



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 1251 of 2002**

**GUCOKANIRIRIA KIHATO TRADERS AND FARMERS COMPANY LTD .....PLAINTIFFS**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT**

**RULING**

On 23<sup>rd</sup> June, 2006, I delivered a judgment in a long standing dispute over ownership of land parcel known as L.R No. 11571, LAIKIPIA, between the plaintiff **GUCOKANIRIRA KIHATO TRADERS AND FARMERS COMPANY LTD** and the **ATTORNEY GENERAL**.

In my judgment, I granted a declaration, as sought in the plaint that,

**“police officers having lost or otherwise misplaced and or destroyed the plaintiffs documents relating to the plaintiff’s claim of ownership of L.R No. 11571, LAIKIPIA, the plaintiff is entitled to obtain a new allotment thereof from the Chief Land Registrar, and on the Commissioner of Lands”.**

Soon after the judgment, one Edward Parfet of Nyeri/Nyahururu Road, P.O. Box 30595, 00100 Nairobi a director of Solio Ranch, moved the court by Notice of Motion seeking the following orders:-

- (1) ***“That judgment and decree passed herein be reviewed and set aside,”***
- (2) ***“There be application for stay of execution of the decree pending the hearing and determination of this application”,***
- (3) ***“Costs of the application be provided for”.***

The application was made on the basis that, there are some mistakes and errors apparent on the face of the record in that

- (a) ***“Solio Ranch is the registered proprietor of L.R No. 11571, Laikipia”,***
- (b) ***“Solio Ranch was not made a party to this suit and therefore no order should have been made adverse to it”,***
- (c) ***“Solio Ranch Ltd was not heard before judgment was given effecting its property”,***

**(d) L.R No. 11571, Laikipia is not unalienated Government land and there is no power to allocate it to the plaintiff or any other person”,**

**(e) “There is sufficient reason to review and set-aside the judgment”.**

In the supporting affidavit, the applicant averred inter alia, “the plaintiff knew that the property in question was owned by Solio ranch Ltd, as can be seen from the correspondence at pages 10 to 19 of the exhibit. Solio Ranch was not heard before the order was made affecting it.....”.

The Company Secretary of the plaintiff company, one John Maina Mwangi, filed a replying affidavit on 28<sup>th</sup> July, 2006, in which he averred, inter alia,

“That in 1973 I was personally present at State House Nakuru when the late Hon. President Jomo Kenyatta gave to the plaintiff (Gucokaniriria Kihato Traders and Farmers Company Ltd), a letter of allotment to Solio Ranch (L.R No. 11571 Laikipia) to the plaintiff”.

And at para 6, the plaintiff averred, “That some CID Officers having taken from the plaintiff by force the said letter of allotment, it is upon the defendant to have introduced evidence in court to show that the land in question was not available for allotment, but the defendant did not do so”, and further still, at para 7 the plaintiff’s Company Secretary averred,

“That on many occasions the plaintiff has been to court to pursue recovery of the letter of allotment aforesaid, the defendant has never raised the defence of the non-availability of the land in question for allotment thereby creating the inescapable inference that the land was and is available for allotment and was allotted to the plaintiff by the State and that being so, no person can question the authority of the State and particularly in 1973 when there was a policy of land re-distribution from the settlers to landless Africans....”

And para 10,

“That the plaintiff had no reason to sue Solio Ranch Ltd as the plaintiff had reason to believe that any person who may have claimed ownership of land in question prior to 1973 had his ownership extinguished by the time the late President Kenyatta issued the letter of allotment to the plaintiff in 1973”.

The Attorney General who was the defendant in the suit did not file a replying affidavit to the application by Solio Ranch Ltd, the interested party.

The applicant’s counsel, Mr. Kiragu presented the 5 grounds of his application – namely:

“That Solio Ranch Ltd is the registered proprietor of the suit land being L.R No. 11571 in Liakipia. The certificate of title was annexed to the supporting affidavit. It showed that the applicant was so registered on the title since 1.8.65, for a term of 944 years. That further the applicant not being a party to the suit, no orders against it should have been made, and it was incumbent upon the plaintiff to bring this to the court’s attention”.

