



Ngaruiya v Registered Trustees of Faith Mission Church & 10 others (Environment & Land Case 226 of 2016) [2023] KEELC 637 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEELC 637 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 226 OF 2016
CA OCHIENG, J
FEBRUARY 9, 2023**

BETWEEN

WILFRED NG'ANG'A NGARUIYA PLAINTIFF

AND

**REGISTERED TRUSTEES OF FAITH MISSION CHURCH & 10
OTHERS DEFENDANT**

RULING

1. What is before court for determination is the plaintiff's Notice of Motion Application dated the September 8, 2022 where he seeks the following orders:
 1. Spent
 2. Spent
 3. That this honourable court be pleased to review and/or set aside its Ruling and Orders issued on April 25, 2022 by Hon. Christine Ochieng which allowed defendant's Application dated March 18, 2019 seeking the enjoinder of the Land Registrar as a defendant in this suit.
 4. That if the honourable court is pleased to grant order number 3 above, that the court does issue summons to the Land Registrar to appear as a witness in this suit.
 5. That the costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting affidavit of Edna Brandy Wanja, the plaintiff's advocate where she deposes that the decision of the Judge allowing the defendants' Application for joinder dated the March 18, 2019, is in sharp deviation from several previous Rulings on joinder Application in this suit that had been delivered by Hon. Justice O. A. Angote who had the previous conduct of this matter. She enumerates the Rulings of January 29, 2021 and October 8, 2021 including the outcome of Nairobi Court of Appeal Civil Appeal No. E



300 of 2020 and contends that the defendants are abusing the court process due to their frivolous Applications. Further, that the plaintiff herein had already testified and closed his case and the defendants were indolent in prosecuting the Application for joinder. She claims the plaintiff is not opposed to the attendance of the Land Registrar but it would be appropriate for the court to issue summons to the said Land Registrar to appear as a witness and parties will have an opportunity to cross examine. Further, that the plaintiff is not seeking any remedies from the Land Registrar in this matter, thus amending pleadings will be of no significance. She reiterates that granting the orders sought will not occasion any prejudice to the defendants. She insists that the decision by the trial Judge in allowing the Application for joinder of the Land Registrar is unprocedural and waters down the progress made this far in the current suit.

3. The 5th respondent Harun Ngugi Ndungu opposed the Application by filing a replying affidavit on behalf of himself and the 1st, 3rd, 6th, 7th as well as the 11th respondents where he deposes that the applicant has failed to pin his Application to any ground that should ordinarily invoke the court's jurisdiction to review its orders. He contends that the applicant is in the habit of unjustifiably seeking to lock out parties in this case, irrespective of the fact that this is a land matter which by its very nature is quite emotive. He avers that the impugned Application was filed in court way back on March 18, 2019 and for reasons not clear, it was not prosecuted until the court disposed of it. He contends that all parties were given an opportunity to file responses to the said Application, but the applicant did not file any objection to it. He insists that the position of the Land Registrar in these proceedings is so integral by virtue of the fact that he is the custodian of the contested documents of ownership in this matter and it would be grossly prejudicial to call him as a witness by either party already in this matter and not as an independent party. He reiterates that Justice Angote's decisions are not binding on this court and even the decision of the Court of Appeal being referred to, has nothing to do with joinder of the Land Registrar. He avers that it is the applicant who is in the habit of delaying the matter.
4. The 8th respondent opposed the instant Application by filing a replying affidavit sworn, by Alex Isoe Moseti, its Director on its behalf and that of the 10th defendant, where he deposes that the applicant has not demonstrated grounds upon which he brings the instant Application. He contends that the Land Registrar has already been enjoined in this suit. He argues that the position advanced by the plaintiff to the effect that he seeks no remedies against the Land Registrar and he should not be enjoined in these proceedings, is a fallacy, since the Land Registrar is the custodian of Land records and his participation is cardinal and cannot be limited to his appearance as a witness. Further, since both the plaintiff and defendants stake claim to the suit land, title to the property can only be adequately addressed to the required standard of proof by the participation of the Land Registrar. He reiterates that no order sought to be reviewed was annexed to the instant Application.
5. The Application was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the instant Notice of Motion Application including the respective affidavits and rivaling submissions, the only issue for determination is whether the court should review and/or set aside its ruling and orders issued on April 25, 2022, which allowed defendant's Application dated March 18, 2019 seeking the joinder of the Land Registrar as a defendant in this suit.
7. I note the plaintiff never filed a response to oppose the Application dated the March 18, 2019, despite being granted leave to do so. Further, none of the other Respondents opposed the Application to join the Land Registrar, which Application was allowed on April 25, 2022.



8. The grounds upon which an order of the court may be reviewed is set out in section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

9. Section 80 of the Civil Procedure Act provides that:-

“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.”

While Order 45 Rule 1(1) of the Civil Procedure Rules stipulates thus:

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.”

10. In the case of *Muyodi v Industrial and Commercial Development Corporation and another* EALR [2006] EA 243, the Court of Appeal while dealing with issues of review held as follows:-

“For an application for review under Order 45 Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay.”

11. I note the Order sought to be reviewed emanated from an order of this court dated the April 25, 2022 where it allowed an Application for joinder of the Land Registrar. I further note, none of the defendants were opposing the Application but despite granting the plaintiff leave to file a replying affidavit, he failed to do so, hence the Application stood unopposed. On May 31, 2022, the plaintiff's Counsel later sought for leave to file and serve an Amended Plaint upon the Land Registrar, and this court granted her leave of fourteen (14) days to do so, but she still failed to file it and opted to file the instant Application for review. I have had a chance to peruse the two previous Rulings from Justice Angote which I must say do not bind this court, and note none of them determined the issue of joinder of the Land Registrar. From the pleadings filed herein, the fulcrum of the dispute revolves around land and the Land Registrar being the custodian of Land Records is a key party to the dispute herein. Insofar as the plaintiff insists he has no claim against him, I beg to disagree. To my mind, it seems the plaintiff wants the evidence of the Land Registrar to be on record on his own terms. In the circumstance, I decline to review the orders granted on April 25, 2022.

12. It is against the foregoing that I find the instant Notice of Motion Application unmerited and will disallow it.



Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 9TH DAY OF
FEBRUARY, 2023**

CHRISTINE OCHIENG

JUDGE

