



**Opany v Opany (Environment and Land Appeal 42 of 2021)
[2023] KEELC 21660 (KLR) (14 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21660 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 42 OF 2021
GMA ONGONDO, J
NOVEMBER 14, 2023
(FORMERLY MIGORI ELC APPEAL NO. 12 OF 2020)
(FROM ORIGINAL NDHIWA PMC ELC CASE NO 66 OF 201)**

BETWEEN

SAMUEL ODOYO OPANY APPELLANT

AND

RONALD OCHIENG OPANY RESPONDENT

RULING

1. By a notice of motion application dated 18th July 2022 generated pursuant to sections 1A, 1B, & 3A of the *Civil Procedure Act*, Order 51 rule 1 and order 45 rule 1A and 1B of the *Civil Procedure Rules*, 2010, the appellant/applicant who appears in person is seeking the following orders;
 - a. Moot
 - b. Moot
 - c. The Honourable court be pleased to review, vary and/or set aside the judgment which was delivered on the 21st day of June 2022 due to the discovery of new and important matter of evidence which after the exercise of due diligence was not within the knowledge or could not be produced by the appellant/applicant at the time when the decree was passed.
 - d. The Honourable court be pleased to allow the appellant/applicant to amend the pleadings and/or memorandum of appeal accordingly.
 - e. The costs
2. The anchorage of the application is the applicant's supporting affidavit of 28-paragraphs sworn on even date together with the annexed documents marked "SOO-1 to SOO-10" which include; copies of



land adjudication register, letters, receipt and a cadastral map. Also, the application is based on grounds (a) to (o) set out on its face. In a nutshell, the applicant averred, *inter alia*; the respondent sued him in the original suit, Ndhiwa Law Courts Environment and Land case number 66 of 2018 over the suit property, LR No. Homa Bay/Kawere/Kanyango/Karanding/3243 which was illegally created from LR No. Homa Bay/Kawere/Kanyango/Karanding/8 (The original property) which was owned by Opany Maiko (Deceased) who was the appellant's father. That the trial court delivered judgment in the said suit in favour of the respondent hence precipitating the present appeal.

3. The appellant averred that before the appeal could be prosecuted, he discovered and obtained documents including the adjudication record, a cadastral map and all the documents which he had failed to trace but contained the bulk of evidence. That the firm of Hellen. O. Mimba and Company Advocates who was on record for him failed to amend the memorandum of appeal without informing this court of the new and important evidence
4. The respondent through the firm of Tom Mboya and Company Advocates, opposed the application by the grounds of opposition dated 17th August 2022 thus;
 - a. The said application is incompetent, bad in law, frivolous, vexatious and is an abuse of due process of this honourable court and hence, ought to be dismissed summarily.
 - b. That this honourable court having delivered its judgment in this matter and being that this is an appeal from the original suit, this court is functus and cannot review this matter and set aside the judgment based on discovery of new and important evidence.
 - c. That this honourable court having rendered its judgment in this matter cannot open this matter for fresh hearing and allow the parties to amend and respond to pleadings as it is not the original court that heard and determined this matter but only dealt with appeal.
 - d. That the Appellant herein is just trying to be litigious with intention to continue using and farming the land while the Respondent herein suffer.
 - e. The said application is a non- starter in law.
5. Hearing of the application was by way of written submissions further to this court's directions of 17th October 2022.
6. Accordingly, by the submissions dated 31st October 2022, the applicant in part, made reference to the orders sought in the application and the history of the suit property including that the original property was registered in the name of the applicant's father, Opany Maiko (Deceased) during first registration. That an objection to Land Committee and an appeal to the Minister could not be prosecuted due to the missing file. That the creation of the suit property and LR No. Homa Bay/Konyango/Karanding/2743 after the completion and publishing of the adjudication register as shown in two different cadastral maps and the other documents annexed to his affidavit as well as further affidavit in support of the application, was illegal. He relied on Order 45 Rule 1a and 1b of the [Civil Procedure Rules](#), 2010 and sections 1A, 1B and 3A of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya, to reinforce his submissions.
7. In the submissions dated 1st February 2023, Learned counsel for the respondent referred to the application, the grounds of opposition and the rival submissions. Three issues for determination including whether this court can review its judgment based on discovery of new and important evidence and whether the court can re-open this matter for fresh hearing, allow amendment and response to the pleadings, are identified therein. Counsel submitted that the document the applicant intends to introduce is not new and will not change the outcome of this case. That thus, this court



has no powers to entertain this application as it will re-open this matter to fresh hearing. To fortify the arguments, counsel cited the decision in the case of Otieno, Ragot & Company Advocates-vs-National Bank of Kenya Ltd (2020) eKLR.

