



Sankale & another v Karasha & 3 others; Nyaugo (Interested Party) (Environment & Land Case 937 of 2017) [2024] KEELC 5889 (KLR) (16 September 2024) (Ruling)

Neutral citation: [2024] KEELC 5889 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 937 OF 2017
MN GICHERU, J
SEPTEMBER 16, 2024**

BETWEEN

ALFRED KARASHA SANKALE 1ST PLAINTIFF

**MARY KARASHA (WIFE OF WILLIAM M KARASHA (DECEASED) S/O
SIMEON J OLE KARASHA 2ND PLAINTIFF**

AND

SIMEON JOSEPH OLE KARASHA 1ST DEFENDANT

LAND REGISTRAR, KAJIADO NORTH SUB-COUNTY 2ND DEFENDANT

DISTRICT LAND SURVEYOR, KAJIADO 3RD DEFENDANT

HON ATTORNEY GENERAL 4TH DEFENDANT

AND

ROSE AKINYI NYAUGO INTERESTED PARTY

RULING

1. This ruling is on the notice of motion dated 23/11/2021. The motion which is by the plaintiff is brought under Sections 1, 1A, 3 and 3A of the *Civil Procedure Act*, Sections 26 (1) (b) 80 (1) and (2) fo the *Land Registration Act*, Section 13 (1) of the *Environment and Land Court Act*, Order 9 Rule 9 9(a), Orders 45 rule 1(a) and 51 and all other enabling provisions of law.
2. The motion seeks the following orders.
 - i. The law firm of Taliti Collins be placed on record for the 1st plaintiff in place of Mung'ao Rachier and Company Advocates.



- ii. Review of the judgment delivered on 7/6/2021 by directing that L.R. Ngong/Ngong/506 and all its resultant subdivisions be declared to be the property of the late Serah Karasha and that all the said parcels be registered in the name of the said estate by the Land Registrar, Kajiado North.
 - iii. That the court orders the Land Registrar, Kajiado North to cancel and revoke all the resultant title deeds which were acquired upon the subdivision of the suit parcel, the same having been acquired through corrupt and fraudulent means.
 - iv. That the costs of this application be in the cause.
3. The motion is based on eight grounds and is supported by two affidavits dated 23/11/2021 and 8/3/2022 respectively. The gist of the entire application is as follows.

Firstly, the judgment on record dated 7/6/2021 held that the suit land and its resultant parcels are held by the 1st defendant in trust for his late wife Serah Karasha and her family. Secondly, there were 18 subdivisions of the suit land which are Ngong/Ngong/63986 – 64003. Thirdly, the court ordered that the plaintiff is entitled to the 4 acres that he occupies on the suit. Fourthly, on 9/10/2015 the court had issued a temporary injunction restraining any dealings with the suit land. Fifthly, the court in the judgment dated 7/6/2021 held that the subdivision of the suit land was done in contempt of the court order dated 9/10/2015 and it is prudent for the court to order that all the resultant parcels be declared to be the property of the estate of the late Serah Karasha. Sixthly, the 1st defendant does not reside on the suit land or its subdivisions and he did not appeal against the decision of this court. Seventhly, the 1st defendant has not fully complied with the judgment dated 7/6/2021 because he has sold land after judgment without the consent of the family of the late Serah Karasha. Such parcels include L.R. 63991, 63990, 63989, 63986, 63994, 64000. Eighthly, the above new and important matters and evidence regarding the illegal transfers and subdivisions were not within the knowledge of the court at the time of making the judgment on 7/6/2021. Ninthly, there is an error apparent on the face of the record because the court failed to order the cancellation and revocation of the illegal subdivisions of the suit land making it impossible to implement the judgment of the court. It is therefore in the interests of natural justice, equity and conscience to allow the motion dated 23/11/2021.

