



Rotich (Suing as the Administratrix of the Estate of the Late David Kiplangat Rotich - Deceased) v Kipkorir & 5 others (Environment and Land Appeal E004 of 2022) [2024] KEELC 3836 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3836 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

LA OMOLLO, J

MAY 9, 2024

BETWEEN

JANE CHELANGAT ROTICH (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF THE LATE DAVID KIPLANGAT ROTICH - DECEASED) APPELLANT

AND

JOEL KIPKORIR ALIAS MOTTO 1ST RESPONDENT
JOSEPH KIBET KOROS ALIAS CHEME 2ND RESPONDENT
JULIANA SOI ALIAS BOT SELINA 3RD RESPONDENT
JUSTINA CHEPNGENO KOROS 4TH RESPONDENT
STANLEY KIPKIRUI KOROS 5TH RESPONDENT
DAVID KIRUI MEIGARA ALIAS KIPKEMEI 6TH RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 24th June, 2022 the Appellant challenges the decision of Hon. J Omwange SRM in Sotik PMCC ELC No. E002 of 2021 delivered on 21st June, 2022.

Factual Background.

2. The Appellant filed a plaint dated 18th January, 2021 against the Respondents seeking the following orders;



- a. An order of permanent injunction restraining the Defendant from interfering with the Plaintiff's quiet possession and trespassing on land registered as Kericho/Kapkures/207.
 - b. To vacate and/or handover vacant possession of Kericho/Kapkures/207 to the Jane Chelangat Rotich respectively with immediate effect.
 - c. Eviction orders against the Defendants herein being that they are trespassing on the land known as Kericho/Kapkures/207.
 - d. Upon granting prayer (c) above, this honorable court be pleased to order the officer commanding Sotik Police Station to provide security at the time of execution of the order of eviction.
 - e. Mesne profits from the date of expiry of the date of occupation of the parcel of land till possession is delivered up to the Plaintiffs.
 - f. General damages for violation of the Plaintiff's rights to quiet possession.
 - g. Interest thereon.
 - h. Costs of this suit; and
 - i. Any other relief the court deems fit to grant.
3. The Respondents filed their Statement of Defence on 9th March, 2021 where they denied the averments in the Plaintiff and stated that the Plaintiff was in occupation of three acres of land parcel No. Kericho/Kapkures/97 that belonged to the late Kiprono Arap Chepkwony who died intestate and succession proceedings were yet to be commenced.
 4. The trial Magistrate delivered Judgement on 15th February, 2022 and made the following orders;
 - a. The defendants be and is are (sic) hereby granted 45 days to vacate land parcel No. Kericho/Kapkures/207.
 - b. An injunction do issue in terms of prayer one upon lapse of the 45 days granted above.
 - c. The eviction orders do issue to be execution (sic) upon lapse of the 45 days granted above.
 - d. That the Defendant to pay mesne profit upon extension of the time in the land from the 46th day from the date of this order.
 - e. The Plaintiff also gets costs in the cause.
 5. After judgement was delivered, the Respondents filed the Notice of Motion application dated 26th May, 2022 where they sought the following orders;
 - a. That this application be certified as urgent and its service be dispensed with in the first instance.
 - b. That pending the hearing and determination of this application inter parties, the honorable court be pleased to grant stay of execution of its judgement dated 15th day of February, 2022 and all its consequential orders and events.
 - c. That pending the hearing and determination of this application inter partes, the Honorable Court be pleased to stay sale of the Defendants'/Applicants' 10 heads of cattle which were irregularly attached and collected by...Auctioneers on the 20th day of May 2022 from their deceased father's land.



- d. That the Honorable Court be pleased to review its judgement of the aforesaid date and set it aside and/or vary the same for the interest of justice.
 - e. That the cost of this application be granted.
6. The Appellant filed a replying affidavit opposing the said application and the Learned Trial Magistrate in the ruling delivered on 21st June, 2022 allowed the application dated 26th May, 2022 in terms of prayer No. (d).
 7. The Appellant being aggrieved by the said ruling approached this court by way of Appeal.

