# Murithi & 2 others v Murithi (Environment and Land Appeal E070 of 2021) [2023] KEELC 571 (KLR) (8 February 2023) (Judgment)

Neutral citation: [2023] KEELC 571 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ENVIRONMENT AND LAND APPEAL E070 OF 2021**

**CK NZILI, J**

**FEBRUARY 8, 2023**

**BETWEEN**

**MUCHEKE MURITHI ........................................................................ 1ST APPELLANT**

**SILAS MICHENI MURITHI ........................................................... 2ND APPELLANT**

**ELIAS MURITHI .................................................................................. 3RD APPELLANT**

**AND**

**M'IKIUGU MURITHI ......................................................................... RESPONDENT**

## JUDGMENT

1. Before the court is an appeal dated 11.6.2021 in which the appellants who were the plaintiffs in the lower court seeks to overturn the ruling by the trial court, made on 18.5.2021 declining to review, vary, or set aside the judgment delivered on 24.9.2013. The appellants complain that:

   a. The court should have found there was inadvertent and a genuine mistake of the appellants' counsel which should not be visited upon him regarding the filing of the amended plaint dated 14.3.2011 due to amendment on 12.3.1991.

   b. The trial court had failed to consider that the appellants already had a title deed *vide* a judgment of 28.4.1993 in Meru CMCC No. 522 of 1990 following which he took vacant possession and extensively developed close to 2.3 acres of the land.

   c. For failing to find and hold that the appellants' late father wishes were that each of his sons gets 2.3 acres of land as per his testimony of 5.2.1992.

   d. For failing to find that the firm of Otieno C & Co Advocates were improperly on record and that the application dated 19.10.2020 stood unopposed.

   e. For failing to consider an appellant's evidence, submissions and caselaw cited.

f. For being biased and issuing an order full of errors and against the weight of evidence, amounting to both miscarriage/travesty of justice in so far as the size of the suitland.

2. This being a first appeal, it is the duty of an appellant court to rehearse and re-appraise itself of the entire record of the appeal and come up with its own findings on both facts and the law while mindful that the trial court had the benefit of hearing and seeing the witnesses first had. See *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Machira Co Advocates* (2013) eKLR, This matter has a checkered history starting with its filing on 19.1.1991. After the respondent failed to attend court a judgment was entered on 28.4.1993. The first appeal herein was Meru HCCA No. 17 of 1994. Ouko J as he then was by a judgment dated 21.9.2007 set aside the lower court judgment and remitted the suit for retiral.

3. Before the trial court and by an application dated 14.3.2011, the appellants sought to amend the plaint. The application was allowed by consent on 24.3.2011 and an order was issued that the respondent was at liberty to amend the defense in 7 days. The implication was that as per prayer II of that application, the annexed amended plaint was deemed as filed. In the said amended plaint dated 14.3.2011, the appellants pleaded that they were brothers with the respondent being sons of Daniel Murithi Rucha (deceased), the owner of L.R No. Igoki/Kinoro/156 measuring 4.6 acres and Igoji/Kinoro/897 measuring 464 acres which the late father had given to the respondent to hold for himself and in trust for the appellants as the only grown up child each being entitled to a quarter share as per what each son was shown, took possession and developed.

4. The appellants averred that the respondent breached the trust by parents despite each of them occupying and developing their shares in equal. The appellants therefore claimed for an order that the respondent subdivides and transfers L.R No. Igoji/Kinoro/156, in terms of 1.75 acres to the 2nd appellant, 1.75 acres thereof to the 3rd appellant and 1.75 acres out of LR Igoji/Kinoro/897 to the 1st appellant as discussed before a panel of elders and administrative officers between 1988 and 1990.

