



Ngugi & 2 others v Njau (Suing as the Next of Friend Of Simon Njau Kamakia alias Njau Kamakia) & 2 others (Environment & Land Case 400 of 2017) [2022] KEELC 3592 (KLR) (21 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3592 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 400 OF 2017**

**LN GACHERU, J
JULY 21, 2022**

BETWEEN

**JOHN KAMAKIA NGUGI 'A' 1ST APPLICANT
SAMSON NJAU NGUGI 2ND APPLICANT
JOHN KAMAKIA NGUGI 'C' 3RD APPLICANT**

AND

**TABITHA MUTHONI NJAU (SUING AS THE NEXT OF FRIEND OF SIMON NJAU KAMAKIA ALIAS NJAU KAMAKIA) 1ST RESPONDENT
LAND REGISTRAR MURANGA 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

RULING

1. Through a Notice of Motion Application dated June 2, 2021, the 1st Plaintiff/Applicant sought for orders that;
 1. This Honorable Court be pleased to rectify the Judgement dated December 11, 2019, and decree issued thereof to read Loc 4/Gakarara/583, instead of Loc 4/Gakarara/853.
 2. This Honorable Court be pleased to rectify the Judgement dated December 11, 2019 and decree issued thereof in Order D (II) to read John Kamakia Ngugi 'A' instead of John Kamakia 'B'
 3. This Honorable Court be pleased to order removal of Caution and all other inhibitions lodged by Joseph Ngugi Njau on parcel Loc 4/Gakarara/583.
 4. Costs of this application be in the cause.



2. The Application is premised on the 6 grounds outlined on the face of the said application and on the Supporting Affidavit of John Kamakia Ngugi 'A' (the Applicant), sworn on June 2, 2021.
3. It is the Applicant's averments that the instant suit has already been determined and a Judgment delivered. That the suit land is Loc 4/Gakarara/583, and not Loc 4/Gakarara/853. That in its Judgment, the Court used Loc 4/Gakarara/583, interchangeably with Loc 4/Gakarara/853. That the Applicant's name on Page 2J of the said judgment is written as John Kamakia 'B', instead of John Kamakia Ngugi 'A'. That the errors were discovered when he tried to enforce the said Judgment and execute the Decree at the Lands office. That one Joseph Ngugi Njau, had lodged a caution way back in on July 31, 2012, over the suit land claiming beneficial interests and with the Caution in place, they cannot enjoy the fruits of their Judgment.
4. The Application is unopposed by the Respondents herein who failed to file any response despite service of the same.
5. The Application was canvassed by way of written submissions. The 1st Plaintiff/Applicant through the Law Firm of Kanyi Kiruchi & Co Advocates, filed their submissions dated April 20, 2022, and reiterated the averments made in Application. He urged the Court to allow the application as prayed.
6. The Court has considered the pleadings in general, the Applicant's written submissions and the relevant provisions of law and finds that the main issue for determination is whether the Application dated June 2, 2021 is merited.

1. Whether the Application dated June 2, 2021 is merited?

7. The 1st Plaintiff/Applicant has brought the instant application under Sections 99 and 100 of the [Civil Procedure Act](#). Section 99 [Civil Procedure Act](#) provides;

Clerical or arithmetical mistakes in judgements, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

Section 100 [Civil Procedure Act](#) provides;

The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

8. A plain reading of the above provisions of law shows that the Court has power both under the rules of Court and inherent powers of Court, to correct clerical or arithmetical mistakes in judgments, decree or orders arising therein from any accidental slip or omission.
9. The Courts have set out guidelines which govern the circumstances under which the exercise of the jurisdiction to correct clerical or arithmetical mistakes in judgments, decrees or orders is made. In *Vallabhdas Karsandas Raniga Vs Mansukhlal Jivraj and Others* [1965] EA 780, cited with approval [Diamond Trust Kenya Limited VS Motorways Kenya Limited & another](#) [2015] eKLR, the East African Court of Appeal held:
10. Section 3(2) of the [Appellate Jurisdiction Act](#) confers on the Court of Appeal the same jurisdiction to amend judgments, decrees and orders that the High Court has under section 99 of the [Civil Procedure Act](#), making it unnecessary to look to the inherent powers of the court. The words “at any time” in section 99 clearly allow the power of amendment to be exercised after the issue of a formal order.... “Slip



orders” are made to rectify omissions resulting from the failure of counsel to ask for costs and other matters to which their clients are entitled.....A court will only apply the slip rules where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention. In the present case, if the facts had been before the court when judgment was given on appeal, the court would, on application or indeed of its own motion, have made the order for refund, now sought, which was necessarily consequential on the decision on the main issues.”

