



Kamutu & 2 others v Githumba (Sued as the Administrator of the Estate of the Late Githumba Kanyugi and on his Own Behalf) & 3 others (Environment & Land Case 227 of 2016) [2022] KEELC 15683 (KLR) (8 July 2022) (Ruling)

Neutral citation: [2022] KEELC 15683 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 227 OF 2016**

EC CHERONO, J

JULY 8, 2022

BETWEEN

**CHARITY NYAGUTHII KAMUTU 1ST PLAINTIFF
FRANCIS MAINA KAGUCUI 2ND PLAINTIFF
ESTHER WANGUI MURIITHI 3RD PLAINTIFF**

AND

**ANTHONY MUNENE GITHUMBA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE GITHUMBA KANYUGI AND ON HIS OWN BEHALF) 1ST DEFENDANT
JOHN WACHIRA KITHUMBA 2ND DEFENDANT
CLEMENT KARIMI GITHUMBA 3RD DEFENDANT
BENSON WANJOHI GITHUMBA AS TRUSTEE FOR THEMSELVES AND OF MARGARET KARUANA GITHUMBA) 4TH DEFENDANT**

RULING

1. The Plaintiffs filed a Notice of Motion dated 16th December, 2021 and filed in Court on 21st December, 2021 whereby they are seeking the following orders:-
 - a. That this Honourable Court do amend and review the judgment delivered on 19/2/2021 and indicate that the plaintiffs are entitled to be registered as owners of Land Parcel No. Inoi/Kariko/3382 and a portion of Land Parcel No. Inoi/Kariko/3381 by way of adverse possession being subdivisions of Land Parcel No. Inoi/Kariko/280.



- b. This Court do authorize the Deputy Registrar of this Court to sign all papers to facilitate the plaintiffs getting one acre from Land Parcel No. Inoi/Kariko/3883 and Land Parcel No. Inoi/Kariko/3882 and authorize the land registrar to dispense with the production of the original title deed during the registration of the subdivision and transfer of the one acre from the Land Parcel No./Inoi/Kariko/3881 and Land Parcel No. Inoi/Kariko/3882.
 - c. That the O.C.S Kagumo to provide security during the subdivision on the ground.
 - d. Costs be provided.
2. The application is opposed with a Replying Affidavit sworn by Antony Munene Githumba on 7th February, 2022.
 3. When the application came up for hearing on 17th March 2022, the parties through their advocates on record agreed to canvass the same by way of written submissions. The Applicants filed their submissions on 20th April, 2022 while the Defendants filed theirs on 21st April, 2022.

Applicant's case and submissions

4. The applicant's case is that before commencing this suit, she obtained an official search from Kerugoya lands office which indicated the defendants as joint registered owners of Land Parcel Inoi/Kariko/280. She further stated that when she was being cross-examined, the defence were putting to her questions suggesting that there were subdivisions of the suit land. From those questions, she decided to conduct a search from the lands office whereby she obtained a green card showing that the land was not subdivided.
5. She stated that after judgment was delivered on 19/2/2021, she noted that the defendants had filed an application for stay of execution stating that the said land had been subdivided to new numbers being Inoi/Kariko/3376 to 3382 and after checking from the lands office, she noted that the suit land had indeed been subdivided.
6. She further stated that the green card she obtained reflected some noticeable irregularities and that the Land Registrar had misled her. In conclusion, she said that from the mutations, the portion they occupy are shown as land parcel number Inoi/Kariko/3382 and Inoi/Kariko/3381.
7. She also stated that there is an error on the face of the record and therefore judgment needs to be amended and reviewed by indicating that they get land parcel number Inoi/Kariko/3382 and part of Inoi/Kariko/3381.
8. She stated that it was not possible to discover the subdivision using due diligence and that there is sufficient cause to review and amend the judgment to give effect to the intention of the Court when it granted the judgment.
9. She also stated that the defendants were not candid as they failed to disclose to the court that they had subdivided the suit land and therefore they wouldn't suffer prejudice.
10. In their submissions, the Applicants reiterated the facts deposed in the supporting affidavit and prayed that the application be allowed.

Defendant's Case and Submissions

11. The defendants case is that the plaintiffs filed their suit after the land had been subdivided and new titles issued on or about 13th June, 2013 and that the issue of having exercised due diligence and having



allegedly been misled by the Land Registrar is neither here nor there, which should be directed against the Land Registry.

12. They stated that the plaintiffs prosecuted this matter and got judgment in respect to land parcel number 1noi/Kariko/280 and therefore it would be overstretching the provisions of amending Judgments/Decrees or even seeking review.
13. They further stated that there is nothing on record to demonstrate that the plaintiff sought for an adjournment after being cross-examined on subdivisions or that they sought to amend their plaint.
14. The defendants stated that they had been advised that the plaintiff's application is frivolous especially in light of the proceedings in Nairobi High Court Succession Cause No. 68 of 2011, and stated that despite the fact that the plaintiffs were aware of the same, they did not file the necessary papers to register their interests or even seek to object to the confirmation of grant that was issued by the High Court on 23/7/2013.
15. In their submissions, the defendants submitted that the applicants were overstretching the judicial discretion of this Honourable Court as the plaintiffs filed and prosecuted a suit without being diligent at all and therefore they have themselves to blame and that equity aids the vigilant and not the indolent.
16. They submitted that if at all the plaintiffs truly had any interests in the suit land, then their proper cause of action ought to have been registering their interests in Nairobi Succession Cause No. 68 of 2011 and therefore the Honourable Court ought to decline the plaintiffs' invitation to sit on Family Law Succession issues as this Court's jurisdiction is purely on Environment and Land Court related disputes. They relied on the case of Mary Waithera Gikima & Another vs Kariuki Wairagu & 3 Others, Thika ELC Case No. 661 of 2017.
17. They prayed that the plaintiffs' application be dismissed with costs.

