Masila & another (Suing As The Legal Representatives Of The Estate Of Ibrahim Salim Kiprash - Deceased) v Mwangi (Environment & Land Case 71B of 2008) [2024] KEELC 3566 (KLR) (9 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3566 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 71B OF 2008

M SILA, J

APRIL 9, 2024

BETWEEN

AGNES SYOMBUA MASILA ..... 1ST PLAINTIFF

FARID SALIM KIPRASH ..... 2ND PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF IBRAHIM SALIM KIPRASH - DECEASED

AND

IGNATIUS CHEGE MWANGI ..... DEFENDANT

RULING

(Application for review; principles to be considered; applicant contending that there is new evidence; nothing new demonstrated by the applicants and even assuming that it was new it was not evidence that could not be made available at trial; application dismissed)

1. The application before me is dated 5 October 2023 filed by the plaintiffs. The application seeks the following orders :-

    1. The firm of Netaya Pion & Company Advocates be granted leave to come on record for the plaintiffs/applicants after judgment.

    2. That the honourable court be pleased to review, vary and/or set aside the judgment of Justice S. Okongo dated 31/10/2014 delivered at Kisii on the same day together with all consequential orders therein.

    3. The costs of this application be in the cause.

2. Prayer 1 of the application was allowed on 13 March 2024, there being no objection from the plaintiffs' erstwhile counsel to the law firm of Netaya Pion & Company Advocates coming on record after judgment. It will be observed that the substantive order is prayer (2) which seeks review of the judgment delivered on 31 October 2014 and this prayer is opposed by the defendant/respondent.

3. To put matters into context, the suit herein was commenced by Ibrahim Salim Kiprash (as plaintiff) on 2 May 2007. He died on 15 June 2011 while the case was ongoing and he was substituted by his wife and son who took over as plaintiffs; they are the applicants herein. The case of the original plaintiff, as continued by the applicants, was that he was the proprietor of the land parcel Trans-Mara/Ololchani/232 (hereinafter referred to as land parcel No. 232). It was claimed that in the year 2001, the respondent illegally caused a portion of this land parcel No. 232 to be hived off and be registered in the respondent's name as Trans-Mara/Ololchani/237 (land parcel No. 237). The applicants wanted an order to have the parcel No. 237 returned to the name of the deceased original plaintiff, eviction of the respondent, and general damages for conversion. The respondent filed defence and refuted the claims of the applicants. He denied that the land parcel No. 237 was hived off the land parcel No. 232 as claimed by the applicants and also contended that the suit was time barred. The matter was heard by Okong'o J, who took the evidence of both plaintiffs and defendant. The 1st applicant testified and called the Assistant Director of Land Adjudication and Settlement as her witness and the respondent testified in defence. It emerged that both parcels of land arose upon adjudication of the Ololchani Adjudication Section and were registered differently with parcel No. 232, measuring 0.9 Ha, registered in the name of the original deceased plaintiff , whereas the parcel No. 237, measuring 2.0 Ha, registered in the name of the respondent. In his judgment, Okong'o J was of opinion that there was no evidence that the parcel No. 237 (the suit property) was carved out of the land parcel No. 232. He was indeed satisfied that the suit property did not emanate from the parcel No. 232 as alleged. He held that the evidence strongly pointed to the fact that the suit property was a product of the adjudication and demarcation process at Ololchani. He did not find merit in the case of the applicants and he dismissed it with costs.

4. The respondent had his costs taxed in the year 2016, and in the year 2017 he moved to execute for the taxed costs. The attempt was unsuccessful and in the year 2019 the respondent applied for the applicants to show cause why execution should not issue. While all this was pending, an application dated 14 January 2020 was filed by one Samson Mpatian Rinka, seeking to be joined to the suit as interested party and an order to stop the respondent from dealing with the suit property. He claimed that the respondent had filed a suit against him, being Narok ELC No. 56 of 2019, for eviction. He alleged to be the owner of the suit land. I observe that this application had the support of the applicants herein with the 1st applicant, Agnes Syombua Masila, swearing an affidavit to support it. She thought that the application 'raised serious triable issues.' That application was heard by Onyango J, who dismissed it in a ruling delivered on 21 February 2020. Another application was filed seeking to review the ruling of 21 February 2020. The court (Onyango J) found no merit in it and dismissed it in a ruling delivered on 10 February 2021. This application was subsequently filed.

