



**Mubweka & another v Barasa (Environment & Land Case  
127 of 2015) [2025] KEELC 318 (KLR) (4 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 318 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 127 OF 2015  
BN OLAO & BN OLAO, JJ  
FEBRUARY 4, 2025**

**BETWEEN**

**WANJALA OJIAMBO MUBWEKA ..... 1<sup>ST</sup> PLAINTIFF**

**OJIAMBO PETER RODGERS ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**LEONARD ONGWENI BARASA ..... DEFENDANT**

**RULING**

1. The dispute between Wanjala Ojiambo Mubweka And Ojiambo Peter Rodgers (the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein) as against Francis Otieno Barasa And Vitalis Omondo Ongweni (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively and sued as the personal representative to the Estate of Leonard Ongweni Barasa) over the ownership of the land parcel No Bukhayo/Bugengi/7919 which the Plaintiffs alleged had been fraudulently sub-divided by the Defendants to create parcels No Bukhayo/Bugengi/9224 and 9225 was heard and determined by Kaniaru J. The Plaintiffs had sought judgment against the Defendant in the following terms:
  - a. Cancellation of title to Land parcels No Bukhayo/Bugengi/9224 and 9225 and a fresh one be issued in favour of the Plaintiffs therefore evicting the Defendant altogether.
  - b. A permanent order of injunction be issued against the Defendant, his servants, and/or employees from entering the freshly registered parcel or in any manner whatsoever dealing with it.
  - c. Costs of this suit and interests at Court rates.



The Plaintiffs' claim was resisted but having heard all the parties, Kaniaru J delivered his Judgment on 24<sup>th</sup> May 2019 and allowed the Plaintiffs' claim as follows:

“Prayer (a) is awarded as follows: Title to parcel No. Bukhayo/Bugengi/9224 is to be cancelled. There will be no cancellation of title to parcel No. Bukhayo/Bugengi/9225.”

“Prayer (b) this prayer is granted but only in respect of parcel No. 9224.”

“Prayer (c) this prayer is not granted as prayed. Instead each side should bear its own costs.”

The Defendant sought and obtained an order of stay of execution vide a ruling dated 6<sup>th</sup> February before Omollo J. However, the Defendants Notice of Appeal was struck out vide a ruling delivered by Kiage, Mumbi Ngugi And Tuiyott Jja In Court Of Appeal Civil Application No E073 Of 2021 Kisumu.

2. I now have for my determination the Plaintiffs' Notice of Motion dated 31<sup>st</sup> January 2024 anchored on the provisions of Order 45 Rule 1 and Order 51 Rule 3 of the Civil Procedure Rules. The same is premised on the grounds set out therein and supported by the affidavit of the 2<sup>nd</sup> Plaintiff also dated 31<sup>st</sup> January 2024. The Plaintiffs seek the following orders:

1. Spent.
2. That the firm of B. M. Ouma be granted leave to come on record for the Plaintiff in place of A. N. Moruru & Company Advocates.
3. That the judgment entered herein on 21<sup>st</sup> May 2019 together with all consequential orders and decrees are hereby reviewed and/or set aside and substituted with orders that there be cancellation of L.R Bukhayo/Bugengi/9224 to revert to L.R Bukhayo/Bugengi/7919 in the name of Peter Ojiambo Mubweka and that there be no cancellation of title to parcel L.R Bukhayo/Bugengi/9225.
4. That the costs of this application be provided for.

The gist of the application is that in the judgment delivered herein on 21<sup>st</sup> May 2019, the Court ordered that the title to the land parcel No Bukhayo/Bugengi/9224 be cancelled and that there be no cancellation of the title to the land parcel No Bukhayo/Bugengi/9225. That a decree was issued on 25<sup>th</sup> July 2022 directing the Land Registrar to cancel the title to parcel No Bukhayo/Bugengi/9224. Upon presenting that decree to the Land Registry, the Registrar realized that if the title to the land parcel No Bukhayo/Bugengi/9224 is cancelled, it will revert to the original owner the Defendant herein and who lost the case. The Land Registrar advised that the Court should review the judgment directing the Land Registrar to revert the title to the Plaintiff's father Peter Ojiambo Mubweka instead of the Defendant who had fraudulently caused the land parcel No Bukhayo/Bugengi/7919 to be registered in his names without the consent of the owner.

