land.
3. The application is based on the grounds on its face and supported by the affidavit sworn on March 14, 2022 by one Eunice Chemutai.



## **Factual Background**

4. The Plaintiff/Applicant commenced this suit vide a plaint dated September 29, 2021. In the plaint, she prays for judgment against the Defendant for:
  - a) An order that the Nakuru County Land Registrar to amend/rectify or cause to be amended the Registry Index Map (RIM) for Nakuru/Kapsita parcels of lands known as Nakuru/Kapsita/1131 and Nakuru/Kapsita/1133 to confirm and concur with the ground positioning of the 2 parcels involved to reflect the true position on the ground.
  - b) A Temporary injunction pending the hearing and finalization of this suit restraining the Defendant, his agents, servants and others whatsoever and howsoever from evicting, taking possession of, entering into, demolishing structures, trespassing upon, selling, alienating, transferring, cultivating, continuing to cutting down trees, develop or construct structures thereupon and/or dealing in any manner with all those parcels of land known as Nakuru/Kapsita/1131 and Nakuru/Kapsita/1133 situated within Kapsita, Nakuru County in the Republic of Kenya.
  - c) A permanent injunction restraining the Defendant, his agents, servants and others whatsoever and howsoever from evicting, taking possession of, entering into, demolishing structures, trespassing upon, selling, alienating, transferring, cultivating, continuing to cutting down trees, develop or construct structures thereupon and/or dealing in any manner with all those parcels of land known as Nakuru/Kapsita/1131 and Nakuru/Kapsita/1133 situated within Kapsita, Nakuru County in the Republic of Kenya.
  - d) Costs and interest of this suit.
5. The 1<sup>st</sup> Defendant filed his statement of defence dated November 19, 2021 on November 24, 2021 wherein he denied the Plaintiff's allegation in the plaint. He averred that orders being sought cannot be granted as they are sought to be executed by a party who is not a party to this suit and should therefore be dismissed with costs.
6. Consequently, the Defendant filed an application dated November 19, 2021 seeking that the Plaintiff's suit be dismissed for being res judicata. The court heard the application and delivered its ruling on February 24, 2022. The suit was dismissed with costs for the reason of being res judicata.
7. The ruling delivered on February 24, 2022 forms the basis of the instant application.

### **Plaintiff/applicant's Contention.**

8. The Plaintiff/Applicant contends that on February 24, 2022 the court delivered a ruling dismissing the Plaintiff/Applicant's suit.
9. The Plaintiff/Applicant further contends that the court in its ruling made reference to the report of December 24, 2014 which report disclose that there exists a clearly demarcated boundary in red between the parcel owned by the Plaintiff and the Defendant. That the boundary comprises of a barbed wire fence and line of tree stamps.
10. She further contends that the Honourable Judge erred by failing to appreciate the surveyors drawing of the two parcels yet she should have concluded that the Defendant's parcel of land was intact and had not been interfered with.



11. It is the Plaintiff/Applicant's contention that the court heavily relied on the parcel number as per the Registry Index Map (RIM) while ignoring the size of the Defendant's parcel on the ground and the title. She further contends that by granting the Defendant the 4.2Ha (9.93) acres which he never had before, the court has usurped the powers of the Executive in the sense that it allocated him an extra land almost the same size of what he actually owns which goes beyond boundary adjustment.
12. The Plaintiff/Applicant further contends that the government surveyors report was disregarded due to clear discrepancies yet the same was extensively discussed by the court in its ruling. She contends that the court discussed the report by the government surveyor dated November 24, 2014 as well as the joint report of November 9, 2016 yet the orders contained in the impugned ruling are a clear deviation of the substantive content of the reports.
13. She ends her deposition by stating that the ruling contains errors on the face of record and further that this court should exercise its discretion in her favour by placing more emphasis on substance rather than undue technicalities and allow the instant application.

#### **Respondent's Response.**

14. In response to the application, the Defendant/Respondent filed a replying affidavit sworn on March 23, 2022 by one Suleiman Karuga Njoroge wherein he deposes that the application is misconceived, incompetent and bad in law.
15. He deposes that the application does not meet the threshold set to warrant the review and/or setting aside of the ruling of the court since it found that the Plaintiff/Applicant had trespassed his land and was ordered to vacate and no Appeal was ever lodged.
16. He further deposes that the Nakuru County Surveyor visited the two properties and filed a joint report in November, 2016 and the court after consideration of the report dismissed the Plaintiff/Applicant's application dated November 4, 2014. He deposes that the report dated December 24, 2014 was considered by the court and thereafter disregarded. Further, that the same had been overtaken by events given the joint report prepared by the surveyors in November, 2016.
17. The Defendant/Respondent deposes that the Plaintiff/Applicant never Appealed the ruling delivered on January 31, 2019 and as such prayer 4 of the application cannot be granted as it had already been granted in Nakuru HCC 72 of 2007 and thus this court cannot be called upon to act as an Appellate court over another court with concurrent jurisdiction. Further, the Defendant/Respondent deposes that this court is barred by the law from trying matters already heard and determined.
18. He ends his disposition by stating that once the court pronounced itself on February 24, 2022, it became functus officio in this matter and that the instant application should be dismissed with costs.