The Appeal.

8. The grounds of appeal are as follows;
 - a. That the Learned Trial Magistrate erred in law and in fact in disregarding the Appellant's evidence thus arriving at a wrong judgement.
 - b. That the Learned Trial Magistrate erred in law and in fact by applying the wrong principles and misapprehending the evidence and as a result arrived at a wrong decision.
 - c. That the Learned Trial Magistrate erred in law and in fact by allowing the Respondents herein litigate in the names of Kiprono Arap Chepkwony (deceased) when they did not have the requisite standi to institute the claim on his behalf.
 - d. That the Learned Trial Magistrate erred in law and fact by allowing prayer 4 of the application dated 26th May 2022 when the Respondents herein did not comply with provisions of Order 45 of the Civil Procedure Rules and no sufficient evidence had been brought before court.
 - e. That the Learned Trial Magistrate erred in law and fact by setting aside the earlier judgement of court dated 15th February 2022 and all consequential orders there under.
 - f. That the Learned Trial Magistrate erred in law and fact by finding that the allowing the application dated 26th May 2022 was timely brought before court when the earlier judgement was entered on 15th February 2022. (sic)
 - g. That the Learned Trial Magistrate erred in law and in fact by failing to weigh all the evidence placed before her and/or relying on insufficient evidence.
 - h. That the Learned Trial Magistrate erred in law and fact by failing to consider submissions by the Appellant.
 - i. That the Learned Trial Magistrate erred in law and in fact in failing to be guided by recent court awards thus arriving at unconsciously wrong decision.
 - j. That the decision of the Learned Trial Magistrate as a whole as contained in the ruling dated 21st June 2022 is legally untenable, against the weight of evidence and ought to be set aside.
9. The Appellant prays for orders that;
 - i. That the ruling and decree thereof of the Principal Magistrate's Court, Sotik Senior Resident Magistrate Hon. J Omwange delivered on 21st day of June 2022 at Sotik Law Courts in PMCC ELC No. E002 of 2021 be set aside and/or varied in such terms as this honorable court may deem necessary.



- ii. That upon granting prayer i) above, the judgement and the decree thereof of the Principal Magistrate’s court, Sotik Senior Resident Magistrate Hon. J. Omwange delivered on 15th day of February 2022 at Sotik Law Courts in PMCC ELC No. E002 of 2021 be reinstated and all consequential orders there under as this honorable court may deem necessary.
 - iii. That this Honorable Court be pleased to make an order on the costs of this appeal.
 - iv. That such further or other orders be granted as this honorable court may deem fit and just.
10. On 23rd January, 2024, the court directed that the appeal be disposed by way of written submissions. The Appellant filed her submissions on 11th January, 2024 while the Respondents did not file any submissions.

Issues for Determination.

11. The Appellant in her submissions identifies the following issues for determination;
- a. Whether the learned magistrate erred in allowing the respondents herein to litigate on (sic) the estate of a deceased person without the requisite locus standi.
 - b. Whether the learned magistrate erred in granting the order for review and setting aside of the judgement dated 15th October 2022.
 - c. Who should bear the costs of this appeal?
12. With regard to the first issue, the Appellant submits that the Respondents in their application dated 26th May, 2022, argued that land parcel No. Kericho/Kapkures/97 was subdivided into land parcel No’s Kericho/Kapkures/206 and Kericho/Kapkures/207 that belonged to Kiprono Arap Chepkwony (deceased).
13. The Appellant also submits that since Kiprono Arap Chepkwony is deceased, the procedure for litigating on his behalf would be to first apply for grant of letters of administration ad litem of his estate which was not done.
14. The Appellant relies on Section 82(a) of the *Succession Act*, the judicial decisions of *Alfred Njau & 5 others v City Council of Nairobi* [1983] eKLR, *Edema & 2 others v Edema & 5 others* (Miscellaneous Succession Cause E001 of 2022) [2022] KEHC 9960 (KLR) (6 July 2022) (Ruling) and submits that the Respondents application was incompetent.
15. The Appellant also submits that since the Respondents did not have the requisite locus standi, the ruling by the trial magistrate was ‘legally crippled’ and so she sought that the appeal be allowed.
16. On the second issue, the Appellant submits that the ground upon which the Respondents were seeking review of the judgement is that they had discovered new evidence. The Appellant also submits that the alleged new evidence is that land parcel no. Kericho/Kapkures/207 is owned by the deceased’s spouse and their father. The Appellant further submits that it was on this basis that the Learned Trial Magistrate proceeded to set aside the judgement delivered on 15th February, 2022.
17. It is the Appellant’s submissions that the said information was not of such gravity that it would have escaped the Respondents knowledge had they exercised due diligence. The Appellant relies on Section 80 of the *Civil Procedure Act*, Order 45 Rule 1(1) of the *Civil Procedure Rules*, *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 Others* [2021] eKLR in support of her arguments.



