



REPUBLIC OF KENYA



**Ndung'u v Mwangi & 7 others (Environment & Land Case  
1391 of 2014) [2022] KEELC 3287 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3287 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1391 OF 2014  
LC KOMINGOI, J  
JULY 28, 2022**

**BETWEEN**

**FRANCIS MAINA NDUNG'U ..... PLAINTIFF**

**AND**

**PETER MWANGI ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH MUGO ..... 2<sup>ND</sup> DEFENDANT**

**PETER NJOROGE NDERITU ..... 3<sup>RD</sup> DEFENDANT**

**JOHN KAMANDE NJOROGE ..... 4<sup>TH</sup> DEFENDANT**

**PETER WANJOHI MWANGI ..... 5<sup>TH</sup> DEFENDANT**

**WANJIKU WANJENGA KARANJA ..... 6<sup>TH</sup> DEFENDANT**

**FRANCIS NJENGA MUKUA ..... 7<sup>TH</sup> DEFENDANT**

**ISAIAH PETER KANYI ..... 8<sup>TH</sup> DEFENDANT**

**RULING**

1. Judgement was entered for the plaintiff in this matter on January 24, 2021.
2. The defendants/applicants then filed this notice of motion dated February 7, 2022 which is consolidated with the notice of motion dated January 21, 2022.
3. It is brought under order 45 rule 1, 2, and 5 of the *Civil Procedure Rules*; sections 1A and B, 3A, 80 of the *Civil Procedure Act* cap 21 laws of Kenya, section 3 of the *Environment and Land Court Act* and all other enabling provisions of the law.
4. The defendants seek orders that:



- a) Spent.
  - b. Spent
  - c. Spent (refers to consolidation of this application and the application dated January 21, 2022).
  - d. Spent.
  - e. This honourable court be pleased to review and vary its judgement delivered on January 24, 2021 since the court delivered it while under the impression that the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> defendants were in possession of the suit property *ie* Ruiru/Kiu Block 2/4547 while in reality they were and still are in possession of Ruiru/Kiu /Block 2/4546.
  - f. The costs of this application be provided for.
5. The application is based on 14 grounds set out on the face of the motion.
  6. It is supported by the affidavit of the 1<sup>st</sup> defendant. He deponed that he is a proprietor and has been in occupation since 2012 of plot No T44, Githunguri Constituency Ranching Company Limited following purchase and transfer from John Maina. He further deponed that the 2<sup>nd</sup>, 6<sup>th</sup>, and 8<sup>th</sup> defendants own plot numbers T51, T42 and T41 respectively. He added that he has established his matrimonial home on his portion and that the 2<sup>nd</sup> defendant has also built permanent structures on his plot and has been in occupation since 1998.
  7. He deponed that he was sued together with the 2<sup>nd</sup>, 6<sup>th</sup> and 8<sup>th</sup> Defendants seeking to have them evicted from Ruiru/Kiu/Block 2/4547. He further deponed that since they had not been issued with titles, they defended the suit presuming that the subject property they were being sued over was Ruiru/Kiu Block 2/4546. He added that at the hearing of the suit, the Chairman of Githunguri Constituency Ranching Company Limited testified on being summoned by the court and it emerged that they were in occupation of Ruiru/Kiu Block 2/4546 and not Ruiru/Kiu Block2/4547 which is the subject of this suit but he failed to produce a surveyor's report to prove the same.
  8. He further deponed that failure to produce a surveyor's report was captured in paragraph 32 of the judgement delivered by this court on January 24, 2021 wherein the court found that the defendants had trespassed on Ruiru/Kiu Block2/4547 and ordered them to vacate and pay the plaintiff Kshs 500,000/= as damages for trespass. He added that they filed a notice of appeal dated February 10, 2021 and on January 19, 2021, the 1<sup>st</sup> defendant was served with warrants of attachment and proclamation notices and forced to pay the plaintiff Kshs 200,000/= and a further Kshs 135,000/= as part payment of auctioneers fees since their advocate at the time had not obtained a stay of execution.
  9. He annexed a map from survey of Kenya for Ruiru/Kiu Block 2 sheet 5 and a report from Global Geo-Consult registered land surveyors which shows that they are in occupation of Ruiru/Kiu Block2/4546 and not Ruiru/Kiu Block2/4547. He deponed that the plaintiff is yet to serve them with an eviction notice but he has proceeded to execute the order that he be paid Kshs 500,000/= and thus they are constantly being harassed by auctioneers. He urged the court to review and/or set aside its judgement delivered on January 24, 2021.
  10. The plaintiff opposed the application vide his replying affidavit sworn on February 22, 2022. He deponed that he is the registered owner of Ruiru/Kiu Block2/4547 and that judgment was entered in his favour after a full trial. He further deponed that the 2<sup>nd</sup> and 8<sup>th</sup> defendants did not tender evidence hence they cannot ride on the evidence of the 1<sup>st</sup> and 6<sup>th</sup> defendants.



11. He also deponed that the defendants did not plead that they were not on the suit land in their pleadings and that PW3 failed to produce a surveyor's report during the trial thus such evidence cannot be tendered after judgment has been delivered. The report was in their possession.
12. The plaintiff further deponed that he has taken possession of the suit land save for the small portion occupied by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and he is in the process of evicting them. He further deponed that the 2<sup>nd</sup> defendant commenced payment of the decretal amount and a such this application is an afterthought. He also pointed out that there has been inordinate delay since this application is brought a year after the judgement.
13. Parties did not file written submissions.
14. I have considered the notice of motions and the affidavits in support. I have also considered the affidavits in response. The issue for determination is whether this application is merited.
15. Judgement herein was entered for the plaintiff and against the defendants on January 24, 2021. The defendants were ordered to vacate Ruiru/Kiu Block2/4547. They filed a notice of appeal dated February 10, 2021 and later withdrew it vide their notice of withdrawal dated February 3, 2022. The 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup> and 8<sup>th</sup> defendants then filed this application to seek a review of this court's judgement.
16. In the Supreme Court case of *Menginya Salim Murgani v Kenya Revenue Authority* [2014] eKLR: The court held,
 

“It is a general principle of law that a court after passing Judgment, becomes *functus officio* and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.”
17. The law on review of judgement is section 80, 63 (e) and 3A of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules*. The 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup> and 8<sup>th</sup> defendants' main ground of review is based on discovery of new evidence. They annexed a report dated February 9, 2022 by Geo-Consult Registered Land Surveyors and a survey map for Ruiru/Kiu v/ Block 2 Sheet 5 which indicates that the 1<sup>st</sup> and 2<sup>nd</sup> defendants occupy Ruiru/Kiu Block 2/4546.
18. In *Benjob Amalgamated Ltd v Kenya Commercial Bank Limited* [2014] eKLR, the court stated,
 

“The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).”
19. Guided by the decision in *Benjob Amalgamated Ltd v Kenya Commercial Bank Limited* (*supra*) and *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR and considering facts of this case, I'm of the view that the applicants ought to have demonstrated that they discovered new evidence after judgement herein was entered. In the contrary, they were aware that PW3'S testimony raised the issue of whether they occupied the suit land or Ruiru/Kiu Block2/4546 .They ought to have



led the court since evidence that they now seek to introduce was available to them. In the circumstances, the application has no merit.

20. In conclusion, I find no merit in this application and the same is dismissed with costs to the plaintiff/respondent.

It is so ordered.

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

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**L KOMINGOI**

**JUDGE**

In the presence of:-

Mr Njonjo advocate for the plaintiff

Mr Muchemi holding brief for Mr Okonji for the defendants

Steve - Court AssiStant

