



REPUBLIC OF KENYA



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Arita & another v Bochaberi (Being sued as the representative of the Estate of the Late Hezron Ndubi Ocheng) & 8 others; Nyauma & another (Interested Parties) (Environment & Land Petition E001 of 2024) [2024] KEELC 7493 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7493 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT & LAND PETITION E001 OF 2024

JM KAMAU, J

NOVEMBER 6, 2024

FREEDOMS AS ENSHRINED UNDER ARTICLES 22(1), 23, 24, 25, 29, 31, 40, 43E, 47, 48, 50, 159, 162(2) & (3) AND 165(6) & (7) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ENVIRONMENT AND LAND COURT ACT, NO.09 OF 2011

AND

IN THE MATTER OF: SECTION 5(1) (A) OF THE TRESPASS ACT CAP. 294

LAWS OF KENYA

AND

IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012 LAWS OF KENYA

AND

IN THE MATTER OF: THE MAGISTRATES COURT ACT, CAP.10 LAWS OF

KENYA

AND

IN THE MATTER OF: SECTION 3 OF THE LAW OF CONTRACT ACT, CAP.23 LAWS

OF KENYA

AND

IN THE MATTER OF: THE DOCTRINE OF CONSTRUCTIVE TRUST

AND

IN THE MATTER OF: STAY OF PROCEEDINGS IN NYAMIRA CMCC NO. 38

OF 2022, ANDREW NYAUNDI NDUBI & 2 OTHERS VS. EUNICE KEMUNTO ARITA & THE HON. ATTORNEY GENERAL, CIVIL APPEAL NO. ELCA NO.004 OF 2024 & E68 OF 2020 AND E002 OF 2020



BETWEEN

EUNICE KEMUNTO ARITA 1ST PETITIONER

EVANS MORARA NYANGONGO 2ND PETITIONER

AND

**JANE BOCHABERI (BEING SUED AS THE REPRESENTATIVE OF THE
ESTATE OF THE LATE HEZRON NDUBI OCHENGE) 1ST RESPONDENT**

ANDREW NYAUNDI NDUBI 2ND RESPONDENT

STEPHEN KINANGA NDUBI 3RD RESPONDENT

TIMOTHY ARONI NDUBI 4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT

THE OFFICE OF DPP - NYAMIRA 6TH RESPONDENT

**THE DISTRICT LAND REGISTRAR – NYAMIRA COUNTY 7TH
RESPONDENT**

INSPECTOR GENERAL OF POLICE 8TH RESPONDENT

GN SAGWA & COMPANY ADVOCATES 9TH RESPONDENT

AND

AGNES N NYAUMA INTERESTED PARTY

SAMUEL MOMANYI OGECHI INTERESTED PARTY

RULING

1. The 2 Petitioners herein, Alice Kemunto Arita and her husband Evans Morara Nyamongo moved this Court seeking a number of reliefs as follows; -
 1. A Declaration that the rights of the Petitioner to privacy under Article 31 to own property under Article 40, to a fair administrative process under Article 47 and a fair hearing under Article 50 of the Constitution Constitution}} have been violated by the Respondents.
 2. It be declared that by reason of the deceit, concealment and fraud committed by the 1st, 2nd, 3rd and 4th Respondents in proceedings before the Chief Magistrates Court in CMCC No. E2 of 2020, *Stephen Kinanga Ndubi v Eunice Kemunto Arita & 2 others* Nyamira CMCC Cause No 48 of 2019 in the *matter of Hezron Ochenge Ndubi- Deceased* and Nyamira CMCC No 38 of 2022, *Andrew Nyaundi Ndubi & 2 others v Eunice Kenunto Arita and the Hon. Attorney General* the Court in exercising its Judicial authority was obstructed from promoting and/or protecting the purpose and principles of the Constitution. The powers of the Court under Articles 159 (I)(e) were constrained.
 3. It be declared that the reason of the deceit, concealment and fraud committed by the 1st, 2nd, 3rd and 4th Respondents in proceedings before the Chief Magistrates Court in CMCC No. E2



of 2020, *Stephen Kinanga Ndubi v Eunice Kemunto Arita & 2 others* Nyamira CMCC Cause No 48 of 2019 in the matter of Hezron Ochenge Ndubi- Deceased and Nyamira CMCC No 38 of 2022, *Andrew Nyaundi Ndubi & 2 others v Eunice Kemunto Arita and the Hon. Attorney General* the Court in exercising its Judicial authority the Petitioners right to fair trial or hearing was contravened or violated.