3. The following documents are annexed to the application:

1. Copy of the Order issued herein on 2<sup>nd</sup> November 2023.
2. Copy of a consent Order dated 10<sup>th</sup> January 2024 signed by the Plaintiffs, A.N. Mururi & Company Advocates and B. M. Ouma Advocates allowing the firm of B. M. Ouma Advocates to come on record for the Plaintiffs.
3. Copies of the Registers for the land parcels No Bukhayo/Bugengi/9224 and 9225.
4. Copy of the Register for the Land Parcel No Bukhayo/Bugengi/7919.



4. The application is opposed and Francis Otieno Barasa (the 1<sup>st</sup> Defendant) filed a replying affidavit dated 22<sup>nd</sup> July 2024 in which he has deposed, inter alia, that the Decree herein is not the proper Decree since this dispute is still the subject of an appeal pending in the Court of Appeal. That the Plaintiffs are raising a new cause of action which should be the subject of another suit and not an application for review. In any case, the alleged new evidence could have been discovered with due diligence and therefore, this application does not meet the threshold for review. That this is a case of negligence and not a case of discovery of new and important matter or evidence. The application has also been brought with unreasonable delay and should be struck out.
5. Annexed to the affidavit is a Notice of Appeal dated 3<sup>rd</sup> November 2023 by the Defendants notifying the Court of their intention to appeal my ruling dated 2<sup>nd</sup> November 2023. The Notice of Appeal is however not signed by the Deputy Registrar.
6. The application has been canvassed by way of written submissions. These have been filed by MR Ouma instructed by the firm of B. M. Ouma & Company Advocates for the Plaintiffs and by Mr Wangalwa instructed by the firm of Ashiruma & Company Advocates for the Defendants.
7. I have considered the application, the rival affidavit and annexures thereto as well as the submissions by counsel.
8. This being an application for review, it is to be considered in accordance with the provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1(1) of the Civil Procedure Rules. Section 80 of the Civil Procedure Act sets out the law on review of judgments and orders. It reads:

80: "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."

The procedure for review is set out under Order 45 Rule 1(1) of the Civil Procedure Rules as follows:

1(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 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."

It is clear from the above that a party seeking an order of review of judgment and order must meet the following threshold:

1. Demonstrate that there has been a discovery of new and important matter or evidence which, with due diligence, was within the knowledge of the Applicant or could not be produced; or
2. Show that there is some mistake or error apparent on the face of the record; or
3. Establish any other sufficient reason; and



4. File the application without unreasonable delay.

From the application, it is clear that the Plaintiffs are basing the same on the basis of discovery of new and important matter or evidence which was not within their knowledge nor could it be produced at the time when the judgment was made. The Plaintiffs' case is that after the Decree herein was extracted on 25<sup>th</sup> July 2022 directing the Land Registrar to cancel the title to the land Parcel No Bukhayo/Bugengi/9224, they presented it to the Land Registrar who advised that if the said title is cancelled, it will revert to the name of Leonard Ongweni Barasa who had in fact fraudulently caused the original land parcel No Bukhayo/Bugengi/7919 to be registered in his names. That is clearly new and important matter or evidence which could not have been within the knowledge of the Plaintiffs since it was only discovered when the Decree herein was presented to the Land Registrar who then gave the said advise. The Plaintiffs have not stated when this advise was given to them. On the other hand, the Defendants have also not told this case when the advise was given to the Plaintiffs. All that the Defendants have pleaded in paragraph 10 of the replying affidavit of the 1<sup>st</sup> Defendant is that "this application has been brought with unreasonable delay." The advise by the Land Registrar is obviously "new and important matter or evidence" which could not have been produced by the Plaintiff in 2019 when the judgment was made. The Plaintiffs have not stated exactly when that advise was given and whether the Defendants say the delay in filing this application is "unreasonable" they too have not stated when the Plaintiffs obtained that advise, if they know the date. In view of the fact that neither the Plaintiffs nor the Defendants can say with certainty when the Land Registrar gave that advise, this Court can only give the benefit of doubt to the Plaintiffs and find any delay not to be unreasonable.