4. The plaintiff's motion is opposed by the 1st defendant in a replying affidavit dated 27/11/2021 in which he replies as follows. Firstly, the issue of the representation of the plaintiff should be clear because there are two law firms respecting him. Secondly, the second plaintiff withdrew her claim against the defendant vide a notice of withdrawal of suit dated 29/10/2019. Thirdly, the final orders of the court declared that the suit land and the resultant subdivisions are held in trust for the late Sarah Karasha and her family, the 1st plaintiff be declared as entitled to the 4 acres that he occupies and the 1st defendant was directed to transfer the 4 acres to the 1st plaintiff within 90 days failure to which the Deputy Registrar to execute all the transfer documents. Fourthly, immediately after the judgment, the 1st defendant tasked the 2nd and 3rd defendants to implement the court judgment as a result of which a title deed for L.R. Ngong/Ng2 was registered in favour of the applicant on 23/8/2021. It measures 1.62 Ha (4.003) acres. Fifthly, it is dishonest and insincere for the applicant to mislead the court that the judgment needs review. Sixthly, the application for contempt was dismissed on 22/9/2017 in a ruling by Hon. Justice Angote and Hon. Lady Justice Ochieng was aware of this as she delivered the judgment in this case on 7/6/2021.

Finally, the application has no basis and ought to be dismissed.

5. Counsel for the parties were to file written submissions but I do not see any on record. I have written this ruling without the benefit of such submissions.



6. I have carefully considered the motion dated 23/11/2021 in its entirety including the grounds, the affidavits and the annexures. I have also considered the law applicable to the motion especially Order 45 Civil Procedure Rules. I find that the following issues arise.
 - i. Whether the law firm of Taliti should be allowed to come on record for the 1st plaintiff.
 - ii. Whether there are grounds for review in this case.
 - iii. Whether it is prudent to order the cancellation of the tittle deeds for the resultant subdivisions of the suit land.
7. On the 1st issue, I find that the law firm of Taliti Advocates should be allowed to come on record because the former counsel for the plaintiff Mung'ao Rachier Advcoates is not available to give the requisite consent required by Order 9 rule 9(b) of the Civil Procedure Rules. It provides as follows.
 9. "Where there is change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court.
 - (b) upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be".
8. On the second issue, I find that the 1st plaintiff has not proved any of the prerequisites for review. The prerequisites for review as follows.
 - i. Discovery of new and important matter or evidence which was not within th knowledge of the applicant or which he could not produce at the time of the decree,
 - ii. Error or mistake apparent on the face of the record, or
 - iii. Other sufficient reason .

According to the 1st plaintiff, the new evidence is that the suit land was subdivided by the 1st defendant inspite of the ruling dated 9/10/2015. This evidence was available to the 1st plaintiff when the court delivered its judgment in 2021. The 1st plaintiff is not saying that he came across this evidence after judgment.

Secondly, in paragraph 21 of the supplementary affidavit dated 8/3/2022, the 1st plaintiff is saying that the disobedience of the judgment is happening after judgment. If disobedience is happening after judgment, then there is no error in the judgment. The court could not have foreseen that its judgment would be disobeyed and therefore deal with that disobedience in the judgment. An error on the face of the record has been described as one that is so obvious that it stares at the court in the face.

It is clear that the trial Judge was aware of the subdivision of the suit land during the pendency of the case as can be seen at page 12 of the judgment where she states;

...I note the 1st defendant admitted he had proceeded to subdivide the suit land during the pendency of this suit contrary to the court order granted on 10/10/2014..."

This being the case, it is not correct to say that there is an error apparent on the record. Neither do I find any other sufficient reason to interfere with the judgment dated 7/6/2021. From the prayers in the plaint to the orders in the judgment it is clear that the 1st plaintiff got the 4 acres that he desired. He has not disclosed in the current application how many children the late Sarah Njoki Karasha had and how many of them are entitled to the estate of his late mother. I believe that such an issue would adequately be dealt with by a Probate and Administration Cause.



For the above stated reasons, I find no merit in the motion dated 23/11/2021 and I dismiss it. No order as to costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 16TH DAY OF SEPTEMBER 2024.

M.N. GICHERU

JUDGE