11. Further in the case of *Dominic Alois George Omenye t/a Omenye & Associates VS Prime Bank Limited* [2017] Eklr, the Court of Appeal stated thus;

We start by asking ourselves the question, what is the true purpose of Section 99 of the *Civil Procedure Act* on which the application before Amin, J was founded? In *Raniga v Jivraj* [1965] EA 700, the predecessor of this Court was considering an application to vary its judgment. The Court stated that under section 3(2) of the *Appellate jurisdiction Act*, it had the same jurisdiction to amend judgments and orders that the High Court has under section 99 of the *Civil Procedure Act*. Regarding that jurisdiction, the Court was emphatic that the power to correct errors will only be made where the court is fully satisfied that it is giving effect to intention of the court at the time when judgment was given, or in the case where a matter was overlooked, where it is satisfied beyond doubt that as to the order which it would have made had the matter been brought to its attention.

12. All the mistakes and errors cited in Sections 99 and 100 of the *Civil Procedure Act* are provided for under Order 45 Rule 1(1) *Civil Procedure Rules* which provides;

45 (Rule1) (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) Where the court is of opinion that the application for review should be granted, it shall grant the same:”

13. Order 45 Rule 1 (1) (b) *Civil Procedure Rules* sets out the parameters for an Application for Review. This is for purposes of avoiding a scenario where the Review Court turns into an Appeal Court over its own Ruling or Judgment. The Court may only hear a new and important matter or evidence which was not within the knowledge of an Applicant or could not be produced by him at the time when the Order was passed.

14. Secondly, the Court may only consider a mistake or error apparent on the face of the record. On this, the record must speak for itself or by itself without much explanation. Thirdly, the court may consider any other sufficient reason.



15. In considering the issue of review under Section 80 *Cap 21* and Order 45 of the *Civil Procedure Rules* 2010, the Court of Appeal in the case of *National Bank of Kenya Ltd vs Ndungu Njau* (Civil Appeal No 211 of 1996 (UR)) held;

“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 a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.”

16. Further in *Pancras T Swari vs Kenya Breweries Ltd* (2014) eKLR the Court of appeal stated thus;

“The Applicant’s right to seek review though unfettered, could not be successfully maintained on the basis that the decision of the court was wrong either on account of wrong application of the law or due to failure to apply the law at all.”

17. In the instant Application, the applicant seeks to rectify the Court’s Judgment delivered on December 11, 2019, and the subsequent Decree issued on 23/1/2020, based on an allegation that the same contains an error on the face of the record. The Plaintiffs via an Amended Plaint dated February 5, 2019, had sought for orders against the Defendants as follows;

- a. A declaration that the registration of Simon Njau Kamakia in respect of Land Parcel No Loc 4/Gakarara/853 (suit land) approximately 7 acres was done in trust of himself and his brother Jorum Ngugi Kamakia (deceased) and his entire family.
- b. A declaration that the Plaintiffs are entitled by way of adverse possession having occupied ½ of Loc 4/Gakarara/853 for a period exceeding 12 years and hence the Defendants title to ½ portion of the suit land be extinguished by operation of law and transferred to the Plaintiffs.
- c. An order of cancellation of the title held by Simon Njau Kamakia and the same be subdivided as follows;
Simon Njau Kamakia - 3.5 acres
John Kamakia Ngugi ‘B’ - 1.17 acres
Simon Njau Ngugi - 1.17 acres
John Kamakia Ngugi ‘C’ - 1.17 acres
- d. That an order of transfer of land parcel No Loc 4/Gakarara/853 as prayed in clause b above be implemented by the Executive Officer of this honourable Court in place of the registered owner Simon Njau Kamakia
- e. Costs of the suit.
- f. Any other further relief that this honourable Court deems fit to grant.