4. A Declaration that the 1st and 3rd Respondents' grants having been obtained by fraud and material concealment – on these Respondents part, the same are null and void. Consequently, these Respondents the requisite locus standi and capacity to challenge the 1st Petitioner's title LR No North Mugirango/Boisanga/4600.
 5. An order to bring to this Court and quash the proceedings in Chief Magistrates Court in CMCC No. E2 of 2020, *Stephen Kinanga Ndubi v Eunice Kemunto Arita & 2 others* Nyamira CMCC Cause No 48 of 2019 in the matter of Hezron Ochenge Ndubi- Deceased and Nyamira CMCC No 38 of 2022, *Andrew Nyaundi Ndubi & 2 others v Eunice Kemunto Arita and the Hon. Attorney General* the Court the same having been brought by people who lacked standing and were riddled with fraud on the trial courts.
 6. A Declaration that the petitioner is the registered, rightful and absolute owner, in law of all parcels of land known as LR No North Mugirango/Boisanga/4600.
 7. An order of permanent injunction prohibiting the 1st, 2nd, 3rd and 4th Respondents from entering, remaining, beaconing, trespassing or in any way interfering with the boundaries and title of the 1st Petitioner who is the Registered proprietor of LR No North Mugirango/Boisanga/4600.
 8. In the alternative, a Declaration be made that there exists a constructive trust in favour of the 1st Petitioner on account of the land Sale agreement dated 3rd December, 2023 , 10th June 2006 and 24th August 2008 between the 1st, 2nd, 3rd and 4th Respondents herein and the late Hezron Ochenge Ndubi, on he the one hand and the 1st interested party herein on the other where the Respondents were parties and they received the purchase price and were the suit land was sold and transferred to the 1st Petitioner.
 9. Further by Order of this Court the Deputy Registrar signs sub-division and transfer documents to register and issue a title deed to the 1st Petitioner excised 1 and 1/8 Acre from the larger L.R. No. North Mugirango/Boisanga/2516 on constructive trust.
 10. That by order of this Court the Deputy Registrar of the Court refers the 9th Respondents C.N. Sagwa to the Advocates Commission for professional misconduct and the law Society of Kenya and be held jointly liable for the costs of the Petition.
 11. General damages for violation of petitioner's fundamental rights.
 12. An award of aggravated and exemplary damages to be borne by the 1st, 2nd, 3rd and 4th Respondents jointly and severally.
 13. An order that the costs of this petition be provided for.
2. The 9th Respondent raised a Preliminary Objection dated 6/6/2024 where among other issues she argued that all the issues in this Petition have been canvassed in the lower Court and in some of them, Appeal had been preferred and in others Applications for Review heard and determined and can therefore not be introduced in this court under a different jurisdiction. That of Constitutional Petition.



