



REPUBLIC OF KENYA



Khonde & another v Ngomeni Swimmers Limited & 8 others (Environment & Land Case 15 of 2010) [2022] KEELC 4831 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4831 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 15 OF 2010**

**JO OLOLA, J
SEPTEMBER 22, 2022**

BETWEEN

TABU TUVA KHONDE 1ST APPLICANT

KAHINDI KAINGU GONDA 2ND APPLICANT

AND

NGOMENI SWIMMERS LIMITED 1ST RESPONDENT

ZEDI AHMED SAID 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

LAND REGISTRAR KILIFI 4TH RESPONDENT

CHIEF LAND REGISTRAR 5TH RESPONDENT

DIRECTOR OF SURVEYS 6TH RESPONDENT

**DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT 7TH
RESPONDENT**

REGISTRAR OF TITLES MOMBASA 8TH RESPONDENT

ST. PATRICKS SCHOOL LIMITED 9TH RESPONDENT

RULING

1. I have before me for determination two applications. By the first application dated March 22, 2021, Tabu Tuva Konde and Kahindi Kaingu Gonda (the 8th and 9th defendants herein) pray for orders:
 1. That this honourable court be pleased to review and vary the judgment/decree given on February 19, 2019 to include a determination in respect to the 8th and 9th defendant's counterclaim dated March 17, 2015;



2. That the honourable court should, as a matter of course, consequent to the judgment delivered on February 19, 2019 dismissing the plaintiff/respondent's suit, allow prayers 1A, 1B, 2 and 3 of the 8th and 9th defendants' counterclaim dated March 17, 2015; and
 3. That the plaintiff/respondent be condemned to pay the costs of this application.
2. The application which is supported by two affidavits sworn by the 8th and 9th defendants is premised on the grounds that:
- (a) The honourable court dismissed the plaintiff's suit on February 19, 2021 on the ground that it could not explain how it acquired the parcels of land numbers 20119, 20130, 24845 and 24846 neither could it prove that the same overlap the 8th and 9th defendants' parcels of land numbers 787 and 894;
 - (b) That there is an error apparent on the face of the record and/or sufficient cause for the review of the judgment delivered herein as the honourable court erroneously did not pronounce itself on the 8th and 9th defendants' counterclaim despite appreciating the existence of the counterclaim in its analysis of the judgment;
 - (c) That in the circumstances of the findings made in the judgment that led to the dismissal of the Plaintiff's suit, there is a justification for the 8th and 9th defendants' prayers 1A, 1B, 2 and 3 of the counterclaim to be allowed as a matter of course; and
 - (d) That the justice of the matter dictates that the application filed herein be allowed.
3. Ngomeni Swimmers Limited (the plaintiff) is opposed to the orders sought in the first application. In a replying affidavit sworn by its director Daniel Ricci and filed herein on May 6, 2021, the plaintiff avers that the application is vexatious and meant to abuse the court process and waste the court's time. The plaintiff avers that it has already filed a notice of appeal in regard to the judgment delivered herein on February 19, 2021 and the said notice has been served upon the 8th and 9th defendants.
4. By the second application dated April 6, 2021, Zedi Ahmed Said (the 1st defendant herein) prays for orders:
1. That this honourable court be pleased to review and vary the judgment/decreed issued on February 19, 2021 to include a determination and/or finding in respect of the 1st defendant's further amended counterclaim dated May 19, 2015;
 2. that this honourable court consequent to the judgment delivered on February 19, 2021 dismissing the plaintiff's suit, do allow prayers a, b, c and d of the 1st defendant's further amended defence and counterclaim dated May 19, 2015;
 3. That the court do order that the plaintiff's title deed is irregular and an order do issue to the Land Registrar to effect correction on the Land Registry entry on the suit property by cancelling the plaintiff's title to the suit property; and
 4. That the costs of this application be paid by the plaintiff.
5. The second application is supported by an affidavit sworn by the 1st defendant and is based on the grounds that:
1. The suit was instituted by way of a plaint dated March 22, 2007 which plaint was amended severally with the final amendment being on March 20, 2015;



