



**Nyambati v Kisii County Government (Environment & Land Case
1209 of 2016) [2022] KEELC 2632 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2632 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 1209 OF 2016**

JM ONYANGO, J

JULY 6, 2022

BETWEEN

ALICE KERUBO NYAMBATI PLAINTIFF

AND

KISII COUNTY GOVERNMENT DEFENDANT

RULING

Introduction

1. By a Plaint dated 4th March 2008, the Plaintiff filed suit against the defunct Gusii County Council claiming that the Defendant had trespassed into her land parcel known as L.R No. Wanjare / Bokeire/1783. The plaint was later amended on 26th May, 2016 to substitute the Gusii County Council with the Kisii County Government. In the amended Plaint the Plaintiff sought the following reliefs against the Defendant:
 - a) A permanent injunction restraining the Defendants, its agents, servants or employees from in any way whatsoever trespassing and/or encroaching onto, interfering with and/or dealing with in any way whatsoever land parcel number Wanjare /Bokeire/1783.
 - b) An order evicting the Defendant’s agents, servants and or employees from land parcel number Wanjare /Bokeire/1783 and demolition of all erected structures thereon.
 - c) General damages for the loss occasioned by the trespass, illegal occupation, use and wastage of land parcel No. Wanjare /Bokeire/1783.
 - d) Costs of this suit.
 - e) Interest at court rates.

The Defendant entered appearance but did not file any defence.



2. When the matter came up for hearing on 20th March 2018, the court observed that the dispute involved the boundary between the Plaintiff's parcel of land No. Wanjare /Bokeire/1783 and the defendant's land parcel No. Wanjare /Bokeire/115. The court further noted that it could not determine the position of the boundary as that was the mandate of the Land Registrar and County Surveyor. The court therefore directed that the Land Registrar and County Surveyor, Kisii County do visit the site of the two parcels of land and establish and fix their respective boundaries in accordance with sections 18 and 19 of the Land Registration Act, 2012. The court further directed that a sketch plan be drawn illustrating any encroachment by either of the parties onto the other's parcel of land. The said officers were required to file their report in court within 90 days.
3. Pursuant to the said court order, the Land Registrar and County Surveyor, Kisii County visited the suit property and filed their report dated 9th August 2018. In the said report, they made the following findings:

OBSERVATION

1. "That both parcels of land are in the Registry Index Map (RIM) No. 6 of Bokeire registration section.
2. There are permanent and temporary structures belonging to a school
3. Part of the disputed land is under maize and sugar cultivation.

FINDINGS

- i. Parcel number Kisii/Wanjare /Bokeire/1783 was a result of an amalgamation of plots number 1767 and 1769 which then measured 5.3 hectares and 0.94 hectares respectively and that amalgamation was registered on 30th July 1979.
- ii. Parcel No. 1783 is registered under the Plaintiff's name whereas parcel 115 is registered under the defunct Gusii County Council.
- iii. Parcel No. 115 measures 0.05 Ha (approximately) which was reserved for clay works.
- iv. The school is utilizing land totaling 2.3 Hectares i.e 5.7 Acres.

CONCLUSION

In view of the above findings and in light of the court order, the area encroached by the school to the Plaintiff's land is approximately 2.215Ha."

4. When the matter came up for mention on 10th June 2019, Mr. Mosota learned counsel for the Defendant requested the court for more time as he indicated that they were willing to engage the Plaintiff with a view to settling the matter amicably.
5. The court then adopted the joint report of the Land Registrar and County Surveyor as the judgment of the court. The court further directed that implementation of the report be carried out as between the Plaintiff and the Defendant through consultation with a view to having the portion occupied by the school being 2.215 Hectares hived off from the Plaintiff's land and the Plaintiff being compensated for the land on the basis of market rates unless the parties agree otherwise.
6. The matter was thereafter mentioned on a number of occasions for purposes of confirming whether the parties had exchanged their respective valuation reports. On 24th February 2021, the Plaintiff filed her valuation report dated 27.10.20 in which the encroached portion was valued at Kshs. 25,300,000/ = The Defendant asked for time to file their valuation report and on 5.10.21 counsel for the Defendant informed the court that they did not intend to file a valuation report as the Defendant was not in



occupation of the Plaintiff's land. He indicated that in view of this, they intended to file an application for review of the judgment that had been entered against the Defendant. The Applicant then filed a Notice of Motion dated 12th January 2022 seeking that the judgment of the Honourable Court delivered herein on 10th June 2019 by Honourable Justice Mutungi be reviewed/varied so as to correct an apparent error on the face of the record. It is the said application that is the subject of this ruling.