5. By a reply to the amended plaint dated 11.9.2011, the respondent denied contents of paragraph 4B of the amended plaint that their father was the owner of L.R No Igoji/Kinoro/897. He instead stated that he had bought the said land from one Joseph Mutunga - deceased. The respondent averred that the 1st appellant was in occupation of LR No. Igoji/Kinoro/897 and which he only took possession in 1993 during the pendency of the suit the same case with the 2nd and 3rd appellant regarding LR No. Igoji/Kinoro/156.

6. By a consent, parties on 24.4.2012 agreed to have the evidence of PW 2 & PW 3 already recorded before the retrial tail admitted as evidence and for the recall of PW 1 and other witnesses which the court allowed.

7. PW 1 told the court that his brother, the respondent was given the land to hold in trust. He produced the green card for the two parcels of land as P. Exh No's 1 & 2. He said that at the time of registration on 16.8.1974 he was 30 years old, the 2nd appellant in his twenties while the other one was 16 years but the respondent was about 40 years old. He said that all of them lived on their houses on the parcel since 1975 while the respondent house was erected in 1968 on Parcel No. 897. PW1 confirmed that his late father had suggested the 1st appellant gets 2.30 acres and the respondent 2.34 acres each from L.R No. 897 while Elias Mwenda and Silas Mucheri were to get 2.30 acres each from LR No. 156. He confirmed each of them occupied the respective acres as per their father's wishes until he died in 1995. However, PW1 said that the respondent failed to subdivide and or transfer the land despite promises to do so. He vehemently denied the alleged purchase of the land by the respondent since it was ancestral land.

PW 1 admitted that his brothers were eight in number, two had passed on, and that three of them had acquired other parcels of land unlike them.

8. Asked by the court, PW 1 confirmed that his ID showed that he was born in 1959. He also confirmed the three brothers had various developments on Parcel No. 156. He said that at a meeting in 1989 in the presence of a village elder and neighbour, his late father shared the suit land as pleaded so as to avoid problems in future.

9. PW 2 associated himself with the evidence of PW 1 and confirmed that he was in occupation of Parcel No. 897 which was equivalent of 2.30 acres where he had erected a timber house, planted tea and banana plants. He clarified that his ID indicated that he was born in 1938 meaning that he was younger than the respondent since his ID indicated the date of birth as 1939.

10. PW 3 was Silas Micheni Murithi. He confirmed that he lived on Parcel No. 156 occupying approximately 2.30 acres where he had built a timber house, planted 400 tea plants as well as nappier grass. He denied that the respondent had ever occupied Parcel No.1 56 since the balance was occupied by Elias Murithi. PW 3 admitted that he was born in 1948 as per his ID card.

11. The respondent testified as DW 1. His testimony was that his late father had 8 sons, the elder one being Kathira Murithi while he was the 2nd born. His evidence was that in 1957, his late father donated to him Parcel No. 156 now occupied by the 2nd & 3rd appellants since 1993. As regards Parcel No. 897, DW 1 said that he bought it from one James Mutunga and was in occupation of it alongside one Kirigia who was allegedly sold the land by the 1st appellant. DW 1 said that his elder brother Kathira Murithi was allocated Parcel No. 987 while parcel No. 319 was still under his late father's name which was located at Igoji Kiangua initially occupied by the appellants prior to filing the suit. DW1 denied the alleged trust or an agreement to share the land with the appellants. Similarly, he denied that his late father had any claim over the land though before his death he had testified as PW 2. In cross examination, DW 1 admitted that the 2nd and 3rd appellants had erected houses and planted coffee, tea and fruit trees on Parcel No. 156 before his late father passed on. DW1 confirmed that he never at the time complained to his late father why the 2nd and 3rd appellants had trespassed into his parcel of land.

12. As indicated above, the evidence of the parties' parents, the father and mother were adopted by consent. The cumulative effect of their testimony was that the suit land was registered under the name of DW 1 since he was the eldest of their sons, had agreed to share the land with his brothers but later on changed his mind. By a judgment dated 24.9.2013, the trial court held in favor of the appellants as per paragraph 5 of their amended plaint.