2. That the 1st defendant filed a defence and counterclaim which has also been amended with the final one being the further amended defence and counterclaim dated May 19, 2015;
 3. That the suit was heard and this court delivered its judgment on February 19, 2021 where the plaintiff's suit was dismissed on the ground that the plaintiff had failed to demonstrate how it acquired the parcels of land number 20119, 20130, 24845 and 24846;
 4. That there is an error on the face of the record and/or sufficient cause for review of the judgment as the court erroneously failed to pronounce itself on the 1st defendant's further amended counterclaim dated May 19, 2015;
 5. That in the circumstances of the findings made in the judgment that led to the dismissal of the plaintiff's suit, there is a justification for the 1st defendant's counterclaim dated May 19, 2019 to be allowed as a matter of course; and
 6. That it is in the interest of justice that the application be allowed.
6. I have carefully perused and considered the two applications and the submissions and authorities placed before me by the learned advocates acting for the parties. While the plaintiff was opposed to the first application filed by the 8th and 9th defendants, the second application filed by the 1st defendant was not opposed.
 7. The two applications as filed by the 1st, 8th and 9th defendants urge the court to be pleased to review the judgment and decree issued herein on February 19, 2019 to include a determination in respect of their respective counterclaims. The plaintiff is opposed to the first application on account that the same is a waste of time as it has already lodged a notice of appeal against the judgment and that the said notice of appeal has already been served upon the 8th and 9th defendants.
 8. From the record before me, it is apparent that this suit was instituted vide a plaint dated February 22, 2010. That plaint was overtime amended severally, first on July 28, 2010, secondly on November 19, 2014 and finally on March 2, 2015. Those amendments necessitated the 1st, 8th and 9th defendants who had also filed their pleadings to amend the same.
 9. In response to the final amendments to the plaint, the 8th and 9th defendants filed a joint amended defence and counterclaim dated March 17, 2015 wherein they sought orders as follows against the plaintiff:
 - 1A. That the honourable court be pleased to issue a permanent injunction against the plaintiff, restraining itself, its agents, employees, workmen, servants and/or any other third parties from trespassing and/or laying claim to and/or dealing in any way whatsoever with land parcel numbers Ngomeni Squatter Settlement Scheme/787 and Ngomeni Squatter Settlement Scheme/894;
 - 1B. That the honourable court be pleased to issue a permanent injunction against the plaintiff restraining itself, its agents, employees, workmen, servants and/or any other 3rd parties from trespassing and/or laying claim to and/or dealing in any way whatsoever with all parcels of land within Ngomeni Settlement Scheme registered under the old Registered Land Act cap 300 Laws of Kenya;
 2. That the honourable court be pleased to cancel delete and/or declare as null and void the registration of the plaintiff's parcel of land numbers 20130, 24845 and 23846 comprised in grant numbers 33295 and 33298; and