18. On who should bear the cost of the appeal, the Appellant relies on Section 27 of the *Civil Procedure Act*, Republic v. Rosemary Wairimu Munene (Ex parte Applicant) v. Ihururu Dairy Farmers Co-operative Society Ltd (citation not given) as was cited in *Republic v. Kisii University Ex parte Mary Jebet Mutai* Judicial Review Application No. 6 of 2017 and seeks the appeal be allowed as prayed with costs.

Analysis and Determination.

19. In my view the issues that arise for determination are as follows;
- a. Whether the Learned Trial Magistrate erred in not holding that Respondents did not have the locus standi to file the application dated 26th May, 2022.
 - b. Whether the Learned Trial Magistrate erred in setting aside the judgement delivered on 15th February, 2022 on the ground of discovery of new material evidence.
 - c. Who should bear costs of the appeal.

A. Whether the Learned Trial Magistrate erred in not holding that Respondents did not have the locus standi to file the application dated 26th May, 2022.

20. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR. It was held as follows;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.” [Emphasis mine]

21. In *Abok James Odera T/A A.J.Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR the court held as follows;

“This being a first appeal, we are reminded of our primary role as a first Appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

22. The Appellant alleges that the learned trial magistrate erred in not holding that Respondents did not have the locus standi to file the application dated 26th May, 2022.
23. The Appellant argues that the Respondents application was in respect of land parcel numbers Kericho/Kapkures/206 and 207 which were subdivisions of land parcel No. Kericho/Kapkures/97 that was registered in the name of the late Kiprono Arap Chepkwony.
24. It is the Appellant’s argument that since the said properties were alleged to belong to a deceased person, it was important for the Respondents to apply for a grant of letters of administration ad litem before filing the said application.
25. The Respondents did not file any submissions to the appeal.



26. In the judicial decision of *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Faniel Evans Amudavi, Deceased)* [2016] eKLR the court held as follows;

“Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. (Emphasis Mine). It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties. (Emphasis Mine)

29. In this matter therefore the Respondent lacked the requisite locus standi to institute and/or maintain the suit. The result is that all the proceedings before the trial court were instituted and maintained by a person who lacked the legal capacity to do so. They are indeed a nullity and as such lack the legal leg to stand on.” (Emphasis Mine)
27. It is important to note that it is the Appellant who instituted the suit against the Respondents. In the said suit, the Appellant sought various orders against the Respondents on the ownership of land parcel No. Kericho/Kapkures/207. Judgement was entered in favour of the Appellant on 15th February, 2022.
28. The Respondents filed the application dated 26th May, 2022 before the trial court in their capacity as Defendants in the suit. They were seeking orders of stay of execution, review and setting aside of the Judgement, which judgment was in favour of the Appellant.
29. My view is that the Appellant cannot have his cake and eat it. She now alleges that the Respondents did not have capacity to file the said application and yet the application is filed in the suit instituted by her against them.
30. The question of Defendants lack of capacity goes to the very foundation of the Appellants suit before the trial court. So much so that the said suit may very well be a nullity.
31. This ground of appeal lacks merit.

B. Whether the Learned Trial Magistrate erred in setting aside the judgement delivered on 15th February, 2022 on the ground of discovery of new material evidence.