13. Following the judgement, the appellants brought an application dated 19.11.2020 seeking to review the said judgment on the basis that the respondent had sought through Misc. 7 of 2020 for execution and their houses were likely to be demolished. The grounds were that they were entitled to 2.30 acres each and not 1.7 acres hence there was an error or mistake on the part of their advocate then handling the matter which should not be visited upon them. The second ground was that each of their 2.30 acres was extensively developed and should execution occur, they would be prejudiced.

14. In the supporting affidavit of Elias Murithi Rubucha he stated that by the time the suit was filed his late father had not ascertained the size of the land until the amendments of 12.3.1991 and that after the judgment of 28.4.1993, they acquired title deed as per EMR 03. That the amendments of 14.3.2011 did not reflect the land acreage as 2.3 acres but 1.75 acres each and that the court should have gone as per the plaint dated 12.3.1991 which had no errors unlike the one of 14.3.2011. That they had extensively developed 2.30 acres as per photos marked EMR 006. That mistake of counsel should not be visited upon them otherwise there would be miscarriage of justice, immense loss and damage if their houses,

developments thereto and eviction occured as per the imminent impending execution threatened by the respondent.

15. The respondent filed a replying affidavit sworn on 22.2.2021 opposing the application as untenable, unfounded in law, unmerited and an abuse of the court process since there was no apparent error, omission, self-evident on the part of the court. Further, the respondent averred that Misc. Application No. 7 of 2010 was out to affect the judgment which to him was out of fraudulent acts of the applicants, which did not determine the issues, was predetermined and that there was a conspiracy and scheme to pervert and subvert the course of justice. He urged the court to dismiss the application. The parties relied on their submissions filed on 29.3.2021 and dated 16.3.2021 respectively.

16. By a ruling dated 18.5.2021, the trial court on the basis that there was unreasonable delay of over 8 years, the correct acreage was captured in the judgment; the acreage was not a discovery of new and important matters, there was no error and that the application lacked merits. It is this ruling which the appellants urge this court to overturn.

17. Following leave of court, parties opted to canvass the appeal by written submissions. It was only the appellants who file theirs dated 28.11.2022 as at the set deadline.

18. The appellants submitted that under Section 80 of *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, the court has powers to review, set aside or vary its orders or decrees on account of inadvertent mistake or error. In this case, the appellants submitted that the lawyers inadvertently amended the plaint yet it had already been amended in 1993. Reliance was placed on *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* (2015) eKLR on the proposition that mistakes of counsel are excusable.

19. The appellants submitted further that the court failed to consider their entire evidence, the written submissions and case law. On ground 6 of the appellant submitted that under Order 9 Rule 9 of the *Civil Procedure Rules*, the respondent's advocates Otieno C & Co Advocates had no capacity to mount the execution proceedings and or file the replying affidavit sworn on 22.2.2021. Reliance was placed on *John Langat v Kipkemoi Terer and 2 others* (2013) eKLR. The appellants lastly submitted that the court was biased and ruled against the weight of the evidence produced.

20. The court has carefully gone through the entire lower court file, the record of appeal, the grounds of appeal and the submissions. At issue is whether the trial court in hearing and determining the application for setting aside, review and or variation of the judgment and the decree thereof followed the law based on the facts obtaining and reached a correct decision.

21. In the notice of motion dated 19.10.2020, the appellants sought for the court to review, vary or set aside the judgment delivered on 24.9.2013 on account of an inadvertent error or mistake on the part of their advocates said to have erroneously filed an application dated 14.3.2011 yet the plaint had already been amended on 12.3.1991. It was the appellants' contention that by so doing, there was miscarriage of justice given that on the ground, they were and continued occupying 2.3 acres of land each instead of 1.73 acres decreed to them. Further, it was argued that if the judgment was to be affected, some of their developments covering more than 1.75 acres would be demolished. They urged the court not to visit mistakes of counsel upon them.

