



REPUBLIC OF KENYA



KENYA LAW
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**Ongondo v Mariongo & 4 others (Environment & Land Case
1191 of 2016) [2025] KEELC 1062 (KLR) (4 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1062 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 1191 OF 2016**

M SILA, J

MARCH 4, 2025

BETWEEN

THOMAS ONGONDO PLAINTIFF

AND

JOSEPHINE NYABONYI MARIONGO 1ST DEFENDANT

MARGARET MORAA SOSI 2ND DEFENDANT

**JOSEPHAT MARORO ONSONGO (SUED AS LEGAL REPRESENTATIVE OF
THE ESTATE OF JOHN ONSONGO MAYOGI (DECEASED)) ... 3RD DEFENDANT**

ZEBEDEO OMBASA 4TH DEFENDANT

NYASORO MANGANA 5TH DEFENDANT

RULING

(Application for review; principles to be considered; applicant claiming that he came across critical documents after judgment; documents obtained from the Lands Office; not demonstrated that the applicant had applied for the documents at the time the matter was heard and informed that the documents could not be available; application dismissed)

1. The application before me is that dated 4 September 2025 filed by the 5th defendant. He seeks two substantive prayers which are prayers 3 and 4 of the application being :
 - a. That the court be pleased to review and/or vary its judgment.
 - b. That an order be made declaring that Thomas Ongondo (the plaintiff) holds a portion measuring 0.1 Ha out of the land parcel Central Kitutu/Daraja Mbili/1377.
2. The application is opposed by the plaintiff and the 1st – 3rd defendants.



3. By way of background, the plaintiff (Thomas Ongondo) and one Sigara Mangana (now deceased) were on 4 June 1985 registered as co-owners of the land parcel Central Kitutu/Daraja Mbili/1377. This land measures 0.47 Ha but their individual shares on the suit land was not indicated in the register. Sigara Mangana died on 25 May 1992. On 19 May 2009, the 5th defendant/applicant obtained a grant of letters of administration for the estate of Sigara Mangana. Using that grant, he caused himself to be registered as proprietor of the whole of the land parcel No. 1377 to the exclusion of the plaintiff. He then proceeded to subdivide the said land into the parcels No. 3144 – 3147. He transferred to himself the parcel No. 3144 (0.24 Ha) then transferred the rest to the 1st – 3rd defendants as follows : parcel No. 3145 measuring 0.06 Ha to the 2nd defendant; parcel No. 3146 measuring 0.09 ha to the 1st defendant; and parcel No. 3147 measuring 0.04 Ha to the 3rd defendant. Having obtained titles, the 1st – 3rd defendants took possession and developed their respective portions. Aggrieved by this action, the plaintiff filed an objection in the succession matter of Sigara Mangana, the result of which, the grant issued to the 5th defendant was revoked. Also nullified were the titles No. 3144 – 3147, meaning that the land reverted back to the title No. 1377 in name of the plaintiff and Sigara Mangana (deceased). In his amended plaint the plaintiff asked for orders that he (Thomas Ongondo) be registered as proprietor of the whole of the parcel No. 1377 and for an order of permanent injunction to stop the defendants from interfering with the land.
4. The one who testified on behalf of the plaintiff was his wife Keresensiah Kwamboka who holds a power of attorney donated by the plaintiff. She inter alia testified that she has been living on the suit land since 1986 and she held the original title deed to the land parcel No. 1377 which she exhibited. She also stated that she lives on the lower part of the suit land and occupies about half an acre of the land. She did not know the share of Sigara Mangana on the land.
5. PW-2 was Steve Mokaya, the then Land Registrar, Kisii. What he had were only records of the suit land i.e parcel No. 1377 which he could see emanated from a subdivision of the parcel No. 1270. He did not have the prior records of the land and he could not tell how the plaintiff and Sigara Mangana got registered as owners, nor did he know what size of land the plaintiff was entitled to.
6. The applicant also testified in defence. In examination in chief, he claimed not to know the plaintiff, though he subsequently stated that he came to know him later, and he acknowledged that he had bought some land from his mother (Sigara Mangana). He further stated as follows in his examination in chief which I quote verbatim :

“I am prepared to give Thomas Ongondo his share. I know his portion. It is where he lives... Thomas can come and I give him his share.”

Cross-examined by counsel for the plaintiff, he inter alia stated as follows :

“I have no problem giving Thomas his land. He has a portion that he purchased from my mother. I was willing to give him the land but he sued me. He deserves half the land... Thomas Ongondo uses the whole land at the moment.”

Re-examined he stated as follows :

“Thomas is in occupation of half the land. He purchased only a half but he now occupies all of it. He is the one who sold land to the 1st – 3rd defendant. I am willing to give Thomas Ongondo half of the land.”