Mr. Kiragu submitted further that the plaintiff should have brought Solio Ltd to court as it was the registered proprietor, and was so registered as at 24.7.2002, when the suit against the Attorney General was filed, and there was already a lease from the Government to Solio Ranch. He drew the court’s attention to Section 4 and 7 of the Government Lands Act.

Mr. Kiragu relied on 2 decided cases to make the point that once one is entered in the register, they have undivisible title. The cases were, **MUCHENDU vs WAITA HCCC** No. 72 of 2003, where it was held inter alia, “Section 23(1) of the Registration of Titles Act (Cap. 281) gives an absolute and indefeasible title to the owners of property”.

Also quoted was the Court of Appeal decision in **DR. JOSEPH N.K arap NG’OK vs JUSTICE**

**MOIJO OLE KEIWUA & OTHERS** where the Court of Appeal held inter alia,

“Section 23(1) of RTA, Cap. 281 Laws of Kenya gives absolute and indefeasible title to the owner of the property, and the title of such property can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party.....”

Mr. Kiragu submitted that as regards Solio Ranch Ltd, there is no allegation of fraud. He also referred to a bundle of correspondence between his firm of Advocates, HH Mathews and the Permanent Secretary In-charge of Provincial Administration, and the Mau Mau Council, as well as the Njonjo Inquiry Commission into Land Law.

He particularly singled out two letters dated 18<sup>th</sup> May, 2000 written to the Permanent Secretary, Ministry of Lands & Settlement, and another letter dated 12<sup>th</sup> June 2000, written by the Commission of Inquiry into Land Law, to the Permanent Secretary, Internal Security. These letters were copied to the plaintiffs, and the writer of the letters was doing so on behalf of Solio Ranch Ltd, the registered proprietor.

Mr. Kiragu submitted that this is not a case of compulsory acquisition of land, so Solio Ranch Ltd cannot lose its land by virtue of the judgment herein, as it was not made a party to the suit. He also urged the court to find that there is an error apparent on the face of the record, and he quoted cases on the issue of judgments being set aside on account of “**error**” or mistake on the face of the record.

According to Mr. Kiragu, the applicant has not lodged its notice of appeal in the Court of Appeal, as such no appeal has been filed from this court’s judgment. He relied on the decision of **MOTEL SCHWEITZER v THOMAS EDWARD CUNNINGHAM & ANOTHER** Civil Appeal No. 92 of 1954 (**COURT OF APPEAL FOR EASTERN AFRICA**), in which it was held, inter alia,

“... In Kenya, when a Notice of Appeal refers to a judgment leading to a decree, it is a Notice of intention to exercise a Right of Appeal which has come into existence. The notice is a document filed in the proceedings in the superior court and in no case is the appeal instituted until the record of appeal is lodged in the registry of this court, the prescribed fee paid and the security lodged as provided in Rule 58....”

Mr. Kiragu submitted that his client had not lost the right to seek a Review of the judgment passed herein, though he filed a Notice of Appeal in this court.

On this point, he relied on the decision of **YANI HARYATO v E.D.& F MAN(SUGAR LTD)**, which followed the decision of **MOTEL SCHWELTZER**’s case.

The same principle was applied in the case of **UJAGAR SINGH v RUNDA COFFEE ESTATE LTD [1966] EA 263**, in which the Court of Appeal for Eastern Africa held (**NEWBOLD, P**, dissenting)

(i) ***“the word “appeal” in r 53 of the Eastern Africa Court of Appeal Rules 1954, is used to describe the procedure started by filing the notice of appeal”.***

At page 265 of the judgment paras B and C, the judgment of **SIR CLEMENT DE LESTANG, Ag. V-P**, went a head to consider the next step after lodging the “notice of appeal”. This was contained in Rules 58 and 59 which read,

“58 Lodging appeal. Subject to any extension of time, and to any order made under r 82 of these Rules, the appellant shall within sixty days after the filing of Notice of Appeal lodge the appeal by filing in the registry of the Court four copies of the record of appeal, paying the prescribed fee, and lodging in the court the sum of fifteen hundred shillings for the costs of the appeal .....

Mr. Kaka, State Counsel for the defendant, the Attorney General, said,

**“I enjoin myself to the application of Solio Ranch Ltd. We do not oppose that application in any**

way”.

