



**Gatei v Knaust (Being the personal representative of the Late
Zipporah Wangechi Muturi) & 2 others (Environment & Land Case
798 of 2013) [2022] KEELC 15705 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 15705 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 798 OF 2013
EC CHERONO, J
SEPTEMBER 23, 2022**

BETWEEN

ALICARANDA WATHIITHA GATEI PLAINTIFF

AND

**FLORENCE WAMBUI KNAUST (BEING THE PERSONAL REPRESENTATIVE
OF THE LATE ZIPPORAH WANGECHI MUTURI) 1ST DEFENDANT**

PATRICK MUTURI IHUNGI 2ND DEFENDANT

JOHNSON MUTURI KARIITHII 3RD DEFENDANT

RULING

1. The applicant, Johnson Muturi Kareiithii moved this Honourable court vide a Notice of motion dated April 13, 2021 and Amended on May 19, 2022 seeking the following orders;
 1. (Spent)
 2. That this Honourable court be pleased to review, vary and/or set aside its judgment/decreed made on 28th day of June 2019 and order the suit herein set down for re-hearing.
 3. That the Applicant herein be joined as a defendant to this suit and be heard on merits.
 4. That this Honourable court be pleased to make such other/and or further orders as it may deem fit in the circumstances of this case so as to serve the ends of substantive justice.
 5. That costs of this application be costs in the cause.
2. The application is premised on eight grounds shown on the face of the application supported by the affidavit of his Advocate Randolph M Tindika. The applicant also filed submissions through the firm of Tindika & Co Advocates in further support of the said application. The firm of Apollo Muinde



& Co Advocates appearing for the 1st and 2nd defendants filed submissions also in support of the application.

3. The said application is opposed by the plaintiff, Alicaranda Wathiitha Gatei, vide a replying affidavit sworn on June 28, 2022 and written submissions through the firm of M/S Ngigi Gichoya & Co Advocates.

Applicants Summary of Facts

4. From the materials in support of the application herein, the applicant avers that while delivering its decision did not consider other dependants /beneficiaries of the deceased who have now been completely disinherited/denied their legal and/or equitable share to the subject portion of land, to wit, parcel Number Ngariama/Kabare/414, whether or not it was clan land.
5. The applicant further stated that there are many other dependants of the deceased with a legal and/or equitable claim to half of land parcel number Ngariama/Kabare/414 who were not aware of the existence of this suit or its outcome and that this matter could only be properly dealt with if all persons with a legal/equitable claim are heard on merit as the judgment delivered wholly in favour of the plaintiff directly affect their rights.
6. That he is the biological son to the deceased herein and that he only came to know about this suit recently through his mother, Jane Nginda Kariithi who was previously informed by the 2nd Defendant of this Honourable court's judgment hence an appeal is not tenable for the reason that he was not a party to the proceedings and that the outcome of this suit directly affects his legal rights and others.
7. He stated that the plaintiff is hell-bent to completely disinherit other dependants of the deceased to the extent of intermeddling by transferring the deceased's tea account to her name, withdrawing substantial amount of money from the deceased's tea account without obtaining letters of administration and without prove of marriage to the deceased.

Plaintiff/Respondent's Summary of Facts

8. The plaintiff/respondent in his replying affidavit avers that land parcel Number Ngariama/Kabare/249 was registered in the names of Muturi Ibungi who transferred the same to Loise Wambura and the 1st defendant, in equal shares to hold in trust for the respective families. She stated that the aforesaid land was subdivided into land parcels No Ngariama/Kabare/413 in the name of Loise Wambura Muturi whereas Title No Ngariama/Kabare/414 was registered in the name of Zipporah Wangechi Muturi, the 1st defendant herein who subsequently and unlawfully transferred the same to Patrick Muturi Ihungi, the 2nd defendant.
9. She further stated that, upon hearing the parties and their witnesses and upon evaluating the evidence adduced, this Honourable court rendered itself on June 28, 2019 and entered Judgment in her favour against the defendants. That the defendants were dissatisfied with the judgment of the court and filed a Notice of appeal on July 2, 2019. However, the Defendants subsequently withdrew the Notice of Appeal on August 27, 2019
10. The plaintiff/respondent also stated that this application is an afterthought and that the applicant seeks to adduce further evidence through the back-door as there is no mistake and/or error apparent on the face of the record to warrant a Review, variation and/or setting aside of the impugned judgment.
11. The plaintiff also avers that she was married to the late James Kariithi and were blessed with four children namely; Zipporah Wangechi Nginda, Njoki Kariithi, Muciri Kariithi and Wambui Kariithi. She annexed copies of birth certificates