5. The application is based on the grounds inter alia that recently, in the year 2023, the applicants found all the documents 'which the deceased had kept secretly in an underground safe' in their house. It is averred that among the documents are maps showing the parcel No. 232 as it was originally, and that the current map shows the parcel No. 237 inside what was the original parcel No. 232. It is also averred that the applicants have obtained other documents from Samson Mpatian Rinka who claims that the parcel No. 237 should be in map Sheet No. 4 and that the same belongs to him. It is also added that the applicants have obtained other crucial documents which they did not have at the hearing of the case and they therefore desire to have the judgment reviewed so that the court can have a chance to look at the documents, which they contend will vary the judgment. They say that the new evidence

will show that the parcel No. 237 was indeed carved out of the parcel No. 232 and that the respondent committed fraud. They also state that they have discovered that the adjudication record shows that the land was awarded to two people, that is the respondent and Samson Mpatiany Rinka, but title was registered in the name of the respondent alone.

6. The application is supported by the affidavit of Agnes Syombua Masila who has more or less repeated the foregoing. I will only add that she has deposed that after judgment, she discovered that the suit land was allocated to two individuals, that is the respondent and Samson Mpatiany Rinka (Mr. Rinka). She deposes that she looked for Mr. Rinka who informed him that the suit land belongs to him and was originally in Map Sheet No. 4 but illegally transferred to Map Sheet No. 9. She avers that Mr. Rinka also gave him more documents which she wishes to produce before the court for consideration. She has stated that since the judgment was delivered, the respondent has never occupied nor developed the land, and that the land is at it was in the year 2014, and that this is because he knows that the land does not belong to him. She adds that the whole community knows that the land belongs to the Kiprash family (that is the family of the deceased original plaintiff). She has annexed what she considers to be the new evidence which appear to me to be land adjudication records.

7. The respondent has opposed the application through a preliminary objection and a replying affidavit. In the preliminary objection, he avers that the application offends Order 1 Rule 10; that the application has been brought in breach of Section 19 of the *Civil Procedure Act* as read with Order 2 Rule 1 and Order 3 Rule 1 of the *Civil Procedure Rules*, 2010; that the application contravenes Order 9 Rule 9; that the law firm of M/s Netaya Pion & Company is improperly on record. In the replying affidavit, he has averred that judgment was delivered nine years ago; that they have failed to give cause for the inordinate delay; that the court is functus officio and that the applicants have not come to court with clean hands.

8. Both counsel for the applicants and the respondent (who is acting in person) filed submissions towards the application and I have taken these into account before arriving at my decision.

9. I will start with the preliminary objection which more or less contends that the law firm of M/s Netaya Pion & Company Advocates is not properly on record. As I stated earlier, the issue of representation was ironed out on 13 March 2024 when the previous advocates on record stated that they had no objection to the change of counsel. That should settle any argument relating to Order 9 Rule 9 which is the provision regarding change of advocate after judgment. I have also looked up at the other provisions of the law cited in the preliminary objection and see no application whatsoever. I even wonder why they were cited. Order 1 Rule 10 deals with joinder of persons to a suit; Order 2 Rule 1 deals with pleadings generally; Order 3 Rule 1 provides that a case shall be instituted by plaint or other prescribed manner. There is really nothing in that preliminary objection that can be considered to be a legitimate preliminary objection.

10. On the substance of the application, what I have before me is an application for review. Applications for review are covered under Order 45 Rule 1 which states as follows :-

> 1. Application for review of decree or order
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> (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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.

(2) 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.

11. From the above, it will be seen that one can see a review on the following reasons :

(i) Discovery of new and important matter or evidence which could not be produced at the time the decree was passed or order made, and which was not within the knowledge of the applicant and could not be availed despite the exercise of due diligence ;

(ii) Mistake or error apparent on the face of the record, or;

(iii) Other sufficient reasons.

12. In all this, the application must be made without unreasonable delay.

13. The application herein appears to be based on the contention that there is discovery of new evidence. What an applicant needs to demonstrate is that the new evidence could not be produced at the time that the order or decree was being made. For purposes of a matter that has proceeded for trial, the applicant needs to demonstrate that this is evidence that was incapable of being produced at the hearing, for reason that the evidence was not in his knowledge despite exercise of due diligence. These words are in plain language and speak for themselves. In the matter at hand, I have gone through what is deemed to be new evidence. It will be recalled that the applicants allege that this new evidence was secretly kept by the original deceased plaintiff in a safe which they only discovered prior to filing this application. That reason does not wash.

