



**Ruto v Talam (Environment & Land Case 1 of 2014)  
[2022] KEELC 13832 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13832 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 1 OF 2014  
MC OUNDO, J  
OCTOBER 27, 2022**

**BETWEEN**

**WESLEY RUTO ..... PLAINTIFF**

**AND**

**JAMES TALAM ..... DEFENDANT**

**RULING**

1. Judgment in this matter was delivered on the 2<sup>nd</sup> September 2016, wherein the court held as follows;

“I believe I have addressed all issues in this case. I now make the following final orders:-

- i) The Plaintiff’s suit is hereby dismissed with costs.
- ii) I enter judgment for the Defendant in terms of the counterclaim with costs.
- iii) I hereby order the revocation of the titles Kericho/Kapsuser/5156 and Kericho/Kapsuser/5157 and further order the restoration of the title Kericho/Kapsuser/933 in the name of the Defendant James Talam.
- iv) I order the Plaintiff to demolish all structures and to vacate the land comprised in the land parcel Kericho/Kapsuser/933 and to do so no later than 30 days from the date hereof.
- v) In the event that the Plaintiff does not do so, the defendant is at liberty to apply for an order of eviction and is at liberty if he does so wish to demolish the structures put up by the Plaintiff and the cost of all these will be shouldered by the Plaintiff.
- vi) After the period of 30 days above, the Plaintiff and/or his servants/agents/ assigns and/or anybody claiming under his title, are hereby barred by an order



of permanent injunction from entering, being upon, or in any other way interfering with the possession of the land parcel Kericho/Kapsuser/933. ”

2. By an application dated the 17<sup>th</sup> January 2020, brought pursuant to the provisions of Order 45 Rule 1 and 2 of the *Civil Procedure Rules*, Sections 3A and 80 of the *Civil Procedure Act*, and all enabling provisions of the law, which application was supported by the grounds therein as well as an affidavit dated the 17<sup>th</sup> January 2020 sworn by James Talam, the Applicant/Defendant therein seeks that; the said judgment be reviewed together with all consequential orders to correct the title for revocation therein to read LR No. Kericho/Kapsuser/5256 and LR No Kericho/Kapsuser/5257 instead of LR No Kericho/Kapsuser/5156 and LR No Kericho/Kapsuser/5157. The reason given was that there was an error apparent on the face of the record. That after the judgment had revoked titles to LR No. Kericho/Kapsuser/5156 and Kericho/Kapsuser/5157 with further orders that the titles be restored to LR No. Kericho/Kapsuser/933 in the name of the defendant James Talam, te said orders could not be implemented as the said parcels of land were registered to persons who were not parties to the suit.
3. That although the original suit land LR No. Kericho/Kapsuser/933 was subdivided into portions namely LR No Kericho/Kapsuser/5156 and LR No Kericho/Kapsuser/5157, the said titles, it had been discovered, by the Land Registrar had been erroneously duplicated from the survey department wherein new numbers had been issued. That by a clarification from the District Surveyor, the rectification of the anomaly therein had subsequently resulted into LR No. Kericho/Kapsuser/5256 and LR No Kericho/Kapsuser/5257 respectively. Reference was made to the annexures marked as JT 3(b-f) in the application.
4. That whereas the Applicant would suffer irreparably should the orders for review not be granted, on the other hand the Respondent stood to suffer no prejudice. That this was a discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the Applicant at the time the Decree was passed.
5. That the Plaintiff/Respondent had not filed an Appeal and neither had they been served with any Notice of an intended Appeal. The mere statement that an Appeal was pending final determination was intended to mislead the court. The Applicant sought for the application to be allowed
6. The Application was opposed by the Plaintiff/Respondent via his Replying Affidavit sworn on 22<sup>nd</sup> January 2011 to the effect that it was not merited, was an afterthought and was aimed at reopening an already closed case which was awaiting the final determination in the Court of Appeal.
7. That there had been no error apparent on the face of the record as the evidence adduced by the Defendant at trial had alluded to parcels of land LR No. Kericho/Kapsuser/5156 and LR No Kericho/Kapsuser/5157 respectively where upon judgment had been decided on that basis. That the introduction of a different set of facts by way of review, which had also introduced non- parties and which outcome would affect them, was not permissible.
8. The Respondent further deponed that the application had been filed after an inordinate long period of time which was almost 4 years after judgment had been delivered. That once a judgment was pronounced, the court became functus officio and could not reopen the case. The respondent sought for the application to be dismissed with costs.
9. There were directions issued by the court, on the 22<sup>nd</sup> September 2021, which were received by parties that the said Application be disposed of by way of written submissions which were to be filed within 14 days. These orders were not complied with by the Respondent.