22. In support of the application, the appellants attached copies of records for the suit properties opened on 16.3.1994, title deed issued thereto on 3.9.1994, a copy of the application dated 4.3.2011, the amended plaint dated 4.10.2011, photographs and a copy of application by the respondent dated 22.7.2020.

23. Order 45 of the *Civil Procedure Rules* as read together with Section 80 of the *Civil Procedure Act* provides that any person aggrieved by an order or decree which has not been appealed against 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 on account of mistake or error apparent on the face of the record, or for any sufficient reasons, may apply for a review of a judgment to the court passing the decree without unreasonable delay. To grant or not to grant an application for review is a discretionary power exercisable judicially and on sound principles.

24. In this appeal, the appellants grounds of review were based on error apparent on the face of record which was occasioned out of an inadvertent mistake in the sizes of the suit parcels of land claimed by and decreed to them by the trial court. The alleged mistake or error was brought by way of an alleged erroneous amendment to the plaint.

25. In the case of *Nyamogo & Nyamogo advocates v Kipkolum Kogo* (2001) E.A 170, the court held thus:

> "An error apparent on the face of the record cannot be defined precisely or exhaustively... Mere error or wrong view is certainly not a ground for review though it may be a ground for appeal'.

26. In case of *Republic v Advocates Disciplinary Tribunal Exparte Apollo Mboya* (2019) eKLR the court took the view that it was necessary to correct an error or omission on the part of the court which must be self-evident and requiring no elaborate argument to establish. Further, the court held that a request for review requiring an examination or an argument to establish, could not suffice since review was impermissible without a glaring omission, evidence, mistake or similar ominous error. Additionally, the court said that a re-appraisal of the entire evidence on how the judge applied or interpreted the law would amount to an exercise of an appellate jurisdiction.

27. As to the delay in seeking for review the court in *Phyllis Kariuko Njagi v Jane Waguama Njagi & antoher* (2018) eKLR cited with approval *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* (2014) eKLR, where the court held that there was no set rule on what constitutes an inordinate delay but it all depends on circumstances of each case so long as a reasonable explanation was offered.

28. On the issue of mistake of by counsel, the court in *Savings and loans Ltd v Susan Wanjiru Murithu Nairobi* (Milimani) HCCS No. 397 of 2002 held that it was the duty of a litigant to constantly check with her advocates the progress of her case by being diligent as well as the lawyer in his professional duty. In *Tanda v Jeremiah Mwakio* (*supra*), the court held that it was a counsel's duty, not just limited to his client but also to the court and the other side so as to aid his client with candor to avoid subverting the cause of justice as the custodian of justice. The court further held that on whether to excuse the mistake or not, it must also look at the age of the case, the prejudice to the opposing party and the candidness of the party. The court cited with approval *Habo Agencies Ltd v Wilfred Odhiambo Musingo* (2015) eKLR on the proposition that it was not enough for a party to simply blame the lawyer for all transgressions in the conduct of litigation.

29. Further in the case of *Ferrotech Industries Ltd v Mwadziwe Ali Hare* (2021) eKLR, the court cited with approval *Pancras T. Swai v Kenya Breweries Ltd* (2014) eKLR that a good ground for an appeal may not necessarily be a good ground for review. The court also cited with approval *Manjula Dhirajlal Soni v Dukes Investment international Ltd & 2 others* (2018) eKLR, on the proposition that a court could not be called upon to declare its own decision null and void since it was only the appellant court has such a mandate. Additionally, the court in *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/*

*a Providence Auctioneers* (2016) eKLR held that an unexplained delay of two years was not the type of sufficient reason that could earn sympathy from any court.