#### **Plaintiff/applicant's Response to the Replying Affidavit.**

19. The Plaintiff/Applicant filed a supplementary affidavit in response to the Defendant/Respondent's replying affidavit. She deposed that indeed there was no appeal to the judgement in this matter hence the reason for seeking review.
20. She deposes that if the government surveyor report dated December 24, 2014 was discarded, then the ruling dated September 28, 2021 is defective on the face of record and therefore review should be allowed. She further deposes that the Defendant/Respondent attempts to mislead the court on the difference between application for review and an Appeal on a matter.



21. The Plaintiff/Applicant deposes that issue of the court being functus officio and the principle of res judicata does not hold any legal sense but is misleading and the court has not fully appreciated and addressed the real issue that is the subject of the dispute.

### **Issues for Determination.**

22. Both parties went to great lengths in support of and in opposition to the application. The Plaintiff/Applicant filed her submissions on May 17, 2022, she identified the following issues for determination:
- a. Whether the Applicant has made out a good case to justify the grant of orders for review.
  - b. Whether the circumstances of this case are of such a nature that would warrant this court's exercise of its inherent jurisdiction by invoking the overriding objective as stipulated under section 1A and 1B of the *Civil Procedure Act*.
23. On the first issue, the Plaintiff/Applicant relied on Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. She submits that the court has the discretionary power to review or vary its own decision if satisfied that there are errors and/or omissions in its impugned decision. She further submits that if the surveyor's report of December 24, 2014 is put into effect in terms of strict interpretation and in view of the fact that the report is part of the impugned ruling of February 24, 2022, this application for review becomes more of an interpretation of the court's own decision.
24. She submits that the Defendant/Respondent should just observe the limits of his 10 acres by adopting the surveyor's report of December 24, 2014 which report was duly filed and adopted by this court. She urges the court to take into account the surveyor's observation that the Defendant/Respondent's parcel 'A' Nakuru/Kapsita 1131 comprises of 4.30 Ha.
25. The Plaintiff/Applicant submits that the legal provision under Order 45 of the Civil Procedure Rules is not only limited to discovery of new evidence or on account of mistake or error apparent on the face of record but also includes 'for any other sufficient reason'. The Plaintiff/Applicant relied on *Civil Appeal No 379 of 2017 Sanitam Services (EA) Limited Vs Rentokil (K) Limited & Another [2019] eKLR* and submits that the facts stated are not only authentic and form part of the court's records which the court made reference to in its ruling but support the instant application to warrant a review and variation of the said ruling. She further submits that this Honourable Court should have taken into account the surveyor's report of December 24, 2014 in respect to parcel 'B' which does not interfere with the Defendant's parcel 'A'.
26. The Plaintiff/Applicant argues that by ignoring the ground observation report dividing the contentions parcels into 'A' and 'B' together with the recommendation that the RIM be amended to reflect the situation on the ground, the Honourable Court granted the Defendant/Respondent an extra 9.93 acres which he did not occupy or have. She finally urges this court to exercise its discretion in her favour by placing more emphasis on substance rather than undue technicalities.
27. The Defendant/Respondent on the other hand filed his submissions on April 25, 2022. He cited the Court of Appeal case in *Anthony Gachara Ayub Vs Francis Mabinda Thinwa [2014] eKLR* which dealt with the issue of error on the face of record. He submitted that the various reports were considered in Nakuru HCC No 72 of 2007 and a determination made after the Plaintiff/Applicant got the Land Surveyor to visit the suit properties and make a report. He further submits that the said decision was never appealed against and that the Plaintiff/Applicant has not challenged the finding that the suit is res judicata but instead challenges the decision by the learned Judge in Nakuru HCC No 72 of 2007 delivered on January 31, 2019 through this suit.