7. In my judgment, I found for a fact that the plaintiff and Sigara Mangana were registered as co-owners of the suit land though their shares were not indicated. I referred to the evidence of the applicant wherein he acknowledged that Thomas Ongondo was entitled to half the land. I could also see that when the applicant subdivided the land, he subdivided it in a way that he kept about half of the land (i.e parcel No.1344 for himself) and transferred the other half to the 1st – 3rd defendants. I found no evidence that the 1st – 3rd defendants displaced the plaintiff's possession of the land. I was persuaded to find that the plaintiff was not entitled to the whole of the land, as he had wanted in the plaint, but only half of it. I ordered the title to revert back to the name of the plaintiff and Sigara Mangana as owners in common holding equal shares, and the plaintiff's entitlement was only to the extent of one half, which comprised where he currently resides. I ordered the half share of Sigara Mangana to be subjected to succession in the usual manner. On costs, I found that it was wrong for the applicant to proceed in the manner which he did and ordered him to pay costs of the suit to the plaintiff.
8. Now, the applicant has come with this application seeking review of the judgment, and for an order that it be declared that the plaintiff is only entitled to 0.1 Ha of the suit land. The application is based on grounds that the applicant has discovered new and important evidence which was not within his knowledge and could not be produced by him when the case was heard. He states that he has brought the application without undue delay upon discovery of the new evidence. In his supporting affidavit, he deposed that the judgment was explained to him by his erstwhile counsel on record and he thereafter sought a second opinion from his current advocates, who came on record after judgment. His advocate visited the land registry to determine its root and obtained several documents from the lands office being as follows :
- a. Certified copy of the register of the land parcel Central Kitutu/Daraja Mbili/721;
 - b. Certified copy of the mutation form subdividing the land parcel Central Kitutu/Daraja Mbili/721 into the parcels No. 899, 900, 901 and 902;
 - c. Certified copy of the register of the parcel No. 899 with entry No. 3 showing Thomas Ongondo holding a portion measuring 0.2 Ha.
 - d. Mutation form registered on 7 October 1983 subdividing the parcel No. 899 into the parcels No. 1270 and 1271.
 - e. Certified copy of the register of the parcel No. 1270;
 - f. Mutation form subdividing the land parcel No. 1270 into the parcels No. 1377, 1378 and 1379.
 - g. Surveyor's notice dated 12 June 2023.
9. He deposes that these documents were not available during the hearing of the suit. He points out that from the documents, the root of the suit land is the parcel No. 721 which was closed on 24 October 1979 upon subdivision into the parcels No. 899, 900, 901 and 902. He deposes that the parcel No. 899 shows Thomas Ongondo having a share of 0.2 Ha though he goes on to contend that this was unlawful as there was no consent of the Land Control Board, no mutation, and no transfer. The parcel No. 899 was then subdivided to the parcels No. 1270 and 1271 but the register does not show the individual shares upon subdivision. Thereafter parcel No. 1270 was subdivided to bring forth parcels No. 1377 (the suit land), 1378 and 1379. He deposes that the parcel No. 1377 retained the name of Sigara Mangana and Thomas Ongondo; that the parcel No. 1378 was registered in the name of a buyer, one Joseph Nyabiya Onchonga; and the parcel No. 1370 registered in name of Keresensia Kwamboka, the wife of the plaintiff and that it measures 0.1 Ha. He continues to depose that the titles No. 1378 and



1379 are interchanged on the ground and he has annexed a surveyor's notice issued on 12 June 2023 which he avers is to make the correction. He deposes that the portion purchased by the plaintiff was approximately 0.2 Ha, out of which he transferred a portion measuring 0.1 Ha to his wife Keresensia, and he therefore remained with a portion of 0.1 Ha out of the suit land parcel No.1377. He contends that when the matter proceeded for hearing it was not possible to obtain the documentation from the then Land Registrar, Mr. Steve Mokaya, and that they were only obtained after the said Land Registrar was moved from Kisii. He believes that the documents show the share of the plaintiff and that if they had been placed before court the decision would have tilted.

10. The 1st – 3rd defendants filed Grounds of Opposition. Inter alia it is contended that the application does not meet the threshold for review. It is stated that the documents now availed are documents that could have been availed had the applicant made a request or visited the land registry. It is averred that the applicant chose to do due diligence after the judgment and is now trying to fill the gaps and weaknesses of his defence. It is averred that the applicant took no action to compel the Land Registrar to produce the particulars of the first registration when he was informed that they were missing. They also contend that the applicant is now introducing a prayer which was not in his defence and which he could have sought through a counterclaim. It is further asserted that the documents presented do not point with finality the existence of interchange of the title numbers 1378 and 1379 and there is no document pointing to any transfer by the plaintiff. They aver that the applicant should just file a separate case and plead the fraud that led to the registration of the plaintiff as co-owner and not use this concluded matter to delay execution of the decree.
11. The plaintiff filed a replying affidavit sworn by Keresensia Kwamboka Ongondo. She more or less is of opinion that this is not a proper case for review and that the case has been in court for years with the applicant being present in court.
12. I invited counsel to file submissions and I have taken note of the submissions filed.
13. This is an application for review and I stand guided by the principles laid down in Order 45 Rule 1 of the Civil Procedure Rules, which provide as follows :

Application for review of decree or order [Order 45, rule 1.]

