



REPUBLIC OF KENYA



**Rotich v Chepkoskei & 3 others (Enviromental and Land Originating Summons
52 of 2019) [2024] KEELC 13632 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13632 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 52 OF 2019
LA OMOLLO, J
DECEMBER 5, 2024**

BETWEEN

EZEKIEL KIPKORIR ROTICH PLAINTIFF

AND

RUTH CHEPKOSKEI 1ST DEFENDANT

SIMION KIPNGETICH KOSKEI 2ND DEFENDANT

PAUL LANGAT 3RD DEFENDANT

JOHN MALAKWEN KOSKEI 4TH DEFENDANT

RULING

1. This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 16th January, 2024. The application is expressed to be brought under Order 45 Rule 1 & Order 51 Rule 1 of the Civil Procedure Rules and Sections 3A & 80 of the *Civil Procedure Act*.
2. The Plaintiff/Applicant seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to vary and/or review its judgement dated 28th September, 2023.
 - d. That costs of this application be provided for.
3. The application is based on the grounds on its face and the supporting affidavit of Ezekiel Kipkorir Rotich the Plaintiff/Applicant.



Factual Background.

4. The Plaintiff/Applicant commenced the present proceedings vide the Originating Summons dated 23rd October, 2019 that was amended on 24th September, 2020 where he had sought for the determination of the following questions;
 - a. Whether the deceased Musee Arap Mosonik was the beneficial or registered owner of land comprised in LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 having acquired the same through his own efforts before registration.
 - b. Whether the rights of an adverse possessor can be defeated by either death of the registered proprietor of a land which is subject to a claim based on adverse possession, or transfer of land or even subdivision of such land which is subject to a claim based on adverse possession.
 - c. Whether or not the Plaintiff who has peacefully, continually and in uninterrupted way occupied, tilled, developed and possessed the whole of all that parcel of land known as LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 but now subdivided into the following sub division Titles LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/255, LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/256 and LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/257 measuring 16 acres, from 1999 (January 1998) is entitled to the whole of the said parcel of land measuring 16 acres as an adverse possessor.
 - d. Whether the Plaintiff has acquired prescriptive rights as an adverse possessor over land parcel No. LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 but now subdivided into the following sub-division Titles; LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/255, LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/256 and LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/257 measuring 16 acres for over 21 years since the year 1999.
 - e. Whether the Plaintiff's continuous, uninterrupted, and peaceful occupation, use and possession of all that parcel of land known as No. LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 but now subdivided into the following sub-division Titles; LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/255, LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/256 and LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/257 measuring 16 acres has been adverse to the original registered proprietor thereof and by extension against the now registered proprietors of the sub-division (sic) titles.
 - f. Whether the registration of the sub-division titles LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/255, LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/256 and LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/257 is a subject of such a claim on adverse possession.
 - g. If the Court finds in favour of the Plaintiff as an adverse possessor, what would be the fate of the sub-divisions title deeds LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/255, LR No. Kericho/Kipchorian/



Lelu Block 8 (Singonyet)/256 and LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/257.

- h. That if the Court was to find that the Plaintiff entered the land parcel LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 initially with the permission of the original registered proprietor (Muse Arap Mosonik) on an exchange arrangement with the Plaintiff's land parcel L.R No. Kericho/Kipchorian/Lelu Block 5 (Monori)/35 and in the absence of compliance with Section 3 of Law of Contract Act and in the absence of the consent of Land Control Board, would the Plaintiff not be deemed to have been in adverse possession six months after the oral exchange agreement to the date of filing this suit.
 - i. Whether as at July, 2011 (after the expiry of 12 years from the date the Plaintiff entered the subject land and when the legal requirement of obtaining the Land Control Board had expired by July 1999) the Plaintiff became entitled to this land by the doctrine of adverse possession henceforth.
 - j. Whether on the success of this case, by the Plaintiff, the sub-division Titles should revert to the original Title deed LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 which should subsequently be registered in the Plaintiff's names as an adverse possessor.
 - k. Whether by the time the Defendants were being registered as the proprietors of the sub-division Titles LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/255, LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/256 and LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/257 the Plaintiff had already acquired prescriptive rights on the land parcel LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153.
 - l. Whether the register in respect of the said property comprised in LR No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 ought to be rectified to reflect the names of the Plaintiff/Applicant to pave way for the issuance of title deed.
 - m. Whether the Applicant/Plaintiff (sic) has over the years peacefully and without any interference developed the suit property by building permanent building structures.
 - n. Whether the Applicant is entitled to costs of this suit.
5. The 1st and 4th Defendants/Respondents filed their replying affidavit sworn on 11th May, 2021.
 6. The Court in its judgement delivered on 28th September, 2023 dismissed the Plaintiff/Applicant's suit.
 7. The application under consideration first came up for hearing on 17th January, 2024 when the Court gave directions that it be served upon the Defendants/Respondents.
 8. On 22nd April, 2024 the Court directed that the application be canvassed by way of written submissions. The matter was mentioned severally before it was reserved for ruling on 24th September, 2024.