Mr. Khamati for Mr. Chokaa for the plaintiff/respondent opposed the application and submitted in reply that the decision is **COMMERCIAL BANK OF AFRICA LTD vs ISSAC KAMAU NDIRANGU** Civil appeal No. 157 of 1991, does not provide that an aggrieved party may apply for a Review if they were not a party to the case. That Order 44 of the Civil Procedure Rules, does not support the applicant’s case, as he was not a party to the suit already determined. That the only course he has is a right of appeal.

Mr. Khamati submitted that the plaintiff’s complaint was against the State, which it sued. That throughout the evidence, the State never said that the land in question, being claimed by the plaintiff, was not available for allotment. That even when the document to admit facts was served on the State, they did not dispute its contents.

He also noted that the State offered no evidence at the trial, to urge and or support its amended defence.

According to Mr. Khamati, this is not a question of “mistake” on the face of the record, but the true state of facts which the State has admitted that it owes the plaintiff the parcel of land known as L.R No. 11571. Mr. Khamati submitted further that the applicant’s claim that he only recently learnt about this case in the newspaper cannot be true because the old newspaper cuttings, which are annexures to the affidavit of John Maina Mwangi Ex. B show extracts of this case reported way back in 1994, 1997, 2004 and 2005. That besides this case, there have been other cases touching on the applicant Solio Ranch Ltd, so it was aware of the plaintiff’s claim, but sat back and did nothing until the plaintiff got the present judgment. He urged the court to throw out the applicant’s claim with costs.

Mr. Kiragu for the applicant, submitted in reply that the applicant falls under order 44 of the Civil Procedure Rules “**any person considering himself aggrieved**”, he urged the court to allow the application for Review.

Having summarized the arguments by all the 3 parties, I will now turn to the provisions of Order 44 Rule (5) (XLIV) of the Civil Procedure Rules on Review which reads,

“(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 made, or an 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 undue delay.”**

Solio Ranch Ltd, felt aggrieved by the judgment I delivered on 23<sup>rd</sup> June, 2006, hence this application for Review of that judgment. Though not parties to the suit, I find that they are covered by Order 44(1) of the Civil Procedure Rules, under “**any person**”.

The court records show that the applicants filed a Notice of Appeal in this court on 7<sup>th</sup> July 2006, and subsequently filed the present application for Review on 24<sup>th</sup> July 2006. This procedure was criticized by the advocate for the plaintiff, who submitted that they had therefore lost the right to urge the application for Review. However, relying on the decision of **MOTEL SCHWELTZER** which was followed in **YANI HARYATO** and **UJAGAR SINGH**, I find that the Notice of Appeal filed in this court by the applicant simply showed its intention to exercise its right of appeal. No evidence was tendered to show that it had filed four copies of the record of appeal in the Court of Appeal, paid the prescribed fee and also

paid for costs of the appeal. I am therefore unable to find that the applicant had lost its right to urge the application for Review.

Mr. Kiragu's arguments were that there was "**mistake or error apparent on the face of the record**", as the plaintiffs in the suit were aware that the suit premises they were claiming belonged to Solio Ranch Ltd, yet they were not made a party to the suit.

Apart from the letters exchanged between the parties and other evidence adduced, I decided to scrutinize the court records to see the developments in this case, since this suit was filed on 24<sup>th</sup> July 2002 and served on the Attorney General who entered appearance on 30<sup>th</sup> August 2002 and filed a defence on 22<sup>nd</sup> October, 2002, denying the plaintiff's claim.

The case was first set for hearing on 23<sup>rd</sup> September 2003, before Hayanga, J (as he then was). The records show that the Attorney General asked for adjournment and gave the reason that the "**Attorney General received instructions from the Lands Office and now seeks to amend defence**".

The nature of the instructions received were not disclosed, at the time, but the court nevertheless granted adjournment for that purpose and also granted leave to file amended defence within 14 days, and directed that hearing dates be obtained on priority basis.