3. That the plaintiff be condemned to pay the costs of the suit.
10. On his part, the 1st defendant equally filed a further amended defence and counterclaim dated May 19, 2015 wherein he sought orders as follows against the plaintiff:
 - (a) A declaration that the 1st defendant is the rightful and legal proprietor of Plot No 1361 Ngomeni Squatter Settlement Scheme;
 - (b) Damages for trespass and interest thereon at court rates;
 - (c) A permanent injunction against the plaintiff by itself, servants, agents employees and/or directors from encroaching, trespassing, damaging, wasting and/or in any manner howsoever and whatsoever from interfering with the defendant's ownership, occupation, possession and/or enjoyment of proprietorship rights in Plot No 1362, No. 1361 Ngomeni Squatter Settlement Scheme; and
 - (d) Costs of the counterclaim and interest thereon at court rates.
11. While they did not file any application for a review of the orders, St Patrick's School Limited (the interested party herein) equally filed a counterclaim dated March 30, 2015 upon being enjoined in the suit and sought the following orders against the plaintiff:
 - (i) A declaration that the Interested party is the *bona fide* owner of Plot LR No Ngomeni/Squatters Settlement Scheme/982;
 - (ii) A declaration that the interested party is entitled to exclusive and unimpeded right of possession and occupation of all that Ngomeni/Squatter Settlement Scheme/892;
 - (iii) A permanent injunction restraining the plaintiff whether by (itself) or (its servants or agents or otherwise from interfering, remaining on, selling, alienating, charging, leasing and/or dealing with LR No Ngomeni/Squatters Settlement Scheme/892;
 - (iv) And/or in the alternative the current value of the (said) LR No Ngomeni/Squatters Settlement Scheme/892 which amount shall be determined at the hearing of the suit;
 - (v) Costs of this suit and the counterclaim; and
 - (vi) Interest on (iii), (vi) and (v) above at commercial rates.
12. While this court made reference to the respective defences and counterclaims at paragraphs 9, 15 and 21 of the Judgment delivered herein on February 19, 2021, it was clear to me that due to an oversight on the part of the court those prayers were not addressed in the final orders granted by the court.
13. By the said judgment, this court did find as a matter of fact that the 1st, 8th and 9th defendants as well as the interested party herein derived their claim to the disputed parcels of land from the establishment of the Ngomeni Settlement Scheme by the Government of the Republic of Kenya.
14. It was also the court's finding that the plaintiff had failed to prove the legality of its titles and/or that the same were acquired lawfully.
15. Given those findings, it follows as a matter of course that the 1st, 8th and 9th defendants' as well as the titles acquired by the Interested party are indisputable and it was therefore in the interest of justice that this court pronounces itself with certainty on the prayers brought by the parties.
16. As it were, the power to review a judgment or an order can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. I am satisfied that there is sufficient cause shown out of the oversight on the part of the court and thus justifying a review of the said judgment.

17. Accordingly I allow the two applications, vary the judgment dated and delivered herein on February 19, 2021 and make the following orders:

- (a) The plaintiff's suit is dismissed with costs to the 1st, 8th and 9th defendants.
- (b) A declaration is hereby issued that the 1st defendant is the rightful proprietor of Plot No 1361 Ngomeni Squatter Settlement Scheme.
- (c) A permanent injunction is hereby issued against the plaintiff by itself, servants, agents, employees and/or directors from encroaching, trespassing, damaging, wasting and/or in any manner whatsoever and howsoever interfering with the 1st defendant's ownership, occupation, possession and/or enjoyment of proprietorship rights over Plot No 1361 Ngomeni Squatter Settlement Scheme.
- (d) A permanent injunction is hereby issued against the plaintiff restraining itself, its agents, employees, workmen, servants and/or any third parties from trespassing and/or laying claim to and/or dealing in any way whatsoever with land parcel Nos Ngomeni Squatter Settlement Scheme/787 and 894.
- (e) The registration of the plaintiff as the proprietor of land parcels Nos 20130, 24845 and 23846 as comprised in grant Nos 33295 and 33298 is hereby declared as null and void.
- (f) A declaration is hereby issued that the Interested Party is the bona find owner of Plot LR No Ngomeni Squatter Settlement Scheme/892 and is thereby entitled to exclusive and unimpeded right of possession and occupation thereof.
- (g) A permanent injunction is hereby issued restraining the plaintiff whether by itself, its servants and/or agents from interfering with, remaining on, selling, alienating, charging, leasing and/or dealing with LR No Ngomeni/Squatters Settlement Scheme/892.
- (h) The plaintiff shall also bear the costs of the counterclaims as filed by the 1st, 8th and 9th defendants as well as the interested party herein.
- (i) Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 22ND SEPTEMBER, 2022.

In the presence of:

No appearance for the Applicants

No appearance for the Respondent

Court assistant - Kendi

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J. O. Olola

JUDGE

