



Tsalia & another v Munanga & another (Environment & Land Case 110 of 2019) [2022] KEELC 13626 (KLR) (18 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13626 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 110 OF 2019
DO OHUNGO, J
OCTOBER 18, 2022**

BETWEEN

SAULO GABRIEL TSALIA 1ST PLAINTIFF

TOM TSALIA MBOYA 2ND PLAINTIFF

AND

SAMSON LUTATWA MUNANGA 1ST DEFENDANT

GRACE KHEBELI MUNANGA 2ND DEFENDANT

RULING

1. The plaintiffs moved the court claiming to have acquired claim to have acquired 10 acres of the parcel of land known as Butsotso/Indangalasia/349 by way of adverse possession. Upon hearing the case, my sister NA Matheka J found that the plaintiffs failed to establish their case and accordingly dismissed it with no order as to costs, through judgement delivered on July 27, 2021.
2. The plaintiffs have now approached the court through notice of motion dated September 2, 2021, seeking the following orders:
 - 1) That the Judgement herein entered against the plaintiffs/ applicants on the July 27, 2021 be reviewed and/or varied together with all the consequential orders emanating there from.
 - 2) That costs herein be in the cause.
3. The application is supported by an affidavit sworn by Tom Tsalia Mboya who deposed that the plaintiffs' late father one Tsalia Lutawa and the defendants' late father were brothers and sons of the late senior Lutatwa who was the owner of land measuring 42.5 acres which was subdivided into two portions being Butsotso/Indangalasia/349 measuring 31.5 acres and Butsotso/Indangalasia/350 measuring 11 acres during adjudication. He further deposed that according to the judgement of divisional court in Lurambi Land Case No. 48 of 1957, the said land was divided in to two portions



equally and the defendants' father appealed the said ruling vide Appeal Case No 137 of 1957 whereby he introduced a step brother one Majengo and in the circumstances the court awarded him 31.5 acres to hold on his behalf and in trust for the step brother who was a hoax since he migrated to his biological father's land in Vihiga. That in the essence this court omitted and erred to comprehend that the sharing of the ancestral property among the siblings should be equal and as such, the defendants' father having misled the court as evidenced in the judgement of the said Lurambi court, his siblings have no right to benefit from the irregularities thereof. He added that this court ought to have focused on the mode of distribution rather than limiting itself to adverse possession.

4. The defendants opposed the application through a replying affidavit sworn by Samson Lutatwa Munanga. He deposed that the application lacks merit in that there is no error apparent on the face of the record demonstrated and that the court did not err. He further deposed that if the plaintiffs believe that the court misdirected itself on the evidence then the plaintiffs ought to have appealed as opposed to seeking review.
5. The application was canvassed through written submissions which the applicants and the respondents duly filed. Parties generally reiterated the positions that they took in the application and the respective affidavits.
6. The plaintiffs argued that the judge erred in failing to take into consideration that the divisional court had in 1957 directed that the ancestral land be distributed equally between two deceased brothers and subsequently the families of the deceased brothers. They argued further that there was fraud committed by the defendants' father regarding the sharing of the ancestral land. They accordingly urged the court to allow the application.
7. The defendants submitted that the matters raised by the plaintiffs ought to be handled by way of appeal. They therefore urged the court to dismiss the application with costs.
8. I have considered the application, the affidavits filed and the submissions. The issue that arises for determination is whether the orders sought should issue.
9. The law relating to review is found at section 80 of the *Civil Procedure Act* which provides:
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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
10. Further, additional provisions on review are found at Order 45 Rule 1 of the *Civil Procedure Rules* 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

11. The plaintiffs claim that there is an error apparent on the face of record in that the learned judge misapprehended the evidence. It is settled law that review cannot be granted on the basis that the court misapprehended the evidence or the law and that it ought to have reached a different conclusion based on the material that was before it. In such a scenario, the aggrieved party ought to pursue an appeal as opposed to review. The Court of Appeal emphasised as much when it stated in *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR as follows:

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.

12. The present application has not met the conditions for review, and it is therefore not merited. I dismiss it with costs to the defendants.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF OCTOBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The first plaintiff absent

The second plaintiff present

The first defendant present

The second defendant absent

Court Assistant: E. Juma