## Determination.

10. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that a party who fails to file his submissions on an application as ordered by the court is deemed as a party who has failed to prosecute and/or defend an application and therefor that application is either liable for dismissal or considered unopposed. The filing of submissions having been ordered on the 22<sup>nd</sup> September 2021 in the presence of counsel for both parties, and this court having extended time for compliance on several occasions without compliance, the failure by the Respondent to exercise the leave granted to him to file written submissions within the stipulated period clearly demonstrates inertia and inordinate delay, lack of interest and/or seriousness. To this effect the court shall consider the Application as unopposed but this does not mean that the merits of the same cannot be tested.
11. Order 45 Rule 1 of the Civil Procedure Rules provides as follows:-  
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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”
12. Section 80 of the *Civil Procedure Act* 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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
13. From the above provisions, it is clear that whereas Section 80 of the *Civil Procedure Act* gives the court the power to review its orders, Order 45 Rule 1 of the Civil Procedure Rules sets out the rules which restrict the grounds upon which an application for review may be made. These grounds include;
  - i. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made or;
  - ii. on account of some mistake or error apparent on the face of the record, or
  - iii. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.



14. The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.
15. The Applicant's application is pegged on the annexures herein marked as JT3 (a-f) which documents he seeks to rely on as his "new evidence"
16. I have considered the said annexures to which annexure 3(a) is a letter dated 30<sup>th</sup> October 2017 addressed to the Kericho Land Registrar by the Kericho District Surveyor informing him that parcels LR No Kericho/Kapsuser/5156 and LR No Kericho/Kapsuser/5157 were erroneously duplicated by the survey office and that the numbers of the parcels of land resulting from the subdivision of LR No Kericho/Kapsuser/933 had now been rectified to reflect the new numbers as LR No Kericho/Kapsuser/5256 and LR No Kericho/Kapsuser/5257 and not LR No Kericho/Kapsuser/5156 and LR No Kericho/Kapsuser/5157.
17. Subsequently vide a letter dated the 20<sup>th</sup> November 2017, herein marked as annexure 3(b), the Land Registrar Kericho had written to Counsel informing him of these developments.
18. Of interest to note however is that parcel of land LR No Kericho/Kapsuser/5256 is in the name of one Irine Chepngeno and is charged to KCB Bank for Ksh 3,060,000/= as per annexure JT3(c), whereas land parcel LR No Kericho/Kapsuser/5257 is registered in the name of one Kiptoo A Talam as per annexure JT3(d).
19. In the decided case of *Ajit Kumar Rath vs State of Orisa & Others* on 2 November, 1999 Court at Page 608 the Supreme Court of India had this to say:-

‘the power 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. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule”

20. Having considered the reason herein advanced by the Applicant seeking that this court reviews its judgment of 2<sup>nd</sup> September 2016 and all factors taken into consideration, I find that indeed the application depicts the discovery of new evidence which was not within the Applicant's knowledge or could not be produced by him at the time of hearing of the suit. However the said new evidence has now introduced third parties. I have carefully perused through the impugned judgment herein and there is no doubt that evidence that was led was in relation to the original Certificate of Title to land LR No Kericho/Kapsuser/933 which had been subdivided giving rise to LR No Kericho/Kapsuser/5156 and LR No Kericho/Kapsuser/5157 and which titles had been registered to the Plaintiff/Respondent herein.
21. The new evidence however reveals that upon the subdivision of LR No Kericho/Kapsuser/933, the resultant parcels of land were LR No Kericho/Kapsuser/5256 and LR No Kericho/Kapsuser/5257 which land was registered to persons who were not parties to the suit. Indeed LR No Kericho/Kapsuser/5256 was registered in the name of one Irine Chepngeno on 14<sup>th</sup> January 2016 and



subsequently charged to KCB Bank for Ksh 3,060,000/= on 3<sup>rd</sup> February 2016. Land parcel LR No Kericho/Kapsuser/5257 on the other hand was registered in the name of one Kiptoo A Talam on 23<sup>rd</sup> December 2010.

22. Reviewing the Judgment herein in the terms as sought by the Applicant would result into revocation of the titles to these third parties thereby condemning them unheard which would be averse to the provisions of Article 50 of the Constitution as well as to the rules of natural justice.
23. Indeed in the case of *Mbaki & Others vs. Macharia & Another* (2005) 2 EA 206, at page 210, the Court of Appeal held as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”
24. On the last limb as to whether the Application was made without un reasonable delay, I find that the Applicant has failed to discharge the same, the new evidence having been brought to his attention vide a letter dated the 20<sup>th</sup> November 2017 wherein the present application was filed on the 17<sup>th</sup> January 2020. The Applicant does not advance any reasons for the delay. He does not explain why he failed to file the instant application in time. I find that the delay of 2 years, 1 month and 3 days was unreasonable delay.
25. In the end, and given the circumstances herein above stated, I find that this is not one of the matters that the court can exercise the discretion granted under Order 45 Rule 1 of the Civil Procedure Rules and I therefore proceed to dismiss the Application dated the 17<sup>th</sup> January 2020 with costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 27<sup>TH</sup> DAY OF OCTOBER 2022**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