 - a. Any person considering himself aggrieved—
 - b. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - c. 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.
 - d. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.
 1. From the above, it will seen that one can apply for review if me meets the following criteria :
 - i. That no appeal has been preferred against the order ; and



- ii. That there is 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
 - iii. That there is some mistake or error apparent on the face of the record; or
 - iv. That there is other sufficient reason to warrant a review of the decree or order; and
 - v. That the application has been made without unreasonable delay.
15. There is certainly no appeal filed from the judgment herein which was passed on 14 May 2024. I am however not persuaded that the test of unreasonable delay is met. The judgment was passed on 14 May 2024 and this application has been filed 5 months later, on 4 September 2024. This period of time is not explained. It is indeed not stated when the applicant obtained all this information that he now contends to be new. Without pointing out when the purportedly new evidence came to be in his possession, one cannot say that the delay of 5 months is reasonable.
 16. But let us assume that the application has been made within good time, has the applicant actually demonstrated that the purportedly new evidence was not within his knowledge and could not be produced by him at the time that the judgment was made ? I am not persuaded.
 17. This is a case that was filed in 2010 and hearing commenced in the year 2019. I have absolutely no evidence that the applicant wrote to the Land Registrar or visited the Lands office with a request that he be supplied with the historical records of the suit land and the documents showing its root. In his affidavit, he has deposed that it is after judgment that his advocate went to the Lands office and he obtained the documentation. I have not been told that there was any difficulty encountered by his advocate when he proceeded to the Lands office to get these documents. It would mean that these documents were readily available to any person who wished to have them. The applicant points at the evidence of the Land Registrar and avers that he stated that he could not find the documents. It could be that when he testified, he could not at an instant obtain the records, or he simply did not bother much with obtaining the records, and I do not see how the applicant can use the claim of the Land Registrar that he did not have the historical records at that time as a foundation for his application.
 18. The Land Registrar testified on 18 February 2020. The applicant has not shown that between 2010 and 2020 he made any effort to seek the historical documents relating to the suit land. I have already shown that these documents appear to have been obtainable as they were obtained by his advocate after delivery of judgment. In brief, the applicant has not met the test that the evidence was not available and could not be available despite exercise of due diligence when the case was heard and judgment delivered.
 19. Putting all this aside, the applicant is not a young man. When he testified, he stated that he was born in 1948. He is the son of Sigara Mangana. You would expect that a person of his age would know very well the history of the land. It ought to have been within his knowledge what share of the suit land the plaintiff held. When he testified, the applicant stated on oath that the plaintiff was entitled to half of the suit land and he confirmed that he had no problem giving the plaintiff half of the land. This came from his own knowledge. The issue of documentation is different from simply being in the know on the facts. He knew from his own knowledge that the plaintiff was entitled to half of the land and that is exactly what he stated in court. He is now pointing at the register of the parcel No. 899 to show that the plaintiff's share was 0.2 Ha , out of which he claims he gave his wife 0.1 Ha which is the parcel No. 1379, and therefore his entitlement is only 0.1 Ha. This allegation has no support whatsoever. The applicant has not brought the register of the parcel No. 1379 so that we can see that indeed it measures 0.1 Ha and it is in the name of the plaintiff's wife. Even if that is the position, there is no evidence that this 0.1 Ha ought to have been from his entitlement of 0.2 Ha in the parcel No. 899. If the intention



was to separate his 0.2 Ha, why is it that the parcel No. 1379 was not given 0.2 Ha ? And why would there still be a joint registration between the plaintiff and Sigara Mangana for the suit land ? These certainly militate against the suggestion of the applicant.

20. I think the applicant lost fair and square. He is now trying to fish around to see how he can get more land which he does not deserve. In any event, history does not favour him. He fraudulently proceeded to procure registration of the whole of the suit land in his name after the death of Sigara Mangana while knowing very well that the plaintiff was also a proprietor. He proceeded to subdivide and sell the land without transferring any portion of it to the plaintiff. And if he even knew that the plaintiff was entitled to half share as he testified, why didn't he just settle the case and give the plaintiff the one half share ? Did he have to wait until the court hears the case and makes a judgment ? I think all that the applicant was doing is trying his luck to see if by some chance he will end up with a judgment that favours him. Now that he failed, he is yet again trying his luck. I am sorry to tell him that his game of chances has come to an end. This court is not persuaded to allow his application for review and he will have to live with the judgment thereof.
21. There is no merit in this application and it is dismissed with costs. The judgment of 14 May 2024 stands.
22. Orders accordingly.

DATED AND DELIVERED THIS 4TH DAY OF MARCH 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Bosire for the 5th defendant/applicant

Mr. Sagwe for the plaintiff/respondent

Mr. Masolo for the 1st , 2nd and 3rd defendants/respondents

Court Assistant – Michael Oyuko