7. In his Supporting Affidavit sworn on the 12th January 2021, Mr. Isaiah Mosota Nyamweya learned counsel for the Plaintiff has deposed that the Land Registrar's report dated 9th August 2018 states that the encroachment is perpetuated by a different entity and not the Applicant. He therefore deposes that the Court's decision on 10th June, 2019 stating that the Applicant has encroached on the Respondent's property is erroneous and ought to be reviewed.
8. The application is opposed by the Respondent through her Replying Affidavit filed on 24th April, 2022 in which she deposes that the Defendant's counsel consented to the adoption of the Land Registrar's report dated 9th August 2018. She further deposes that the Applicant has all along been aware of the occupancy of the suit land and the adoption of the said report cannot be said to be erroneous.
9. It is her further contention that the application was made after more than two years and six months without any reasonable explanation. She is of the view that the orders made on 10th June, 2019 in the presence of both counsels are binding and cannot be discharged unless they were obtained by fraud or collusion or by an agreement that is contrary to the policy of the court or if the consent was given without sufficient material facts which is not the case in this matter.
10. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

Analysis and Determination

11. The only issue for determination is whether the Applicant has met the threshold for review of the consent judgment dated 10th June, 2019.

The orders governing review are found in Section 80 of the [Civil Procedure Act](#) and Order 45 (1) of the [Civil Procedure Rules](#) which provide as follows:

Section 80. Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 rule 1 of the [Civil Procure Rules](#) provides that: -

- (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.

12. In the instant case the Applicant seeks a review of the judgment on the grounds that there is an error apparent on the face of the record.

The Supreme Court of Uganda in *Edison Kanyabwera versus Pastori Tumwebaze* (2005) UGSC had occasion to determine what constitutes an error apparent on the face of the record, it stated as follows;

“it is stated that in order that an error maybe a ground for review, it must be one apparent on the face of the record, i.e an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error maybe one of fact, but it is not limited to matters of fact, and includes also error of law.”

13. The first question I have to determine is whether there is an error in the judgment that adopted the joint report of the Land Registrar and County Surveyor. The error alluded to by the Applicant relates to the fact that in its judgment, the court directed that the report of the Land Registrar and County Surveyor be implemented as between the Plaintiff and the Defendant through consultation with a view to having the portion occupied by the school being 2.215 Ha hived off from the Plaintiff's land and the Plaintiff being compensated for the land on the basis of market rates unless the parties agree otherwise.

14. The import of the said judgment was that the compensation was to be paid by the Defendant yet according to the report the encroachment is by a school which is a separate entity from the Defendant. To the extent that the Court directed that compensation was to be paid by Defendant and not the person or entity that was found to have encroached on the Plaintiff's land, there was an error in the judgment.

15. The second question I must determine is whether the consent judgment should be set aside. The principles upon which a consent judgement or order can be set aside were set out in the case of *Brooke Bond Liebig Ltd v Mallya* 1975 EA 266 where court held that:

“a consent order cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

And in *Flora Wasike v Destimo Wamboko* (1988) 1 KAR 625 the court observed that:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.... In *Purcell vs F C Trigell Ltd* [1970] 2 All ER 671, Winn LJ said at 676;

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons...”



16. In the case of *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited* (2015) eKLR, the Court of Appeal held as follows:

“The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. “

17. Having arrived at the finding that there was an error in the judgment which adopted the report of the Land Registrar and County Surveyor, the said judgment ought to be set aside.

18. In his submissions, learned counsel for the Plaintiff submitted that the application was not made without undue delay as it was made after a period of two years and six months following the consent judgment. Although I agree that the application was made after considerable delay, the Applicant explained that the delay was occasioned by the fact that the parties took some time to exchange their valuation reports. At any rate the parties had not consulted and agreed on the amount of compensation as directed by the court.

19. In light of the foregoing, I find merit in the application and I set aside the judgment dated 10th June, 2019. However, owing to the inconvenience occasioned to the Plaintiff/Respondent, the costs of the application shall be borne by the Defendant/Applicant.

DATED, SIGNED AND DELIVERED AT KISII THIS 6TH DAY OF JULY, 2022.

J.M ONYANGO

JUDGE