9. It is also clear from the submissions of the Plaintiff that for five (5) years since the judgment herein was delivered on 21<sup>st</sup> May 2019, the Plaintiffs have been trooping to the Land Registrar's office to have it executed but to no avail. This is how their counsel has submitted at Page four (4) of his submissions:

"Your Lordship the applicant was issued with the decree dated 25<sup>th</sup> July 2022, however, the Busia County Land Registrar has for 2 years now failed to have it implemented and directed the applicant to go back to Court to review the decision to whom should L.R No Bukhayo/Bugengi/9224 go to upon cancellation. This is the error apparent that should be corrected by this Court to enable the land registrar to actualize the order of this Court."

The above submission should ideally been captured in the supporting affidavit. Counsel then goes on to add in the next paragraph that:

"There is sufficient reason for review of the Court orders of 21<sup>st</sup> May 2019 being that in the 5 years of the order, the applicants have been unable to implement the decree simply because the order of the Court cannot be implemented as they are."

At page 3 of his submissions, counsel for the Defendants states thus:

"The respondent states that the applicants allegation raise a new cause of action and new issues from those in the plaint dated 3<sup>rd</sup> November 2015 that would otherwise be subject to another suit as opposed to an application for review. Further to that, the respondent states that the alleged new evidence is one that could have been discovered with proper due diligence."



I am not persuaded that this application raises issues that should be subjected to another suit. On the contrary, it is clear to me that when the Court cancelled the title to the land parcel No Bukhayo/Bugengi/9224 on 21<sup>st</sup> May 2019, Kaniaru J should have gone further and direct in whose name the title should be registered. That, in my view, was an error apparent on the face of the record and which has necessitated this application. The blanket cancellation of the title to the land parcel No Bukhayo/Bugengi/9224 without indicating in whose name it should be registered is what has made the Land Registrar to give the advise which she has given the Plaintiffs and rightly so in my view.

10. The Defendants suggest in their replying affidavit and submissions that the Plaintiffs’ application is a case of negligence. This is how their counsel has submitted on that issue:

“Similarly your Lordship in this particular (sic), the applicant cannot similarly lament that they are unable to register the decree of this Court at the lands office when they acted negligently and failed to exercise proper due diligence when the decree of the Court was being passed as they ought to have conducted official search at the lands office or raise this cause of action in their pleading dated 3/10/2015.”

I do not think that this can be considered as a case of negligence on the part of the Plaintiffs. It seems to me to be a clear case of an error or mistake on the part of the Court in the manner in which the disposal orders were made at the end of the judgment.

11. The 1<sup>st</sup> Defendant has also deposed in paragraph 3 of his replying affidavit that the Decree herein is the subject of an appeal before the Court of Appeal and it cannot therefore be enforced. In support of that averment, the Defendants have annexed a copy of the Notice of Appeal dated 3<sup>rd</sup> November 2023 intimating their intention to appeal my ruling delivered herein on 2<sup>nd</sup> November 2023. I have perused the Notice of Appeal and there is nothing to show that it was lodged in this Court’s registry. It is not signed by the Deputy Registrar and neither was it served upon the Plaintiffs as required by law. Most importantly, no orders of stay have been issued by this Court or by the Court of Appeal. As was held by the Court of Appeal in the case of Salama Beach Ltd & 3 Others -v- Kenyariri & Associates Advocates 2016 eKLR, a notice of appeal which is not endorsed by the Registrar impacts on the timeliness of all other steps to be taken on appeal. And in any event, the Notice of Appeal in itself is not enough to stay execution. And even if there is a pending appeal at the Court of Appeal, this Court has not been informed of the particulars thereof or the progress of the same.

12. I am persuaded that the Plaintiffs have satisfied the threshold for orders of review of the judgment and any other consequential orders arising therefrom. Consequently, therefore, the Notice of Motion dated 31<sup>st</sup> January 2024 is merited. I allow it and issue the following orders:

- 1: The Judgment delivered herein on May 21, 2019 and the consequential Decrees and Orders are reviewed and substituted with an order that;
  - a. Cancellation of title to parcel No Bukhayo/Bugengi/9224 and the same to revert to the name of Peter Ojiambo Mubweka.
  - b. Title to the land parcel No Bukhayo/Bugengi/9225 shall not be cancelled.
- 2: Costs to the Plaintiffs.

**BOAZ N. OLAO**

**JUDGE**

**4<sup>TH</sup> FEBRUARY 2025**



**RULING DATED, SIGNED AND DELIVERED ON THIS 4<sup>TH</sup> DAY OF FEBRUARY 2025 BY WAY OF ELECTRONIC MAIL.**

**BOAZ N. OLAO**

**JUDGE**