14. First, part of whatever is being touted as 'new evidence' is not by any stretch new evidence and is actually evidence on record. Annexures 2 (a) and 2 (c) of the supporting affidavit, which is said to be new evidence of the original map, was actually in the list of documents of the applicants as documents No. 12 and 13, and were relied upon by the applicants during the hearing. There is certainly nothing new here. Secondly, the other documents said to constitute new evidence are adjudication records and decisions of the adjudication committee on various objections relating to parcels No. 110 and No.83. Even assuming that the parcels No. 110 and No. 83 somehow relate to the parcel No. 237, which was the one in dispute, these adjudication records are never kept in any land owner's personal underground secret safe as alleged by the applicants. They are public documents that are kept by the department of Land Adjudication and easily obtainable by one making an application for the said records. Indeed, even the respondent produced the adjudication record for the parcel No. 237 during trial and nothing stopped the applicants from producing the adjudication records they now purport to be new evidence, and which, as I have mentioned, appear to relate to the parcels No. 110 and 83. During trial, the applicants called an adjudication officer. If they wished him to talk about the parcels No. 110 and 83, nothing stopped them from asking him any question relating to these parcels and nothing stopped them from asking for any records relating to these two parcels to be produced.

15. I do note that in his evidence, the adjudication officer testified that the suit land and the parcel No. 232, both appear in Sheet No. 9 of the map and share a boundary. He had carried with him the extract of the original demarcation book. He had also carried with him proceedings of an objection No. 216 of 1988 between the late Ibrahim Salim Kiprash and the respondent which was over a public utility water point and not the disputed land. He also carried with him the adjudication record of the parcel No.110 which he stated was neither in the name of Mr. Kiprash or the respondent. He had nothing in his record to show that the parcel No. 237 was a subdivision of the parcel No.110 or that it was ever in Sheet No.4 and mysteriously transferred to Sheet No. 9. He testified that there was never any objection on the adjudication of the parcel No. 237 to the respondent. I am taking the trouble to repeat this evidence to demonstrate that the issue of demarcation and the origin of the suit land, i.e parcel No. 237 was exhaustively interrogated during trial and there is absolutely nothing new that the applicants are presenting here. In the alternative, if ever it was new (of which I am not persuaded), there was opportunity to present it during trial and it cannot be said to be new evidence that could not be presented at trial with exercise of due diligence.

16. Apart from the above, this application is being filed more than nine years after judgment. That is a significant period of time. I have already said that there is nothing new being presented, but even assuming that it is new, it is evidence that could easily have been found, and did not need a wait of nine years to avail it. Apart from not availing anything new, the application would still fail for having been filed after an inordinate lapse of time.

17. The other reasons given, that the respondent has not used the land since 2014 and that 'the whole community knows that the land belongs to the family of Kiprash', are not reasons for reviewing the judgment.

18. The applicants clearly lost their case on merits and if they thought that the judge was wrong, they ought to have filed an appeal against the judgment but not continuously vex the respondent by abusing the court process through the filing of multiple applications which my predecessors found no merit in and which in my view are only meant to irritate and torment the successful respondent. The applicants need to live with the fact that they lost the case on merits. They are even clutching at straws in mentioning the other suit that the respondent has with one Mr. Rinka over the suit land and by claiming that they have discovered that the respondent was jointly registered with Mr. Rinka during adjudication. How does it benefit them if Mr. Rinka was jointly registered with the respondent during adjudication and assuming that Mr. Rinka succeeds in his separate case against the respondent ? The land will still not be considered to be theirs. Their continuous obsession with the suit land serves no purpose as a competent court has already determined that it does not belong to them.

19. I think I have said enough to demonstrate that there is absolutely no substance in this application and it is hereby dismissed with costs. Since the matter is finalized, I will, in my discretion, straight away assess the costs payable to the respondent at Kshs. 30,000/=. If not paid, the respondent is at liberty to execute.

20. Orders accordingly.

DATED AND DELIVERED THIS 9TH DAY OF APRIL 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Delivered in presence of :-

Ms. Pion for applicant – Absent

Respondent (acting in person) – Absent

Court Assistant – Aphline Owiwa