Wanjiru & another v Tito & 2 others (Environment and Land Appeal 1 of 2018) [2023] KEELC 16096 (KLR) (14 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16096 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND APPEAL 1 OF 2018

MN GICHERU, J

MARCH 14, 2023

BETWEEN

SUSAN WANJIRU ..... 1ST APPELLANT

MIRRIAM WANJIRU ..... 2ND APPELLANT

AND

TITUS TITO ..... 1ST RESPONDENT

LUCY GATHONI ..... 2ND RESPONDENT

MELICA NDUNGE ..... 3RD RESPONDENT

RULING

1. This ruling is on the Notice of Motion dated February 7, 2021. It seeks the following orders.
   i. Review and setting aside of the judgment dated May 18, 2020.
   ii. Retrial of the suit by the Lower Court.
   iii. Costs of the application.
2. The application which is brought under Sections 1A, 1B, 3A, 63(e) and 80 of the *Civil Procedure Act*, Order 45, Rule 1 of the Civil Procedure Rules and all enabling provisions of the law is supported by an affidavit sworn by the first Appellant Susan Wanjiru and twelve grounds.
3. The gist of the above material is that the court erred in fact and not in law so only review and not appeal is open to the Appellants.
4. Secondly, a great injustice was occasioned by the advocate for the Appellants who did not lead proper evidence in support of the Appellants case. As a result of this failure, the court did not take into account that the Appellants had a valid allotment letter and paid rates for the suit land.

5. Thirdly, the court failed to involve or invite the surveyor to visit the suit property and prepare a report, the trial court too disregarded the surveyor's report.

6. Finally, the Appellants believe that the court did not have enough facts therefore occasioning an injustice. For the above reasons, the application dated February 7, 2021 should be allowed.

7. The application is opposed by the third Respondent who has sworn a replying affidavit dated March 28, 2022 and which does not address the issues raised in the application.

8. The Appellant's counsel filed written submissions on January 20, 2023. No submissions were received from the Respondents' counsel.

9. I have carefully considered the application in its entirety including the affidavits, the grounds and the written submissions as well as the case law cited therein. There are three grounds upon which a decree can be reviewed under Order 45, rule 1 (b) of the *Civil Procedure Rules*. They include –

    i. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced by him at the time the decree was passed or the order made, or

    ii. On account of some mistake or error apparent on the face of the record or

    iii. For any other sufficient reason.

10. Applying the above prerequisites to this case one after the other, what do one find?

11. Firstly, a perusal of the eight grounds of appeal dated November 12, 2012 show that they did not address any of the grounds now in the current application except the one dealing with the letter of allotment. This court and the lower court dealt exhaustively with the issue of the letter of allotment.

    It is incumbent upon the Appellant to prove that all these issues of lack of visit to the locus in quo or failure by the court to deal with them could not have been raised on appeal and it is only later that they became available or clear to the Appellants. This has not been proved. It has also not been proved that there is any error apparent on the face of the record. An error apparent on the face of the record needs no argument. It is so obvious that the court notices it readily with little or no prompting. No such error has been pointed out to me and none is obvious to me.

    Finally at this point, no other sufficient reason has been shown to me by the Appellant. I can also not discern any reason on my own to prove review is merited.

12. Secondly, it was open to the Appellants to apply to the trial court for a visit to the locus in quo. The burden of proof was always upon the Appellants to establish their case against the Respondents on a balance of probabilities. Under Sections 107 and 108 of the *Evidence Act*, it is Appellants who would fail if the case was not preponderated to the required standard. They cannot therefore be heard to say that the court did not order a surveyor to visit the locus in quo. The court had no burden of proof or obligation to make any order suo moto. That was the duty of the party with the burden of proof.

13. Finally on the ground that the court did not have enough facts to deliver justice in this case, that again is not the court's failure but failure by the party required by law to allege those facts and then prove them. That cannot be the duty of the court.

    For the above stated reasons, I find no merit at all in the application dated February 7, 2021, and I dismiss it with costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14TH DAY OF MARCH, 2023.

M.N. GICHERU

JUDGE

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