32. The Appellant argues that the Learned Trial Magistrate erred in setting aside the judgement delivered on 15th February, 2022 on the ground of discovery of new material evidence.
33. The Appellant states that the Respondents were seeking to have the judgement of the trial court set aside on the ground that they had discovered new evidence to wit land parcel No. Kericho/Kapkures/207 belonged to Kiprono Arap Chepkwony. (Deceased).
34. The Appellant argues that it is on this ground that the Learned Trial Magistrate set aside his judgement earlier delivered on 15th February, 2022.
35. The Appellant also argues that the said evidence did not amount to new evidence because, had the Respondents exercised due diligence, they would have discovered it.



36. As aforementioned, the Learned Trial Magistrate allowed prayer No. 4 of the Respondents application dated 26th May, 2022. The said prayer was as follows;

“ 4. That the honorable court be pleased to review its judgement of the aforesaid date and set it aside and/or vary the same for the interest of justice”

37. The Respondents sought that the judgement delivered on 15th February, 2022 be reviewed on the grounds that land parcel No’s Kericho/Kapkures/206 and 207 were subdivisions of land parcel No. Kericho/Kapkures/97.

38. The Respondents argued that Kericho/Kapkures/97 was registered in the name of Kiprono Arap Chepkwony (deceased) and was allegedly illegally subdivided without following the due process.

39. The Respondents raised the same issue in their statement of defence and the Learned Trial Magistrate addressed it in the judgement delivered on 15th February, 2022. The learned trial magistrate states as follows;

“I start by considering the pleadings where the Plaintiff pleads to be the administrator of the estate of the registered owner of land registration no. Kericho/Kapkures/207, whereas the defendants claim that land registration Kericho/Kapkures/207 came into being from a subdivision in (sic) land registration Kericho/Emnguen/97 which was owned by their grandparent now deceased.”

40. Thereafter the Learned Trial Magistrate identifies four issues for determination one of which is on whether there was a nexus between land parcel No’s Kericho/Kapkures/207 and Kericho/Emnguen/Kapkures/97. In determining the said issue, the learned trial magistrate held as follows;

“I have considered the full evidence on record, and note that there is no dispute that land registration Kericho/Ekwen/Kapkures/97(sic) belonged to Kiprono Arap Chepkwony, who the 3rd defendant averred was her husband. It’s also not in dispute that the registered owner of land registration no. Kericho/Kapkures/207 is David Kiplangat Rotich (deceased). Though the defence averred that land registration no. Kericho/Kapkures/207 was hived from Kericho/Ekwen/Kapkures/97, the witness did not tender any evidence to establish the same. The duty was levied upon the defence to demonstrate what they averred was not discharged.

In view of the above, I am unable to find nexus between the 2 parcels of land above...”

41. Section 80 of the [Civil Procedure Act](#) provides as follows;

“ 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.”

42. Order 45 Rule 1 of the [Civil Procedure Rules](#) provides as follows;

“(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.”

43. In the judicial decision of *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR it was held:

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;

- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- (b) on account of some mistake or error apparent on the face of the record, or
- (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

44. As was held in the above cited judicial authority, a court can only review its order/judgement upon discovery of new and important evidence which after exercise of due diligence was not within a party’s knowledge and could not be produced at the time when the decree was passed. A court can also review its judgement on account of an error on the face of the record or for any sufficient reason.

45. The Learned Trial Magistrate in reviewing and setting aside the judgement delivered on 15th February, 2022 in the ruling delivered on 21st June, 2022 held as follows;

“I have considered the application, replying affidavit and the submissions by both parties. I agree with the parties that Order 45, Rule 1 sets the requirements for review of court order by the court making the order.

From the Applicant’s part they have procured new evidence taking the land in dispute with land reg. no. Kericho/Kapkures/97 and that there was non-disclosure of material facts that the ground for land reg. no. Kericho/Kapkures/207 is not demarcated.

The Respondents on their part say that the Applicant has not demonstrated that he exercised due diligence during the hearing and couldn’t procure the new evidence...