3. Having agreed with the 9th Respondent that all the issues had been canvassed in the lower court and the only recourse the Petitioners had was to either appeal or apply for Review in the lower Court, this Court felt that there must be an end to litigation and that the due process of the law must be followed. Accordingly, the Petition was disallowed and dismissed with no order as to costs on 24/7/2024.
4. Having felt dissatisfied with the said Judgment, on 26/7/2024, the Petitioners moved this Court for the setting aside of and Review of the said Judgment as well as a stay of execution of the Judgment and consequential Decrees from Nyamira Chief Magistrate's Court Nos. *MCCC No. 38 of 2022* and *MC ELC No. 002 of 2020* delivered on 2/3/2023 and 25/10/2023 respectively on the following Grounds:
 1. Discovery of an important matter and new evidence that the court judgment dated 24th July 2024 is irregular, unlawful and an ambush since it refers to the 9th Respondent Preliminary Objection dated 06th June 2024 that was not served on the Petitioners.
 2. Discovery of an important matter and new evidence that the 9th Respondent deceived and misled court about a preliminary objection dated 06th June 2024 is a nullity since it was before the 9th Respondent had entered appearance on 12th June 2024.
 3. Besides, a discovery of any an important matter and new evidence that the 9th Respondent filed and served the petitioners a Preliminary Objection dated 12th June 2024 whose grounds lacked the constitutional avoidance doctrine.
 4. Discovery of an important matter that the Petitioners ELC Petition E001 of 2024 is unconverted and therefore deemed unopposed by the Respondents failure to file any replying affidavit or grounds of opposition raising any specific point of law of any preliminary or jurisdictional nature to deny or admit the Petitioners' sworn averments in compliance with mandatory provisions of Rule 15(2)(a)(I, ii) of the *Constitution* of Kenya (Protection of fundamental freedoms and rights) Practice and Procedure Rules, 2013 as held in the Supreme Court case between *Gideon Sitelu Konchellab v Julius Lekaneny Ole Sunkuli and 2 others* (2018).
 5. The applicants have discovered an important matter that the Hon Court lacked jurisdiction to hear and determine the 9th Respondent Preliminary Objection dated 12th June 2024 was in court before filing of a replying affidavit dated 04th July 2024 after the closure of pleadings without leave of court in contravention of the mandatory provisions of Rule 15(2)(a)(b) of the *Constitution* of Kenya (Protection and fundamental freedoms and rights) Practice And Procedure Rules, 2013, Reliance was placed in the Supreme court of case of *JCN Holdings Ltd V Development Bank Of Zambia* which held that "It is settled law that if a matter is not properly before court, that court has no jurisdiction to make any orders or grant any remedies."
 6. Discovery that this court judgment dated 24th July 2024 contravenes section 9(4) of the *Fair Administrative Actions Act*, 2015 which exempts the application of the doctrine of constitutional avoidance/exhaustion on exceptional circumstances by invoking its inherent jurisdiction to do justice and safeguard constitutional values and principles that were at stake in the proceedings of MC CC NO.38 of 2022 and MC ELC NO.02 of 2020 whose proceedings not only lacked jurisdiction but were also obtained by fraud, concealment of material facts and deceit that undermines deprived the Petitioners natural justice, fair trial and fair hearing enshrined in articles 23(3),25 and 50(1) of the *Constitution*.
 7. That the court judgment suppressed and omitted important material facts that the subordinate court proceedings in MC CC No 38 of 2022 and MC ELC NO 02 of 2020 were fatally



incompetent since they were filed by the 1st and 4th respondents without grants that confer legal rights in the deceased Estate of Hezron O. Ndubi in contravention of section 13(2)(d) of the Environment and Lands Court Act, 2011 and section 62 of the Land Registration Act, 2012 thus the appeal remedy on merit is practically unsustainable and or unavailable all through for want of locus standing on the Respondents.