28. The Defendant/Respondent submits that the reports being referred to are not new evidence as they were in the pleadings and the court considered their impact in the suit. He therefore submits that there is no error apparent on the face of the record to warrant setting aside of the ruling.
29. He submits that this court already made a finding that the suit is res judicata and by the said finding, the court lacks jurisdiction to hear the suit or give the orders sought in prayer 4 of the instant application.
30. The Defendant/Respondent urges this court to dismiss the application with costs.
31. Upon perusal of the Application, Supporting Affidavit, Replying Affidavit, Annexures and Submissions filed in respect of this Application, it is my considered view that the following issues arise for determination:
  - a. Whether the orders of February 24, 2022 should be reviewed, varied and/or set aside.
  - b) Whether an order should issue directing the Nakuru Land Registrar to amend and/ or rectify or cause to be amended the Registry Index Map for Nakuru/Kapsita Parcels known as Nakuru/ Kapsita/1131 and Nakuru/Kapsita/ 1133 to conform and concur with the ground positioning of the 32 parcels of land. (Prayer (iv) on the face of the application)
  - c) Who should bear the costs of this application?

### **Analysis and Determination.**

#### **A. Whether the orders of February 24, 2022 should be reviewed, varied and/or set aside.**

32. The law relating to review is found in section 80 of the [Civil Procedure Act](#) read together with Order 45 Rule 1(b) of the Civil procedure Rules.
33. Section 80 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya is the substantive law and it provides as follows:
 

' 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.
34. Order 45, Rule 1(b) sets out the conditions to be met for a court to review its decision. This section provides as follows:
  - (1). 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.

- (2) 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 the review.'

35. Before I delve into the first issue for determination, it is important to correct the Defendant/Respondent's position that this court is functus officio. This court, under the above mentioned provisions of the law, has power to review orders made by it under circumstances mention in Order 45 (1) (b).
36. The basis of an application for review, variation or setting aside of an order is
- a. The discovery of new and important matters or evidence which after due diligence, was not within the Applicant's knowledge or could not be produced by her at the time when the decree was passed or the order made.
  - b. Some mistake or error apparent on the face of the record.
  - c. For any other sufficient reason.
37. The Plaintiff/Applicant claims that there were errors and/or omissions made by this court in delivering ruling. She argues that this court made reference to the report of December 24, 2014 but failed to take into account the surveyor's observation and the size of the Defendant/Respondent's parcel of land both on the ground as well as the title he holds.
38. This is certainly a misapprehension of facts leading to the decision of the court in this matter. The question coming up for determination was whether this suit is res judicata.
39. This court in arriving at the decision that this suit is res judicata analysed the law and situated the facts, as presented, in the law. The application dated November 19, 2021 sought orders that the court finds that this suit is res judicata and the court did find that the suit is res judicata and dismissed it with costs to the Defendant.
40. This court did not interrogate the process culminating to the making of the survey report of December 24, 2014 or the legal effect of it. Reference to the said report was to the extent that it formed the basis of the of the ruling dated January 31, 2019 issued in Nakuru HCCC No 72 of 2007, hence making the present suit res judicata.
41. I find that the Applicant has not been able to place before this court any new and important matters or evidence which was not within the applicant's knowledge or could not be produced by her at the time when the order of February 24, 2022 was made.
42. I also find that the applicant has failed to point this court to a mistake or error apparent on the face of the record.
43. The Applicant has also failed to convince this court that there exists any other sufficient reason necessitating this court to exercise its power or review in her favour so as to vary or setting aside the order of February 24, 2022.



44. In *Grace Akinyi Vs Gladys Kemunto Obiri & another [2016] eKLR* the learned judge cited with approval the decision in *National Bank of Kenya Vs Ndungu Njau Civil Appeal No 2111 of 1996*, wherein the Court of Appeal held that;

' A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law'.

#### **B. Whether prayer (iv) should be allowed**

45. Prayer (iv) on the face of the application is that an order should issue directing the Nakuru Land Registrar to amend and/ or rectify or cause to be amended the Registry Index Map for Nakuru/ KAPSITA Parcels known as Nakuru/Kapsita/1131 and Nakuru/Kapsita/ 1133 to conform and concur with the ground positioning of the 2 parcels of land.

46. This court in its ruling dated February 24, 2022 found that this suit is res judicata and dismissed it.

47. The finding on res judicata coupled with the finding in (A) above, that the Applicant has not met the conditions for grant of orders of review, makes it necessary that prayer (iv) of the instant application is also declined.

#### **C. Who shall bear the costs of this application?**

48. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap 21).

#### **Disposition.**

49. The upshot of the above is that the Applicant has failed to place before this court any new and important matters or evidence, has failed to point the court to a mistake or error apparent on the face of the record and has also failed to convince this court that there exists any other sufficient reason necessitating this court to exercise its power of review in her favour.

50. Consequently, the application dated March 14, 2022 is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28<sup>TH</sup> DAY OF JULY, 2022.**

**L. A. OMOLLO**

**JUDGE**

In the presence of: -

MR. Orioki Kanyeru for the Plaintiff/Applicant

Miss Wangari for the Defendant/ Respondent.

Court clerk; Miss. Jeniffer Chepkorir