Analysis

18. I have considered the instant application, the replying affidavit, parties' rival submissions as well as the relevant law.
19. The applicant has brought this application under Order 45 of the [Civil Procedure Rules](#) which provides as follows: -

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.

20. The applicant also cited Sections 99 and 100 of the Civil Procedure Act which provides as follows: -
 99. Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.



100. The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.
21. The Applicant's case is that after judgment was delivered on 19/2/2021, she noted that the defendants had filed an application for stay of execution stating that the suit land had been subdivided to new numbers being Inoi/Kariko/3376 to 3382 and that after going to the lands office, she noted that the suit land had indeed been subdivided.
22. The Applicants argued that in spite of several visits to the lands office to clarify the status of Land Parcel No. Inoi/Kariko/280, they were misled by the certificates of search and green card for the suit land which indicated that the same was not subdivided.
23. Under Section 99 of the *Civil Procedure Act* abovementioned, amendment of judgment is only available when there is a clerical or arithmetical mistakes or errors arising therein from any accidental slip or omission.
24. The predicament raised by the Applicants does not fall within the meaning of clerical mistakes, error, accidental slip or omission and therefore the application to amend the judgment in the manner proposed by the applicant cannot be allowed.
25. On the issue of review, the Plaintiffs have argued that there is an error on the face of the record as the suit land parcel No. Inoi/Kariko/280 was subdivided. This is a new factual issue that was not raised during hearing and the same requires the court to detailed examination of the facts and legal position.
26. The Applicant also contends that it was not possible to discover the error despite due diligence as the land registrar kept issuing them with erroneous searches to the effect that the land was not subdivided.
27. The Defendants on the other hand argued that the Plaintiffs argument is neither here nor there as there is nothing on record to demonstrate that the plaintiff sought for an adjournment after being put on cross-examination that the suit land had been subdivided to put their house in order including seeking leave to amend the plaint.
28. The Defendants further submitted that if the plaintiffs truly had any interests in the suit land, then their proper cause of action would have been to seek to be joined as a party in Nairobi Succession Cause No. 68 of 2011. She urged this Honourable Court to decline the plaintiffs' invitation to sit and determine Succession issues whereas this court's jurisdiction is purely Environment and Land related disputes.
29. It is trite that a judge has power to review his judgment in order to correct an error apparent on the face of the record. What the plaintiff/Applicant is seeking in the application under review is to introduce titles which are resultant subdivision of the original title No. Inoi/Kariko/280. The plaintiffs/Applicants had sued the defendant/Respondent for a declaration that the defendants/ Respondents held land parcel No. Inoi/Kariko/280 in trust for them and an order for determination of the trust.
30. In its judgment read on 19/2/2021, this Honourable court agreed with the Applicants and held in their favour. This Court also determined the trust and held that the Applicants are entitled to one Acre out of land parcel No. Inoi/Kariko/280. When they presented the decree to the Land Registrar, it turned out that land title No. Inoi/Kariko/280 was not in existence as the same had long been subdivided into two resultant parcel No. Inoi/Kariko/3381 & Inoi/Kariko/3382
31. The issue now is whether this Honourable court can review its judgment under Section 1, 1A, 3, 3A, 99 and 100 CPA as read with Order 45 CPR.



32. The answer to this question can be traced to the conduct of the parties in the pleadings. After the respondents were served with Originating Summons in this suit, the 2nd Respondent, John Wachira Kithumba, with instructions from the others, filed the Replying Affidavit sworn on 9th January, 2017. At paragraph 4 5, & 7 he deposed as follows ;-

- “ 4. That the applicants are mere licensees who were given a portion of land to build their houses by the late Githumba Kanyugi.
- 5. That the applicants do not occupy a portion of 0.33 Hectares but they only occupy a small portion Measuring approximately 100 metres by 120 metres where they have constructed their houses and they have fenced of the said portion with corrugated iron sheets (Annexed hereto and marked JWK1 is a photograph of the said portion).
- 7. That the Applicants have always occupied the aforesaid portion with the consent of the late Githumba Kanyugi as well as all the respondents herein.”

33. From the averments in the Replying Affidavit, the Respondent did not deny that the suit land L.R No. Inoi/kariko/280 had been subdivided. In fact, they admitted that the applicants were occupying a portion of the suit land L.R No. Inoi/kariko/280.

34. I find that this is a suitable case where this Court can exercise its discretion to amend and correct an error on the face of record and to give effect to the judgment of the Court.

35. The upshot of my finding is that the Notice of Motion dated 10/12/2021 is merited and the same is allowed as prayed.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 8TH JULY, 2022.

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HON E.C. CHERONO

ELC JUDGE

In the presence of:-

- 1. Ms Wandia Murimi holding brief for Ann Thungu for Applicant
- 2. Ms Amba holding brief for Wambugu Kariuki for the Respondent
- 3. Kabuta – Court Assistant.