8. That the court judgment suppressed and omitted important material facts that the subordinate court lacked jurisdiction to hear and determine MC CC NO 38 of 2022 and MC ELC NO.02 of 2020 whose proceedings are null and void *abi initio*. The Applicants rely on the Supreme court binding precedent in the case of Crossland Mutinta and others V Donovan Chipanda paragraph 44 which held that; “the absence of jurisdiction on the part of the Magistrate nullified the proceedings in the subordinate court. To that extent it was a futile exercise on the part of the High court to purports to consider an appeal and consequently uphold the judgment of the trial magistrate when, for want of jurisdiction the court proceedings from which it arose were null and void *abi initio*.”
 9. The court judgment on ELC PET E001 of 2024 contravened article 163(7) of the Constitution and consequently imposed miscarriage of justice by omission of the Petitioners binding precedents of the Court of Appeal and Supreme Court precedents in their written submissions in record.
 10. The court judgment has error of omission of law that the Court has jurisdiction under article 165(5)(b) and 165(6)(7) of the Constitution to determine whether the interpretation and application of law and fact was correct in the proceedings of the subordinate courts MC Civil Case No. 38 of 2022 and MC ELC NO.002 of 2020 that contravened section 13(2)(d) of the Environment and Lands Court Act, 2011 and section 4(2) and 7 of the Limitations of Actions Act thus violated the petitioners fundamental rights to natural justice, fair administrative actions act and fair trial provided in article 23(3),25,47 and 50 of the Constitution.
 11. The court judgment suppressed and omitted exceptions to the doctrine of constitutional avoidance based on the High courts (inclusive of special status courts) under article 165(5) of the Constitution read together with section 9(4) of the Fair Administrative Actions Act, 2015 due to the unique and exceptional circumstances of this petition where the petitioners seek ELC Court to redress violation of fundamental rights during the trial proceedings of MC CC NO.38 of 2022 and MC ELC NO.E002 of 2020 on the deceased estate that are deemed fatally incompetent and the courts lacked jurisdiction to hear the dispute.
 12. A discovery that the 9th Respondent’s Preliminary Objection is fraudulent, frivolous and vexatious that is not properly in the court of record.
 13. A discovery that the 9th Respondent’s Preliminary Objection is gross abuse of corrupt that should be set aside as of right to meet the interest of justice.
5. After hearing the Petitioners and the 9th Respondent, I retired to write the Ruling below.
6. Section 80 of the Civil Procedure Act Cap 21 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.”
7. Order 45 Rule 1 of the [Civil Procedure Rules](#), 2010 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.”
8. In [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.”
9. In [Pancras T. Swai v Kenya Breweries Limited](#) [2014] eKLR the Court of Appeal held:-
- Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.....”
10. I would also wish to draw the Petitioners’ attention to [Sarder Mohamed v. Charan Singh Nand Sing and Another](#) (1959) EA 793 where the High Court held that Section 80 of the [Civil Procedure Act](#) conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.
11. Discussing the scope of Review, the Supreme Court of India in the case of [Ajit Kumar Rath v State of Orisa & Others](#), 9 Supreme Court Cases 596 at Page 608. had this to say:-
- the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may



be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

12. In *Tokesi Mambili and others v Simion Litsanga* the Court held as follows:-
 - i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
 - ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.
13. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 Judge John M. Mativo culled out the following principles from a number of authorities: -
 - i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.



14. According to the Petitioners herein the Grounds for the Application as detailed above such as,
- a. Alleged deceit by the 9th Respondent,
 - b. Discovery of the evidence that the 9th Respondent's Preliminary Objection lacked constitutional avoidance doctrine, have absolutely anything to do with
 - (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, Petitioners' knowledge.
15. All the grounds hinged upon by the Petitioners were matters within or which ought to have been within the knowledge of the Petitioners all along.
16. The Application could also not pass the Test of:
-or for any other sufficient reason.....”
- which reasons leading authorities hold must be analogous to the other grounds mentioned under the Act and Rules, a reason sufficiently analogous to those specified in the Rule”
17. In the case of *Evan Bwire V Andrew Aginda* Civil Appeal No. 147 of 2006 cited fin the case of [Stephen Gitbua 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.”
18. 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 of the [Civil Procedure Rules](#).
19. Finally, the Application is irregularly in Court since an Applicant in an Application for Review ought to have annexed a formal extracted Decree or order in respect of which the Review is sought. Not a copy of the Judgment.
20. In the case of [Suleiman Murunga V Nilestar Holdings Limited & Another](#) (2015) eKLR the court held as follows:
- The plain reading of the above provision (referring to Order 45 Rule 1) is that an applicant for review ought to have annexed a formal extracted decree or order in respect of which the review is sought. In essence, judgment or ruling. Thus, where an applicant fails to annex the order sought to be reviewed, an application is defective. In the present application the order that the Defendants sought to be reviewed was not annexed with the result that the Defendant's application was fatally defective. I agree that a formal decree or order is a pre-



requisite before an applicant can bring himself/herself within the ambit of order 45 of the Civil Procedure Rules as relates to review of the decree or order”

21. Save a copy of the Judgment, no such a Decree was attached to the present Application which makes the Application fatally defective.
22. Having said so, the remaining duty is to dismiss the Petitioners’/Applicants’ Application dated 26/7/2024 with costs. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 6TH DAY OF NOVEMBER, 2024.

MUGO KAMAU

JUDGE

In the presence of: -

Court Assistant – Brenda

2nd Petitioner present in person

Respondent – N/A.