The Plaintiff/Applicant's Contention.

9. The Plaintiff/Applicant contends that he instituted the present suit on 24th September, 2020 against the Defendants/Respondents herein and judgement was delivered on 28th September, 2023.
10. The Plaintiff/Applicant also contends that he has been advised by his advocates on record that it is mandatory for a party who files a suit seeking for orders of adverse possession to annex an extract of the register or green card of the suit property to the Originating Summons.
11. The Plaintiff/Applicant admits that he did not attach an extract of the register or the green card for land parcel No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 to his Originating Summons and neither did he produce it as part of his evidence.
12. It is his contention that during the pendency of the case, he exercised due diligence but he was unable to secure an extract of the register and/or green card for land parcel No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153.
13. It is also his contention that he was able to trace the green card for land parcel No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 after the hearing and determination of this case.
14. It is further his contention that he has been advised by his advocates on record that when a party considers himself aggrieved by a decree or order of the Court from which no appeal has been preferred, the party may seek a review of the decree and/or order on the ground of discovery of new and important evidence which upon exercise of due diligence could not be obtained at the time the decree and/or order was made.
15. He contends that this Court should therefore review its judgement delivered on 28th September, 2023 as there is sufficient cause to do so.
16. He ends his deposition by stating that this Court has unfettered jurisdiction to review its judgement delivered on 28th September, 2023.

The 1st Defendant/Respondent's Response.

17. The 1st Defendant/Respondent filed a Replying Affidavit sworn on 19th January, 2024.
18. She deposes that this Court delivered judgement in this matter on 28th September, 2023 and the Plaintiff/Applicant lodged a Notice of Appeal dated 9th October, 2023 which appeal is pending hearing.
19. She also deposes that she is advised by her advocates on record that where a party lodges a Notice of Appeal it is not open to the party to also apply for review of the same judgement.
20. She further deposes that she is advised by her advocates on record that the application under consideration is bad in law and ought to be dismissed with costs.
21. It is her deposition that even if the application under consideration was to be considered on merit, it would not succeed because it has not met the conditions for review set out under Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*.
22. It is also her deposition that the main ground canvassed in support of the application for review is discovery of new evidence which is a certified copy of the register that the Plaintiff/Applicant alleges that even upon exercise of due diligence, he could not obtain during the pendency of this suit.



23. It is further her deposition that the said assertion by the Plaintiff/Applicant is not true and that it is only meant to mislead this Court. She adds that the Plaintiff/Applicant has not given any plausible explanation as to why he could not obtain the copies of the register in the first place.
24. She deposes that the said certified copies of the register which the Plaintiff/Applicant claims to have recently discovered were actually certified by the Land Registrar on 2nd September, 2020 by which date the matter had not yet proceeded for hearing. She adds that this shows that the Plaintiff/Applicant has always had in his possession the said documents.
25. She also deposes that around the time the said documents were certified, Counsel for the Plaintiff/Applicant sought leave to amend the Originating Summons vide the application dated 24th September, 2020.
26. She further deposes that had the Plaintiff/Applicant exercised due diligence he would have in fact annexed and produced the certified true copies of the register given that they had been obtained on 2nd September, 2020.
27. It is her deposition that the Plaintiff/Applicant has only filed the application under consideration in order to fill in gaps in his case after the Court has already rendered itself.
28. She ends her deposition by stating that the Plaintiff/Applicant cannot therefore invite this Court to review its decision under the guise of newly discovered evidence.

Issues for Determination.

