



REPUBLIC OF KENYA



KENYA LAW
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Mutuini Farmers Group & another v Macharia (Environment and Land Appeal 06 of 2019) [2022] KEELC 2716 (KLR) (4 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2716 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 06 OF 2019**

MN GICHERU, J

MAY 4, 2022

BETWEEN

MUTUINI FARMERS GROUP 1ST APPELLANT

JULIUS KARIUKI MUNGAI 2ND APPELLANT

AND

MICHAEL N MACHARIA RESPONDENT

(Appeal from a decision of the Chief Magistrate's Court of Kenya at Kajiado (Hon. B. Cheloti (SRM) dated the 29th day of January, 2019 in CMCC No. 157 of 2009)

RULING

1. This ruling arises from the ruling of Honourable Becky Cheloti, Senior Resident Magistrate, dated 29th January, 2019 in CMCC No. 157 of 2009.
2. In the above mentioned ruling the Learned Magistrate dismissed the Appellants' application dated 30th July, 2017. The said application sought review of the Judgment dated 14th January, 2016 on the ground of discovery of new and important evidence which could not be produced at the trial and which became available after the passing of the judgment. It sought review of the judgment dated 14th January, 2016 on the ground of discovery of new and important evidence which could not be produced at the trial and which became available after the passing of the judgment sought to be reviewed.
3. Aggrieved by the dismissal, the Appellant filed this appeal on 25th February, 2019. The Memorandum of Appeal dated 22/2/2019 has raised six (6) grounds namely, the Learned trial Magistrate erred;
 - i. In both law and fact in dismissing the Appellant's notice of motion dated 3rd July, 2017 without giving the same due consideration.



- ii. In both law and fact by failing to consider issues raised in the Appellant's Application and as such arrived at a wrong decision.
 - iii. In both fact and law by failing to consider the discovery of important evidence thus arriving at a wrong decision.
 - iv. In law and considered and or relied on irrelevant issues thus arriving at a wrong decision.
 - v. In law and fact and totally missed the issue for determination and arrived at an erroneous ruling.
 - vi. In both law and fact and failed to apply the principles upon which review of Judgment is allowed under Order 45 of the Civil Procedure Rules.
4. In the judgment sought to be reviewed, the trial Court found that plot number 455A Residential Ongata Rongai belonged to the Respondent Michael N. Macharia because the Olkejuado County Council which allocated the land adduced evidence that the Land was officially allocated to the Respondent.
5. At the trial before the lower court, evidence had also been adduced to the effect that the Appellants were in occupation of the land and had constructed a two roomed house with a toilet and two bathrooms. The Respondent came to claim the land three years after the construction of the said buildings.
6. Counsel for the parties filed written submissions on 2/12/2021 and 3/3/2022 respectively. The Appellant's counsel reduced the grounds to two sets;
- i. Lack of due consideration
 - ii. Ignored effects of or relied on irrelevancies.
- The Appellants' counsel urges that the trial Magistrate did not consider the legal principle set out in order 45 of the Civil Procedure Rules regarding review namely discovery of new and important matter which was not within the Appellants' knowledge at the time of passing the decree.
- Secondly, counsel urges that the Magistrate only relied on the old evidence and said nothing on the new evidence. On the other hand, the Respondent's counsel identified one issue for determination namely;
- i. Was the trial Magistrate right to dismiss the Appellants' application dated 3/7/2017.
7. I find that the Magistrate erred in law in dismissing the said application on 29th January, 2019 for the following reasons;
- Firstly, the crux of the matter in the dispute between the parties was whether plot number 273 and 445A Ongata Rongai were two different plots at different locations or one and the same plot given two different numbers.
- Secondly, the Judgement by Hon. E.A. Mbicha, Senior Resident Magistrate, was to the effect that the two numbers were for the same plot and the lawful allottee was the Respondent, Michael N. Macharia.
- Thirdly, after the judgment, new evidence came up to the effect that the two numbers represented two different plots at different locations and the land the Court found to belong to the Respondent in fact belonged to the Appellants.
- Fourthly, this new evidence came to the knowledge of the Appellant on or after 20th May, 2017 and on 3/7/2017, the application for review was filed. This clearly shows that it was made without unreasonable delay.



Fifthly, the ruling by the learned Magistrate did not set out issues for determination or the reasons therefore. It left out what was at the heart of the application, namely, the new evidence. The learned Magistrate made no comment on the new evidence yet that was the main issue for determination in the application dated 3rd July, 2017.

Finally, in all the circumstances of the application under consideration, the learned Magistrate ought to have allowed the application for review as it had met all the conditions in Order 45 Rule 1, Civil Procedure Rules.

Consequently, I make the following order;

- a. The judgment of 14th January, 2016 be and is hereby set aside.
- b. The new evidence, that is to say, that the two plots in issue are distinct and at two different locations be filed, served and subjected to cross-examination.
- c. The trial, for the purposes of taking the new evidence, to proceed before a new different Magistrate other than Hon. E.A. Mbicha or Hon. B. Cheloti, Senior Resident Magistrate.
- d. Costs to the Appellant.

Order accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 4TH DAY OF MAY, 2022.

M.N. GICHERU

JUDGE