8. Further, the respondent's counsel filed submissions dated 16th May 2023 making reference to this court's judgment delivered on 21st July 2022, the respondent's grounds of opposition and onset of the submissions. Counsel delineated two issues for determination namely whether this court has the jurisdiction to re-open and review its decision in a concluded appeal and whether the court is now functus officio. It was submitted that the applicant intends to appeal this matter in form of review. To buttress the submissions, counsel relied on Raila Odinga & others-vs-IEBC & Others (2013) eKLR and Lakhamshi Brothers-vs-Raja & sons (1966) EA 313.
9. In that regard, does the applicant deserve the triple orders sought in the application?
10. Order 45 Rule 1 (a) and (b) (*supra*) governs the procedure and conditions to be attained in an application for review. Section 80 (a) and (b) (*supra*) provides for review which is reiterated in the said Order.
11. As stated in paragraphs 1 (c), 2, 3 and 6 hereinabove, the application is clear and specific upon the basis it is made as regards new and important evidence in form of documents discovered after his exercise of due diligence and that the documents were not within his knowledge or would not be produced by him at the time when the decree was passed; see also Rose Kaiza-vs-Angelo Kaiza (2009) KLR 499.
12. Clearly, the applicant has not preferred an appeal from this court's judgment rendered on 21st June 2022. So, the applicant has not lost the right to ask for review of the judgment as noted in Otieno, Ragot case (*supra*) and African Airlines International Ltd-vs-Eastern & Southern Africa Trade Bank Ltd (2003) 1 EA (CAK).
13. It is law trite law that this court has the jurisdiction to review its judgments by dint of powers conferred by section 80 as read with Order 45 (*supra*). That it is justifiable for this court to re-open and hear fresh the matter in which the issues in context must be re-looked at afresh; see Manchester Outfitters (suing Division Ltd) now known as King Wollen Mills Ltd & another-vs-Standard Chartered Financial Services Ltd and 2 others (2019) eKLR.
14. I take into account the date of filing of the instant application and that judgment was rendered on 21st June 2022 herein. In the circumstances, the application was neither commenced too late in the day nor amounts to a fishing expedition of evidence. The applicant has sought leave to amend the pleadings and/or memorandum of appeal to include introduction of new and important evidence in form of documents. The orders sought in the application target at striking a fair balance of interests of the parties in this matter.
15. In the case of Kanwal Sarjit Singh Dhiman-vs-Kashavji Jivraj Shah (2015) eKLR, the Court of Appeal held thus;

“.....the courts exist for the purposes of dispensing justice and that the sword of justice cuts both ways.....we have to balance the two divergent interests.....”
16. Sections 1A, 1B, 3 and 3A Civil Procedure Act provide for overriding objective, inherent and special powers of the court. In the case of Fredrick Otieno Outa-vs-Jared Odoyo Okello & 3 others (2017) eKLR, the Supreme Court of the Republic of Kenya held that the court may invoke its inherent powers, if circumstances so demand, to do justice to all.



17. It is therefore, the finding of this court that the grounds of the application, the applicant's supporting affidavit and the documents annexed thereto, discern discovery of new and important matter or evidence which after the exercise of due diligence was not within the appellant/applicant's knowledge or could not be produced by him at the time the decree was passed herein. That it was occasioned by, inter alia, mistake of the applicant's counsel which should not be visited on him as noted in *Shabir Din-vs-Ram Parkash Anand* (1955) EACA Volume 22 at 48.
18. In conclusion, the applicant has established that there is new and important evidence including the adjudication record, District Land Adjudication Officer's letters and a cadastral maps as shown in the application. There was mistake of the applicant's counsel and lack of consideration of the evidence in issue by the trial court and this court resulting to this court's judgment which is suitable for review. Thus, the application is meritorious.
19. A fortiori, the application dated 18th July 2022, be and is hereby allowed in terms of setting aside of this court's Judgment delivered on 21st June 2022 and amendment of pleadings as per prayers 3 and 4 therein respectively and as stated in paragraph 1 (c) and (d) hereinabove.
20. For clarity, amendment of pleadings as per prayer 4 sought in the application, is granted taking into account the following matters;
 - a. Administration of substantive justice pursuant to, *inter alia*, the decision in the case of *Macharia Mwangi Maina & 87 others-vs-Davidson Mwangi Kagiri* (2014) eKLR alongside sections 1A, 1B, 3, and 3A, [*King Wollen Mills Ltd, Kanwal, Dhiman and Outa*](#) cases (all *supra*).
 - b. That also, the trial court's judgment is hereby set aside to pave way for hearing of the original suit on merits.
 - c. The original suit be subjected to a new trial including amendment of the parties' respective pleadings before a magistrate of competent jurisdiction at Ndhiwa Law Courts pursuant to section 78 (1) (e) of the [*Civil Procedure Act*](#) Chapter 21 Laws of Kenya and Articles 25 (c), 48 and 50 (i) of the [*Constitution*](#) of Kenya, 2010.
21. Parties to bear their respective costs of this appeal.
22. It is so ordered

DATED AND DELIVERED AT HOMA BAY THIS 14TH DAY OF NOVEMBER 2023.

G .M. A ONG'ONDO

JUDGE

PRESENT

1. Appellant/applicant in person
2. Luanga, court assistant