The records further show that indeed the amended defence was filed by the Attorney General on 29<sup>th</sup> September 2003. The amendment in the defence is contained in paragraphs 2(a) and 5(a) which read,

**"The defendant avers that the Land Ref. 11571/R is owned by the Government of Kenya by virtue of Notice of Taking possession which was registered on 15<sup>th</sup> February, 1991".**

And para 5(a) reads,

**"The defendant further avers that indeed land Ref 11571/R has never been allocated to anyone and more particularly to the plaintiff herein and the plaintiff is put to strict proof thereof".**

After the filing of the reply to the amended defence by the plaintiff, the court records show that several hearing dates were obtained from the registry, by the plaintiffs but the case was not heard for one reason or another, and on one such occasion when the parties appeared before Mugo, J for hearing on 24<sup>th</sup> January, 2005, she directed the Attorney General, who is the defendant to

**"file its statement of issues and list of documents within 21 days, and ordered that there would be no further adjournment of the case."**

The records further show that again the plaintiffs took several dates for the hearing of the case but the hearing did not start, as the Attorney General had not complied with the order directing him to file issues and a list of documents. This order was never complied with at all until the case was heard.

On 13<sup>th</sup> June 2005, the case was listed before Mugo, J once more for hearing Mr. Kaka, State Counsel appearing for the Attorney General addressed the court and said,

**"We have received certain crucial information lately which necessitates an amendment to our pleadings..... "**

Mr. Khamati, for the plaintiff said, **"I do confirm the position the State intends to add another party and we concur that the said party be enjoined."**

The advocates thereafter recorded consent orders as follows:-

(1) **"Suit marked stood over generally",**

- (2) ***“The defendant be and is hereby granted leave, to amend its defence and to file and serve the amended defence within 14 days”,***
- (3) ***“The plaintiff to amend its plaint accordingly within 14 days of service”,***
- (4) ***“Fresh dates to be taken at the Registry on priority basis”.***

After this on 27<sup>th</sup> September 2005, the plaintiff’s counsel filed a **“Notice to admit documents and facts”**, dated 26<sup>th</sup> September, 2006. This was not responded to by the Attorney General, so the assumption is that he admitted all facts and documents filed. These included a letter of appointment addressed to the plaintiffs by the then Private Secretary Controller of State House, dated 10.3.73, granting the plaintiffs appointment to see the late Mzee Jomo Kenyatta, who according to them, allocated the land in dispute to them, but the letter of allotment was **“taken”** from their offices along with their other properties by CID Officers. They sued the Government for this loss, and the Government admitted liability and compensated them, but the CID Officers who raided their offices, **NEVER** returned the letter of allotment of this land by the late Mzee Jomo Kenyatta.

The plaintiff again took further dates for the hearing of the suit, these were 13<sup>th</sup> and 14<sup>th</sup> December, 2005, but the case was not heard as the advocate representing the Attorney General Mr. Kaka was appearing in the Court of Appeal and before the Hon. The Chief Justice respectively. That is what he told Hon. Justice Ojwang, who was to hear the case on 13<sup>th</sup> and 14<sup>th</sup> December, 2005. Upto that date no further amended defence had been filed by the Attorney General who had sought and obtained leave to file the same. Hon. Justice Ojwang gave a new hearing date, namely 21<sup>st</sup> March, 2006, and that was the day I heard this suit, when Mr. Mwendwa, advocate who represented the plaintiff, Gucokaniriria Kihato Traders Ltd, called one witness John Maina Mwangi, the Secretary of the plaintiff company, who gave evidence at length, and was cross examined by Mr. Kaka, appearing for the Attorney General, who did not call any witnesses.

The advocates thereafter did by consent hand in written submissions the following day after which I prepared and delivered the judgment now sought to be reviewed.

The question I would pose at this stage is, does the scenario I have outlined above, as revealed by notes from the court file show a **“mistake apparent on the face of the record?”**

When I read the application by Solio Ranch Ltd, the interested party once more, plus the supporting affidavit of Edward Perfet, which affidavit has annexed to it various documents including a Certificate of Title registered under the Registration of Titles Act, Cap 281 Laws of Kenya, granted to Solio Ranch Ltd, I come to the conclusion that indeed land title L.R No.11571, would appear to be registered in the name of Solio Ranch Ltd, in which case it has indefeasible title whose interest cannot be defeated except on proof of fraud or misrepresentation which was not raised as issues in this case.

The decisions in the two cases quoted namely **MUCHENDU v WAITA** and **DR. JOSEPH N.K arap NGOK v JUSTICE MOIJO OLE KEIWUA & OTHERS**, on the interpretation of Section 23(1) of the Registration of Titles Act, Cap 281 Laws of Kenya, are both relevant and applicable to the application by the interested party. I therefore move to adopt and follow them.