12. The plaintiff/Respondent Further stated that contrary to what is alleged by the applicant, She never worked for James Kariithi Muturi. She avers that she is in full possession and occupation of the suit property where she has grown tea under grower No TM0280061-Thumaita Tea Factory and Coffee under Grower No 715Karithathi Farmers Co-operative Society. She stated that applicant cannot allege that she fraudulently acquired transfer documents in respect to the coffee stems and Tea bushes yet he has never lodged any complaint any police station.
13. The plaintiff further stated that the applicant who is allegedly a son to Jane Nginda Kariithi is on a fishing expedition with a sole purpose of blocking her from enjoying the fruits of the judgment delivered in her favour on June 28, 2019.
14. It is the plaintiff's contention that while seeking similar orders vide a Notice of Motion dated November 13, 2019, the 2nd defendant relied on his supporting affidavit and Jane Nginda Kariithi sworn on November 11, 2019 who is allegedly the mother to the current applicant, Johnson Muturi Kareiithi. She annexed a copy of the said affidavit by Jane Nginda Kariithi and marked 'AWG6'.
15. The plaintiff stated that the aforesaid Jane Nginda Kareiithi pleaded her case through Patrick Muturi Ihungu in singles and they are now suing in plural under the current applicant, Johnson Muturi Kareiithi.
16. In conclusion, the plaintiff avers that the Amended Notice of Motion dated April 13, 2021 is res-judicata in view of the ruling delivered by this Honourable court on July 23, 2021 in respect to the Notice of Motion dated November 13, 2019

Applicant's Written Submissions

17. The applicant through the firm of Tindika & Company Advocates submitted on the following four (4) issues namely;
 - i. Whether there are sufficient reasons to warrant a review of the decree issued on the 28th of June 2019 and whether the Applicant can appeal the outcome of this suit
 - ii. Whether this Honourable court should hear this suit afresh and the applicant be enjoined as a party to the suit
 - iii. Whether the orders sought in the plaintiff's application dated February 11, 2021 should be granted
 - iv. Whether the application amended on May 19, 2022 is *resjudicata*
18. On whether there are sufficient reasons to warrant a review of the decree issued by this Honourable court on June 28, 2019, the applicant submitted that he was not involved in the proceedings of this court at the time it was instituted as he was not a party and only came to know about the existence of the suit through his mother who was informed about it by the 2nd defendant after judgment and decree had been passed. For those reasons, the applicant contends that he cannot file an appeal to ventilate those serious issues he is raising since he was not a party to this suit
19. As to whether this Honourable court should hear this suit afresh and the applicant be enjoined as party, the applicant answered in the affirmative and submitted that he should be enjoined as a party and be heard in his own right for the reason that the outcome of the this suit directly affects his constitutional rights under the *constitution*. He therefore sought to be enjoined as a defendant, sets aside its judgment, reopen the suit for retrial to enable the court effectually determine the issues in controversy and deliver substantive justice.



20. On the third issue whether the plaintiff's application dated February 11, 2021 should be granted, the applicant answered in the negative arguing that this Honourable court's judgment giving rise to the said decree was obtained by concealment of material facts and should not be allowed to stand.
21. The last issue is whether the application under review Amended on May 19, 2022 is res-judicata. According to the applicant, that application is not re-judicata for the reason that he was not a party to the suit and is not claiming under the defendants but as of his own right as the son of the deceased. Secondly, he submitted that the current application raises issues that were not addressed in any form or manner in the said Ruling and application for review by the 2nd Defendant

Legal Analysis and Determination

22. I have considered the pleadings and the proceedings, the Notice of Motion by the applicant amended on May 19, 2022 and the one by the plaintiff/respondent dated February 11, 2021, the supporting and rival affidavits as well as annexures thereto and rival submissions. I have also considered the applicable law. From the materials placed before me, the following issues comment for determination;
 1. Whether there are sufficient grounds to warrant the review and setting aside of the judgment and/or decree of this Honourable court delivered on 28th June, 2019?
 2. Whether the applicant should be joined as a party in this suit?
 3. Whether the orders sought in the plaintiff's application dated February 11, 2021 should be granted?
 4. Whether the application amended on May 19, 2022 is res-judicata?

Whether there are sufficient grounds to warrant the review and setting aside of the judgment and/or decree of this Honourable court delivered on June 28, 2019.

23. The applicable law on Review is derived from Section 80 of the *Civil Procedure Act*, cap 21 Laws of Kenya. Order 45 Rule 1 of the *Civil Procedure Rules* which sets out the conditions and limitations for review 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 hereby is 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 review."

24. Several decisions have been made by the superior courts setting out the guiding principles. In the case of *Benjob Amalgamated Limited & Another v Kenya Commercial Bank Ltd* (2014) e KLR the Court of Appeal observed thus;

"(57) Jurisdiction that emerges shows that notwithstanding that it(the court) has not explicitly been statutorily conferred with the jurisdiction to re-open a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to (sic) 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.

(61) ----This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice."