29. The Plaintiff/Applicant filed his submissions on 20th May, 2024 while the 1st Defendant/Respondent filed her submissions on 23rd September, 2024.
30. The Plaintiff/Applicant submits on the question of whether his application for review of the judgement delivered on 28th September, 2023 meets the required threshold.
31. The Plaintiff/Applicant reiterates the averments in his supporting affidavit, relies on Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules, the judicial decisions of Republic v Public Procurement Administrative Review Board & 2 Others [2018]eKLR, Pancras T. Swai v Kenya Breweries Limited [2014]eKLR, Suder Mohamed v Charan Singh Nand Sing and another [1959] EA 793, the Supreme Court of India's judicial decision of Ajit Kumar Rath vs State of Orisa & Others Supreme Court cases 596 at page 608, Tokesi Mambili and Others vs Simion Litsanga (citation not given), Republic v Advocates Disciplinary Tribunal Exparte Apollo Mboya [2019] eKLR and submits that during the pendency of this suit he was unable to get a copy of the green card of the suit property and he was only able to obtain it after judgement had been delivered. It is on this basis that he is seeking that the Court reviews its judgement.
32. He concludes his submissions by urging the Court to allow his application dated 16th January, 2024 as prayed.
33. The Defendant/Respondent submits on whether the Plaintiff/Applicant is entitled to grant of the orders of setting aside and/or reviewing the orders issued on 16th April, 2024. (sic).
34. The Defendant/Respondent submits that there is an appeal before the Court of Appeal that has been filed by the Plaintiff/Applicant and that it is pending determination.



35. The Defendant/Respondent relies on the judicial decision of *Otieno Ragot Advocates v National Bank of Kenya Ltd* (citation not given) and urges the Court to dismiss the Plaintiff/Applicant's application.
36. It is the Defendant/Respondent's submissions that in the event the Court considers the Plaintiff/Applicant's application on merit, it should note that the said application does not meet the threshold for grant of orders of review.
37. The Defendant/Respondent relies on Order 45 Rule (1)(b) of the Civil Procedure Rules and reiterates that the certified copy of the green card that the Plaintiff/Applicant wishes to rely on was certified on 2nd September, 2020 and he cannot therefore claim to have discovered it after judgement had been delivered.
38. The Defendant/Respondent relies on the judicial decisions of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019]eKLR, *London Distillers (K) Ltd v Cabinet Secretary, Ministry of Education & 4 others* [2022]eKLR and urges the Court to dismiss the Plaintiff/Applicant's application.

Analysis and Determination.

39. Having considered the application, the response thereto and the submissions, my view is that the only issue that arises for determination is whether the Court should review its judgement delivered on 28th September, 2023.
40. 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.”
41. Order 45 Rule 1 and 2 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.



(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.”

42. The Plaintiff/Applicant is seeking that this Court reviews its judgement delivered on 28th September, 2023 on the ground of discovery of new and important evidence.
43. The Plaintiff/Applicant submits that even after exercising due diligence, he was unable to obtain a copy of the green card of the suit property. He also submits that he was only able to obtain it after judgement was delivered. It is upon this background that he urges the Court to review its judgement.
44. The 1st Defendant/Respondent has in response raised the issue of whether the application for review is properly before this Court given that the Plaintiff/Applicant had earlier filed a Notice of Appeal.
45. A perusal of the Court record shows that the Plaintiff/Applicant lodged a Notice of Appeal on 11th October, 2023. The same is dated 9th October.
46. The Court of Appeal in *Mary Wambui Njuguna v William Ole Nabala & 9 others* [2018] eKLR held as follows;

“In disallowing that prayer, the trial Court found the appellant could not pursue both review and appeal simultaneously...Under Order 45 rule 2 of the rules, it is stipulated that:

“ 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.”

We agree with the conclusion by the learned Judge that it was not open for the appellant to pursue an appeal and at the same time a review of the same orders.” [Emphasis Mine]

47. As was held by the Court of Appeal in the above cited judicial decision, a party shall not pursue both an appeal and a review of the same orders.
48. It is well settled that the process of appeal commences upon the filing of the notice of appeal. This has the effect of removing these proceedings from this court to the court of appeal. See *Mkabara v Frisch* [2002] 2 EA 475.

Disposition.

49. In the present case it is evident that the Plaintiff/Applicant lodged a Notice of Appeal on 11th October, 2023 while the application under consideration was filed on 16th January, 2024 Having already filed an appeal, he is precluded from seeking review of the Judgment of this court.
50. Consequently, I find that the Plaintiff/Applicant’s application dated 16th January, 2024 lacks merit and it is hereby dismissed with costs.
51. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 5TH DAY OF DECEMBER, 2024.

L. A. OMOLLO

JUDGE.

In the presence of:-

Mr. Kimaru Muchiri for the Plaintiff/Applicant.

Mr. Koech for the Defendants/Respondents.

No appearance for the 2nd, 3rd and 4th defendants

Court Assistant; Mr. Joseph Makori.