The matter proceeded to hearing and the Court delivered judgment on December 11, 2019, in favour of the Plaintiffs as follows;

- a. The counterclaim of the Defendants fails. It is dismissed.



b. A declaration that the registration of Simon Njau Kamakia in respect of Land parcel No Loc 4 /Gakarara/853 (suit land) approximately 7 acres was held in trust for himself and his brother Jorum Ngugi Kamakia (deceased) and his entire family.

c. A declaration be and is hereby made that the Plaintiffs are entitled by way of adverse possession having occupied ½ share of Loc4/Gakarara/583 for a period of exceeding 12 years and hence the title held by the 1st Defendant has been extinguished by operation of law to the extent of ½ share.

d. The said title be and is hereby rectified and the same be subdivided and reissued as follows;

i. Simon Njau Kamakia - 3.5 acres

ii. John Kamakia - 1.17 acres

iii. Simon Njau Ngugi - 1.17 acres

iv. John Kamakia Ngugi c - 1.17 acres

e. The subdivisions on the ground to conform as practicable as possible to the position of settlement on the suit land.

f. Each party to meet the cost of the subdivision and registration of titles.

g. The 1st Defendant is ordered to execute the requisite documents to effect the said orders in default the Deputy Registrar of this honourable Court is mandated to do so.

h. Parties being related, I make no orders as to costs”

18. A keen look of the above reveals that the error referred to by the 1st Plaintiff/Applicant did not emanate from the Judgement of the Court, but from the Plaintiff's Amended Plaint herein above mentioned. The Plaintiffs in the said amended Plaint referred to both parcel '583' and '853'. While this Courts appreciates that the intended suit land should have been Loc 4/Gakarara/583, as per the title deed attached herein, it notes that Judgment was delivered based on the pleadings placed before the Court by the Plaintiffs.
19. The error in respect of prayer 'a' of the application was essentially made by the Plaintiffs at the filing of the instant suit and cannot be rectified at this juncture via the instant application.
20. In respect of prayer 'b' this Court appreciates that the trial Court erroneously omitted 'A' from the name John Kamakia on order D (ii) of the Judgment. While this Court cannot grant prayer 'a' it proceeds to grant prayer b of the application as the same qualifies as error apparent on the face of the record.
21. The upshot of the above is that the Application for review is found partially merited in terms of prayer 'b' and disallowed in terms of prayer 'a' as it is apparent that there is no error on the face of the Record as the Court delivered its judgment based on the prayer sought by the Plaintiffs in their claim
22. On the issue of removal of caution, Section 2 of the [Land Registration Act](#) defines a Caution to include a Notice in the form of a register to the effect that no action of a specified nature in relation to the land in respect of which the notice has been entered may be taken without first informing the person who gave the notice.
23. Section 71 (1) of the [Land Registration Act](#) Cap No 3 of 2012 states as follows; -

A person who—



- (a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;
- (b) is entitled to a licence; or
- (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge”.

24. Section 73 of the aforementioned Act states as follows;

- (1) A caution may be withdrawn by the cautioner or removed by order of the Court or, subject to subsection (2), by order of the Registrar.
- (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
- (3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.
- (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.
- (5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee’s power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.
- (6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under Section 74 shall not be affected by the cancellation”.

25. It is the Applicant’s contention that the Caution should be withdrawn to enable him enjoy the fruits of his judgement by transferring and registering the suit land in his name. This Court notes that the said Caution was place by Joseph Ngugi Njau who was not a party to this suit. It is not clear why the said Joseph was not enjoined as a party to the suit, yet he claimed an interest over the suit land. It is also not clear as no evidence has been led that the said Joseph was aware of the instant suit and he refused and/or neglected to participate in it.

26. While this Court appreciates that a Judgment was already entered in favour of the Plaintiffs in the instant suit, it will exercise restraint in allowing the Order for removal of Caution. The role of this Court is to do justice and lifting the said caution will amount to condemning the said Joseph Ngugi Njau unheard, yet it has not been proved to this Court that he was aware of the instant suit.

27. The upshot of the foregoing is that the Court finds the Application dated 2/6/2021, is only partially merited in terms of prayer No b. However, the said application is disallowed entirely in terms of prayers No b and c This Court will not issue any orders as to costs as the parties herein are relatives.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 21ST DAY OF JULY, 2022.



L. GACHERU

JUDGE

Delivered online in the presence of;-

Joel Njonjo – Court Assistant

Mr. Wachira HB for Kanyi Kiruchi for 1st Plaintiff/Applicant,

2nd Plaintiff/Applicant and 3rd Plaintiff/Applicant

}

1st Defendant

2nd Defendant N/A

3rd Defendant

L. GACHERU

JUDGE

21/7/2022