Having made the above finding, I still have to answer the question whether there is a **“mistake apparent on the face of the record”**, to warrant the Review sought by Solio Ranch Ltd.

To answer that question, I have to refer back to the pleadings on record as at the date I heard the suit. I wish to make particular reference to the amended defence filed by the Attorney General, whose paragraphs 2(a) and 5(a). I have already reproduced in this judgment.

With the evidence from Solio Ranch Ltd, the interested party, that the Land Ref. No. 11571/R was registered in its name and a title issued to it under the Registration of Titles Act, Cap 281, Laws of Kenya,

I wondered why the Attorney General amended its defence on 29<sup>th</sup> September, 2003, to add paragraphs to the effect that the land in question belonged **“to the Government of Kenya by virtue of Notice of Taking possession which was registered on 15<sup>th</sup> February 1991”**, and again, that, **“Indeed land Ref. 11571/R has never been allocated to anyone and more particularly the plaintiff herein, who was therefore put on strict proof”**, when he should have known the true state of facts concerning the ownership of the suit premises. Could the Attorney General’s amended defence have misled the plaintiff in any way, as it was the only pleading on record I considered as I wrote the judgment.

I pose this question because the court records I have gone through show that on 13.6.2005, the Attorney General sought and obtained leave of the court to amend his amended defence further to include fresh instructions received from the Lands office. The nature of the fresh instructions was not disclosed, however, but the Attorney General never filed the said further amended defence, and on the hearing day, he never called any evidence and further still, never referred to the issue of the filing of the further **“amended defence”**, for which he had been granted leave.

My consideration of the evidence as a whole in this case and the application by Solio Ranch Ltd, makes me come to the conclusion that indeed there is a **“mistake apparent on the face of the record”**, which mistake in my view was caused by the Attorney General, who was sued as a defendant on behalf of the Kenya Government.

The mistake arises from the **“amended defence”** filed by the Attorney General on 29<sup>th</sup> September, 2003, stating that, **“land Ref L.R 11571/R is owned by the Government of Kenya and has never been allocated to anybody....”**, yet in my considered opinion, the Attorney General must have known that this property was granted to Solio Ranch Ltd, way back in 1965, as shown by the evidence of a copy of a Grant No. I.R. 20981 issued under the Registration of Titles Act, Cap 281, Laws of Kenya.

This evidence was brought in as an annexure to the affidavit of Edward Parfet, during the hearing of this application for Review filed by Solio Ranch Ltd.

Is this information which was not within the knowledge of the Attorney General at the time he amended his defence? I highly doubt it.

The situation in this case was made more complicated by the Attorney General’s failure, deliberately or otherwise to file the **“further amended defence”**, for which he sought and obtained leave from court on 13.6.2005, to bring, **“crucial information from the Lands office”**. It is not known to me what the crucial information was because it was never brought to court as the Attorney General never filed the further amended defence, and never adduced any evidence at the trial, as he, (through his representative) simply said,

**“I have one witness who is not relevant. I have no further evidence to offer”**.

The submission by Solio Ranch Ltd that the plaintiff ought to have known about its interest in the land as contained in various correspondences is neither here nor there, as I was dealing with the pleadings filed by the parties to the suit, namely, the plaintiff and the defendant, the Attorney General.

I find the Attorney General’s handling of this case to have been casual, careless and generally negligent, in that he withheld relevant evidence, which would have enabled the court to reach a just and fair decision to all parties. Besides, his handling of the case as stated above might have caused prejudice and injustice to members of the plaintiff land buying company who have been pursuing what they believe is their right to this land for over 30 years now.

Be that as it may and, in view of what I have found as a **“mistake apparent on the face of the record”**, I move to Review and set aside my judgment delivered on 23<sup>rd</sup> June, 2006.

I order the defendant, the Attorney General to pay the costs of the application filed by Solio Ranch

Ltd, an interested party.

I direct that a copy of this ruling be served on the Commissioner of Lands for his or her records.

**Dated at Nairobi this 3<sup>rd</sup> day of November, 2006.**

**JOYCE ALUOCH**

**JUDGE**