25. Again in the case of *Republic v Advocates Disciplinary Tribunal Ex-parte Apollo Mboya* (2019) e KLR, the court made the following observation;

30 "The principles which can be culled out from the above noted authorities are;

- i. A court can review its decision on either of the grounds enumerated in order 5 Rule 1 and not otherwise.
- ii. The expression "any other sufficient –reason " appearing in order 45 Rule 1 has to be interpreted in the light of other specified grounds
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger bench of tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its jurisdiction with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated apparent
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to



show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

- viii. A mistake or an error apparent on the face of the record means a mistake or error, which is prima- facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a Civil court and consequently by the appellate courts. The words occurring in section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such have been provided for in order 45 Rule 1
- x. The power of a Civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in order 45 Rule 1.”

26. It is clear from the above decisions and the applicable law that a party aggrieved by a decision or an order of a court or tribunal has to establish the following grounds;

- i. Discovery of new and important matter or evidence
- ii. On account of some mistake or error apparent on the face of the record; and
- iii. For other sufficient reason

27. The applicant in paragraph 9 his supporting affidavit deposed that he only came to know about this suit recently through his mother, Jane Nginda Kariithi. Upon perusal of the pleadings and proceedings in this suit, it indicates that this case was instituted by the plaintiff on November 15, 2013. The suit has been in the courts for more than six(6) years before judgment was delivered on 28/02/2019. The plaintiff in her witness statement which was adopted by this Honourable court during the hearing averred inter -alia that the suit land parcel No Ngariama/Kabare/414 is trust land and that she has been in occupation of the whole land which she has also developed extensively. These averments given on oath were not challenged on cross-examination and were also corroborated by other witnesses. If indeed the applicant had beneficial interest in the suit property, how come he did not have the slightest inkling how the same changed hands from the original owner to the defendants before the plaintiff filed this suit? The only irresistible conclusion to be made is that the applicant did not exercise due diligence to know the status of a property he purports to have beneficial interest. The applicant did not state in his affidavit that he exercised due diligence but could not establish that this suit which was filed in the year 2015 was in existence.

28. It is to be noted that the applicant in his supporting affidavit stated that he was informed about these proceedings, the impugned judgment and the decree in respect of this suit by his mother, Jane Nginda kariithi. The applicant however, did not say when he got the information. From the evidence and the proceedings, it is not in doubt that the applicant’s mother Jane Nginda kariithi together with



Patrick Muturi Ihungi, the 2nd defendant herein had moved this Honourable court vide a Notice of Motion dated November 13, 2019 seeking orders for inter-alia Review, vary and/or setting aside the judgment and decree of the Honourable court delivered on June 28, 2019. The said application was in all fours with the present application by the applicant. In a Ruling delivered on July 23, 2021, the said application was dismissed with costs.

29. Assuming the applicant was informed of this suit by his mother when she filed the application on November 13, 2019, the applicant cannot say that he got to know about this case and the impugned judgment recently. I find that this application has been brought within unreasonable delay. The delay in bringing the application is unreasonable and no explanation has been given.

Whether the applicant should be joined as a party in this suit?

30. The applicant is seeking to be joined as a party in this suit where hearing was conducted, witnesses testified and judgment delivered. The reason given by the applicant is that he was not aware of the existence of this case. The applicant further avers that the suit property is part of a clan land where he is a beneficiary. Before exercising the court's residual power to review my judgment, the applicant must establish the principles set out under order 45 Rule1 CPR. From my evaluation above, I find that the applicant has miserably failed to show that there is a new matter or evidence which was not within his knowledge, even after the exercise of due diligence. He has not also established any error apparent on the face of the record or any other sufficient reason. It would therefore a futile exercise to make an order for joinder of the applicant as a party.

Whether the orders sought in the plaintiff's application dated February 11, 2021 should be granted?

31. The plaintiff filed an application seeking for orders inter-alia that the Deputy Registrar to sign all the necessary documents and/or completion documents on behalf of the 2nd defendant/respondent in respect to the decree and/or orders made on June 28, 2019. The application is seeking enforcement of the judgment and decree of this Honourable court. Since I have found that applicant's application for review amended on 19th May 2022 has no merit, it follows that the dismissal of the said application paves way for execution of the decree herein.

Whether the application amended on May 19, 2022 is res-judicata?

32. From the evidence and the proceedings, it is clear that the 2nd defendant herein filed a Notice of motion dated November 13, 2019 seeking orders similar to those being sought by the applicant in the current notice of motion amended on May 19, 2022. Though the two applications revolve around the same title, the parties are different. The current amended Notice of motion dated May 19, 2022 is brought by Johnson Muturi Kariithi who is not yet a party to this suit while the Notice of Motion dated November 13, 2019 was filed by Patrick Muturi Ihungi, the 2nd defendant who is a party in this suit. The answer to this question is in the negative.
33. For all the reasons given hereinabove, I find the Notice of Motion amended on May 19, 2022 lack merit and the same is hereby dismissed and the Notice of Motion application dated February 11, 2021 is allowed. The plaintiff shall have costs of the two applications. Orders accordingly.

READ SIGNED AND DELIVERED VIA E-MAIL THIS 23RD SEPTEMBER, 2022.

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HON. E.C. CHERONO

ELC JUDGE

