



**Akuma & 5 others v Nyamache & 5 others (Environment & Land Case 419 of 2016) [2023] KEELC 16046 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16046 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 419 OF 2016**

**M SILA, J**

**MARCH 2, 2023**

**BETWEEN**

**WILSON ONYANGO AKUMA ..... 1<sup>ST</sup> PLAINTIFF**  
**BENSON MAGEMBE ONYANGO ..... 2<sup>ND</sup> PLAINTIFF**  
**KEFAH OGANDA ONYANGO ..... 3<sup>RD</sup> PLAINTIFF**  
**EDGAH OKONGO ONYANGO ..... 4<sup>TH</sup> PLAINTIFF**  
**OMBOGA ONYANGO ..... 5<sup>TH</sup> PLAINTIFF**  
**EDWARD MICHIEKA ONYANGO ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**TOWN COUYNCIL OF NYAMACHE ..... 1<sup>ST</sup> DEFENDANT**  
**COUNTY GOVERNMENT OF KISII ..... 2<sup>ND</sup> DEFENDANT**  
**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT**  
**KISII COUNTY LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**  
**ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**  
**DIRECTOR OF LANDS ADJUDICATION ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The application herein is dated June 27, 2022 though filed on October 18, 2022 by the defendant. The applicant seeks orders for review or variation of the judgment delivered on February 21, 2020. The application is based on the ground that there is discovery of new and important evidence which was not brought to the attention of the court at the time the judgment was delivered. The application is opposed.



2. To put matters into context, this suit was commenced by way of plaint filed on March 15, 2011 originally only against Nyamache Town Council as the sole defendant. It was pleaded that the 1<sup>st</sup> plaintiff is the sole proprietor, by virtue of first registration, of the land parcel Bassi/Bondonya/405. In the year 1968, some three members of the public destroyed the fence claiming that they wanted to put up a nursery school. The 1<sup>st</sup> plaintiff sued them in Kuja Civil Case No. 24 of 1968, and succeeded, and an appeal lodged was subsequently dismissed. He thus continued in quiet possession. In 1971, Mogutano SDA requested for a portion of the land to construct a church which request the 1<sup>st</sup> plaintiff accepted. He proceeded to subdivide his parcel Bassi/Bondonya/405 into two, being parcels Bassi/Bondonya/1839 and Bassi/Bondonya/1840 (hereinafter simply referred to as parcels No. 405, 1839 and 1840). He remained with the parcel No. 1839 and the church was built on the parcel No. 1840. He subsequently subdivided his parcel No. 1839 into eleven parcels from parcel No. Bassi/Bondonya 3037 to 3049 (hereinafter simply referred to as parcels No. 3037 to 3049). He remained with the parcels No. 3047 and 3048. The other parcels of land came to be owned by the 2<sup>nd</sup> to 7<sup>th</sup> plaintiffs and others he transferred to his sons.
3. In the year 2010, the District Commissioner, Nyamache, accompanied by some councilors from Nyamache Town Council came to the land of the plaintiffs claiming that this was public land and they wanted them to vacate. He subsequently received a notice that he is required to surrender the land parcel Bassi/Bondonya/1734 (hereinafter simply referred to as parcel No. 1734) which the defendant claimed was public land meant for Mogutano SDA and a nursery school. The 1<sup>st</sup> plaintiff contended that he is not occupying the parcel No. 1734 nor any public land. He reiterated that he had given Mogutano SDA the parcel No. 1840 and they were not claiming anything from him. In the suit, he sought orders inter alia to have the applicant permanently restrained from the parcels No. 3037 to 3049. The applicant filed defence where she inter alia pleaded that the parcel of land No. 1734 is separate and distinct from the parcels of land cited by the plaintiffs. She pleaded that the plaintiffs have encroached into her land parcel No.1734 which land was registered under Gusii County Council.
4. The plaint was subsequently amended to have the County Government of Kisii, the National Land Commission, the Kisii County Land Registrar, the Attorney General and Director of Land Adjudication as defendants. The claim however remained the same as in the original plaint. It was pleaded that the parcel No. 1734 was illegally carved out of the title Bassi/Bodonya/405 and the plaintiffs sought its cancellation and to be allowed unimpeded occupation of the land comprised in the said title. The County Government of Kisii on the other hand filed a counterclaim seeking a declaration that the land parcel No. 1734 measuring 2.8 Ha is public land and sought vacant possession. The other defendants filed no pleadings.
5. The suit was heard by Mutungi J. The plaintiffs asserted that the original land parcel No. 405, measuring 15.5 Ha, was allocated to the 1<sup>st</sup> plaintiff during adjudication. They contended that the parcel No. 1734 was superimposed on their land. They averred that what the applicant claimed to be parcel No. 1734 was actually the same land that the 1<sup>st</sup> plaintiff had subdivided to the SDA Church and part of it was where he had built his houses. The plaintiffs called some elders from the SDA Church who corroborated their evidence. They affirmed that they hold title to the parcel No. 1840 which was given to them by the 1<sup>st</sup> plaintiff. They pressed the point that this parcel No. 1734 includes part of their parcel No. 1840 where they have a church. The court also visited the disputed land to see the developments. The defendants did not offer any evidence. In his judgment, delivered on March 5, 2020, Mutungi J, held for the plaintiffs. He found on the evidence that the land parcel No. 1734 was superimposed on the land parcel No. 405. He found that what was said to be parcel No. 1734 was on the ground fully occupied by the SDA Church and the 1<sup>st</sup> plaintiff's family. The judge found old permanent houses and a fully developed Church sanctuary. He failed to understand how all these



developments could have been effected on the parcel No. 1734 if indeed the same had been set aside as a public utility plot. He held that the title to parcel No. 1734 was merely hived off the 1<sup>st</sup> plaintiff's land on paper but does not exist on the ground and found its creation to be illegal. He ordered this title cancelled and deleted from the register of titles.