30. Applying the foregoing caselaw to the facts in this appeal, the record appeal indicates that the law firm which initiated the application for amendment dated 14.3.2011 was the same law firm representing the appellants herein. The affidavit in support of that application was signed by the 1st appellant on 14.3.2011. The amended plaint introduced paragraphs 4A – D and specifically paragraph 5 thereof which clearly set out the land sizes as 1.75 acres for each of the appellants. The prayers sought referred to paragraph 5 thereof. The amended plaint was also verified by the affidavit of the 1st appellant confirming it contents as true facts. The affidavit was sworn on 14.3.2011 before a commissioner for oaths. The respondent following the court order filed a reply to the amended plaint.

31. Following this, parties went on with the hearing of the matter with PW 1 testifying on 24.4.2012, producing copies of the green cards as P. Exh. No's (1) & (2). He was followed by the 1st appellant as PW 2 on the same day and PW 3 on 30.8.3012.

32. Later on, DW 1 testified on 18.6. 2013.The record indicates that parties put in written submissions dated 8.8.2013 and the same lawyers for the appellants referred to 2.30 acres each of suit land yet they were the same ones who had initiated and filed the amended plaint. Incidentally at paragraph A of the submissions, the appellants referred to the amended plaint dated 14.3.2011 and filed on 15.3.2011.

33. On the last paragraph of the written submissions, the appellants sought for reliefs as per paragraph 4D & 4E of the amended plaint dated 15.3.2011, but indicated that the mention of 1.75 acres in paragraph 5 of the plaint was an error.

34. It is trite law that parties are bound by their pleadings and issues flow from pleadings. See *IEBC v Mutinda Mule & 3 others* (2014) eKLR.

35. There is a procedure in law to seek leave to amend pleadings. The appellants admitted and noted the error as at 8.8.2013 but waited 7 years down the line to apply for the review yet the judgment was delivered in 2013. The mistake, if any, was not on the part of the court but was occasioned by both the appellants and their advocates on record. The same in my view does not fall under Order 45 of the *Civil Procedure Rules* and Section 80 of the *Civil Procedure Act* but is a ground of appeal. The inordinate delay of close to 7 years was not explained at all, if at all the appellants had exercised due diligence. Further, the appellants in their grounds of appeal refer to a title deed issued pursuant to the initial judgment prior to its setting aside by Ouko J as he then was on 21.9.2007.

36. Unfortunately the record of appeal has omitted to attach copies of the entries to the registers, which occurred in 1994 and a title deed issued. This was however before the suit was remitted for re-hearing. The appellants never pleaded before the trial court before the hearing commenced afresh that they had title deeds. Instead the appellants proceeded to only produce P. Exh 1 No's. (1) & (2) for the suit parcels. The consequences were obvious that tittle deeds flowing out of the vacated decree also became invalid since the matter was starting denovo. The appellants never disclosed this to the trial court by way of amendment's. They cannot therefore be allowed to benefit from an illegality or mistakes which they created unto themselves in the first instance.

37. In my view therefore, such an evidence cannot be said to have been new and important evidence which was not in the possession of the appellants by the time they testified in 2011 and before the judgment was entered in 2013. The common denominator in this case is the law firm which handled the suit right from inception until the present appeal. There cannot be any doubt that if the said law firm exercised due diligence together with the appellants, they would have noticed the issues now being raised by

2011 when the suit commenced for hearing and or sought to further amend the plaint before written submissions were filed.

38. As to whether or not the respondent's replying affidavit was filed by a law firm properly before court this did not in any way lead to miscarriage of justice or the improper use of the court's discretion or perhaps amount to any bias on the part of the trial court.

39. Having reviewed the material before the trial court. It is quite apparent that it considered all the factors, evidence tendered, written submissions, the law and arrived at a correct decision. The upshot is the appeal herein lacks merits and is hereby dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 8TH DAY OF FEBRUARY, 2023**

**In presence of:**

C/A: Kananu

Muhtomi for appellants

Mrs. Otieno for respondent

**HON. C.K. NZILI**

**ELC JUDGE**