Having taken into account that there is new material evidence on the subject matter. (sic) It is my view that the evidence needs to be taken into account when determining this matter...

In view of the above, the application is granted in terms of prayer 4.”



46. As afore stated the learned trial magistrate reviewed the judgement delivered on 15th February, 2022 on the ground of discovery of new material evidence.

47. In the judicial decision of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR the court held as follows;

“ 19. The reason for the above limitation is that it is an indulgence given to a party to get the previous decision altered on the basis of discovery of important evidence which was not within his knowledge at the time of original hearing. So, in the fitness of things, a person, who relies on such circumstances to obtain a review, should affirmatively establish them. The latitude shown to a party by a court is conditional upon strict compliance with that requirement.

20. Ordinarily, the expression 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 order was made would refer only to a discovery made since the order sought to be reviewed was passed. An applicant alleging discovery of new and important evidence must demonstrate that he has discovered it since the passing of the order sought to be reviewed.” (Emphasis Mine)

48. As aforesaid, the new material evidence the Respondents alleged to have discovered was that land parcel No’s Kericho/Kapkures/206 and 207 were subdivisions of land parcel No. Kericho/Kapkures/97 and that there was no distinct boundary on the ground between the said parcels of land.

49. As set out in the preceding paragraphs, the Learned Trial Magistrate addressed the issue of whether land parcel No’s Kericho/Kapkures/206 and 207 were subdivisions of land parcel No. Kericho/Kapkures/97.

50. The Learned Trial Magistrate found that no nexus had been established between the said parcels. It is my view, therefore, that this did not amount to new evidence. It was a gap in evidence tendered and was raised and addressed by the Learned Trial Magistrate in his judgement.

51. The other new evidence the Respondents alleged to have discovered was that there was no distinct boundary on the ground between land parcel No’s Kericho/Kapkures/206 and 207.

52. As was held in *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* (*supra*) cited above, when parties are seeking to review an order on the ground of discovery of new and important evidence, they must demonstrate that they made the discovery after the order sought to be reviewed was passed.

53. In the judicial decision of *Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira* [2022] eKLR the court held as follows;

“In the case of *Evan Bwire v Andrew Aginda* Civil Appeal No. 147 of 2006 cited fin the case of //Stephen Githua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers/ (2016) eKLR the Court of Appeal held as follows:

“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated



the existence of new evidence which he could not get even after exercising due diligence.”

The current Application falls under the above category. The effect of allowing it would amount to re-opening the case afresh. Litigation must come to an end. Parties must present all the facts, documents and evidence in Court at the appropriate time before the Court retires to write its Judgment. Time and time again Courts have advised litigants that they are bound by their pleadings and that you do not prosecute your case piecemeal. What is demonstrated by the Application is a case of poor pleading which is not what was envisaged by Section 80 of the Civil Procedure Act nor the Rules under Order 45.” (Emphasis Mine)

54. Similarly, in the present matter, it is my view that the allegation that there was no distinct boundary between land parcel No’s Kericho/Kapkures/206 and 207 could not amount to discovery of new evidence.
55. It is also my view that the Respondents did not demonstrate that after exercising due diligence, the said evidence could not have been obtained. It is further my view that had the Respondents exercised due diligence, they would have discovered the alleged lack of boundaries between the said properties and brought it up during the hearing of the suit and before delivery of judgement.
56. I therefore find that the Learned Trial Magistrate’s finding that the Respondents had discovered new material evidence and therefore set aside the judgement delivered on 15th February, 2022 erroneous. The Respondents did not meet the threshold required to review and set aside the judgement delivered on 15th February, 2022.

C. Who should bear costs of the appeal.

57. It is now settled that costs shall follow the event. This is in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

58. In the result, the appeal succeeds. The ruling and order in Sotik PMCC ELC No. E002 of 2021 delivered on 21st June, 2022 is hereby set aside.
59. The Appellant shall have costs of the Appeal.
60. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 9TH DAY OF MAY, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Mugumya for the Appellant.

No appearance for the Respondents.

Court Assistant; Mr. Joseph Makori.