6. Nothing happened in the case between the date of delivery of judgment and the filing of this application, save that there was an application dated May 11, 2021 to have the applicant change counsel, which application was allowed through a ruling delivered on February 10, 2022. This application was then filed on October 18, 2022, about eight months later. I have already mentioned that the application seeks a review of the judgment. The application is more or less based on the ground that there is discovery of new evidence. It is averred that this new evidence is contained in the County Surveyor's report dated October 4, 2020. It is added that the County Surveyor was not called as an expert witness during trial. It is averred further that the said report indicates that the parcel No. 1734 exists both on the ground and on the map, and also that the parcel No. 1839 and 1840 exist. It is mentioned that the report states that the parcel No. 1734 is occupied by beneficiaries of the parcel No. 1839. It is asked that if the parcel No. 1734 is cancelled because it is non-existent, then to whom is its space and acreage to be apportioned. The applicant asks this court to make an interpretation of the judgment of the court vis-à-vis the surveyor's report.
7. The application is supported by the affidavit of Caroline Nyasetia, the Chief Officer, Lands Physical Planning and Urban Development of the County Government of Kisii. She has annexed the surveyor's report dated October 4, 2020. She believes that the parcel of land No. 1734 is distinct from the parcel of land No. 405. She contends that the plaintiff hid evidence that acreage of the parcel No. 405 was 15 Ha, and that parcel No. 1734 is 2.0 Ha. She has deposed that the plaintiff and his siblings have applied for resurvey of the area so that they can have added extra acreage to the parcel No. 405. She has annexed copies of various letters written by counsel for the plaintiff. She has added that following the judgment, the title to parcel No. 1734 has been cancelled.
8. The application is opposed by the affidavit of Benson Magembe Onyango, the 2<sup>nd</sup> plaintiff. He avers that the judgment has been implemented by the cancellation of the land parcel No. 1734. He believes that the application is challenging the merits of the decision which is not a matter for review.
9. I have considered the above alongside the submissions of both counsel for the applicant and respondent. This is an application for review and I stand guided by the principles laid down in Order 45 Rule 1, of the Civil Procedure Rules, which 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.
10. The application herein is based on the ground that there is new and important evidence which was not available when the court made the decree. The new evidence is said to be that contained in the survey report dated October 4, 2020. In my opinion, to meet the threshold, one needs to demonstrate that the new evidence could not be produced at the time that the decree was passed or order made. Can the survey report qualify to be new evidence? I am not persuaded.
11. The defendants had liberty to undertake a survey at any time before the hearing of the case. They had the time, opportunity and resources, to come to court to demonstrate that the parcel No. 1734 and the parcel No. 405 are different and distinct and that one is not superimposed on the other. It cannot, by any stretch of imagination, be said that they were not able to do a survey and present it to court at the hearing of the case. What the applicant chose to do is not show up in court and not avail evidence. Review is not meant to assist a party who had opportunity to present his case at a hearing but failed to do so. One cannot be heard to say, please allow a review of the judgment because I did not attend the hearing of the case. If that was not the position, then what a party would do is simply not show up during a hearing, wait for judgment, then apply for review. The whole administration of justice would fall into chaos if we are to encourage such practice. It is the duty of a party to appear in court during the hearing and present the whole of his evidence. He cannot sit pretty and wait for judgment then try to upset the applicart through an application for review.
12. All the same, I have looked at the material relied upon by the applicant. The applicant claims that there is extra acreage and that there are applications seeking this extra acreage to be allocated. The court did not find any extra acreage. What the court held is that the land said to comprise in the parcel No. 1734 is entirely within the original parcel No. 405. This would mean that there is no extra acreage. Maybe I would have been sympathetic to the applicants if they had, within this application, demonstrated to me the acreage comprised in the original No. 405 and what they deem to be extra, which goes beyond the indicated acreage. If the position is as the applicant claims the applicant should have demonstrated exactly how much this purported extra acreage is, and where exactly this so called extra acreage is located on the ground, beyond the boundaries of the original parcel No. 405. They should have shown that there is absolutely no superimposition. They have not done so.
13. All that the report relied on by the applicant asserts is that the plaintiffs are occupying parcel No. 1734. Of course, they are occupying what the applicant thinks is parcel No. 1734, as that is exactly what the judge found out. The report adds that parcel No. 1840, said to belong to Mogutano SDA Church, falls within parcel No. 1734 on the ground. That again is precisely what the judge found. Nothing new here. The report continues that on the ground, the parcel No. 1734 is occupied by the beneficiaries of the parcel No. 1839. Is that not what the judge said? The only problem for the applicant is that the judge concluded that the parcel No. 1734 is a superimposition into the original parcel No. 405. There is nothing here in the report of October 4, 2020 to demonstrate to me that the holding that parcel No. 1734 was superimposed was erroneous. You would expect a well drawn map with precise locations of the exact boundaries of the parcel No. 450 and parcel No. 1734 and show that there is no superimposition. If there was extra acreage, not within the superimposition, then this should have been demonstrated. That is not what I have before me. To me, the report confirms the overlap on the ground.



14. Even if there had been such demonstration, that the two parcels of land have no overlap, then this would be a ground for appeal, not review. In essence, they are saying that the judge was wrong in finding that there was superimposition. I am not vested with jurisdiction to second guess the holding of the judge and I cannot sit on appeal against his decision.
15. Whichever way I look at it, there is no substance in this application. It is hereby dismissed with costs. The judgment of the court to be implemented unless otherwise ordered.

**DATED AND DELIVERED THIS 2 DAY OF MARCH 2023**

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

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