



**Ogoti v Chief Magistrate Court, Kisii & 5 others (Environment & Land
Petition 9 of 2014) [2022] KEELC 2611 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2611 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND PETITION 9 OF 2014

JM ONYANGO, J

JULY 6, 2022

**IN THE MATTER OF ARTICLES, 20 (2), 21 (1), 22 (1) & (2), 23
(1), 40(2), AND 165 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALEDGED CONTRAVENTION AND VIOLATION ARTICLES
35, 40 (1) 47 (1) & (2) AND 50(1) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF VIOLATION AND/OR INFRIGEMENT
OF THE PROPERTY RIGHTS OF THE PETITIONER**

AND

**IN THE MATTER OF LAND PARCELS, LR NO NYARIBARI
CHACHE B/B/BOBURIA/9154, 9155 AND 9156**

AND

IN THE MATTER OF THE LAND DISPUTE TRIBUNAL CASE NO. 63 AND 66 ALL OF 2021

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL RIGHTS) PRACTICE AND PROCIDURE RULES, 2013**

BETWEEN

MARY KERUBO OGOTI PETITIONER

AND

THE CHIEF MAGISTRATE COURT, KISII 1ST RESPONDENT

THE DISTRICT LAND REGISTRAR, KISII 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT



MARY KERUBO ONDIEKI 4TH RESPONDENT
EVANS ONCHOMBO NYAIGOTI 5TH RESPONDENT
ZADOCK MOREMA MOCHACHE 6TH RESPONDENT

RULING

Introduction

1. Vide a notice of Motion application dated July 19, 2021 supported by an affidavit sworn by Evans Onchombo Nyaigoti, the Applicants sought the following orders;
 - a) A stay of execution of the judgement/decree/order pending the hearing of the application.
 - b) The Court be pleased to review the Judgment delivered and dated July 19, 2019 entered in favor of the Petitioner.
 - c) The costs of this application be provided for.
2. In his Supporting Affidavit, Mr. Nyaigoti averred that land parcels LR No. Nyaribari Chache B/B/Boburia/9154, 9155 and 9156 (hereinafter referred to as the 'suit properties' emanated from LR No. Nyaribari Chache B/B/Boburia/6776 which was a subdivision of the parent title; LR No Nyaribari Chache B/B/Boburia/1429.
3. He averred that portions of LR No Nyaribari Chache B/B/Boburia/1429 had been sold to them before the subsequent subdivisions.
4. He further averred that parcel LR No Nyaribari Chache B/B/Boburia/1429 was registered in the name of the late Aligisina Bosibori Kinaro. He contended that the late Aligisina Bosibori Kinaro had sold portions of the said parcel to them but died before she could transfer the portions to them. It was his contention that the suit properties were obtained out of a decree of the Land Disputes Tribunal without a succession process being carried out.
5. He averred that this court erred in awarding the suit properties to the Petitioner without a succession process being carried out. He therefore prayed for a review of the Judgment of the Court cancelling the titles to the suit properties and causing the same to revert to the estate of the late Aligisina Bosibori Kinaro.
6. The application was opposed by the Petitioner vide a statement of Grounds of Opposition dated December 1, 2021. In the said statement, the Petitioner argued that the application was premature, misconceived, incompetent, bad in law and otherwise legally untenable. The Petitioner further argued that this court is devoid of jurisdiction to entertain the application either in the manner mounted or at all as it is functus officio. It was her contention that the application does not meet the requirements for review set out in order 45 Rules 1, 2, & 3 of the *Civil Procedure Rules*, 2010.
7. It was her further contention that the application for stay had been made in a vacuum and the same did not disclose any cause of action worth being entertained by this court. The Petitioner contended that the application has been filed late in the day and the inordinate delay has not been explained by the Applicants.



Brief Background of the Suit

8. In order to determine whether to review the judgment of this court delivered on July 19, 2019, it would be necessary to consider the background of this suit from the date of its institution to the date of the delivery of the Judgment. From the record of the court, this suit was instituted by the Petitioner against the Respondents on March 20, 2014 vide a Petition dated March 19, 2014. In the Petition the Petitioner sought the following orders:
 - a. A declaration that the Petitioner was entitled to protection under *the Constitution*
 - b. A declaration that the complaint, proceedings and the attendant award of the Land Dispute Tribunal, Kiogoro Division which was subsequently adopted by the Chief Magistrate's Court vide Kisii CMCC Land Dispute Tribunal Case No. 63 and 66 of 2011 and the resultant decree(s) were null and void for want of jurisdiction.
 - c. A declaration that the process of enforcement, execution and implementation of the decree arising from Kisii CMCC Land Dispute Tribunal Case No. 63 and 66 of 2011, culminating into the revocation of the Petitioner's titles over the suit properties was void.
 - d. A declaration that the transfer and registration of titles in respect of the suit properties in favor of the 4th and 5th Respondents (the applicants herein) was anchored on an illegal and void process and hence the same ought to be nullified.
 - e. An order of cancellation of the titles to the suit properties in favour of the 4th and 5th Respondents and rectification of the register in respect of the suit properties to reflect the name of the Petitioner.
 - f. An order of permanent injunction restraining the 4th, 5th and 6th Respondents either by themselves, their agents, servants and/or anyone claiming under them from entering upon, trespassing onto, taking possession, building structures thereon and/or in any other way interfering with the Petitioner's interests over the suit properties.
 - g. Payment of damages arising from the illegal and void actions by and/or at the instance of the Respondents.
 - h. Costs of the petition be borne by the Respondents jointly and/or severally.
 - i. Any other order that this court deems fit and expedient to issue.
9. In support of the Petition, the Petitioner filed a Supporting Affidavit sworn on 19th March, 2014 in which she averred that land parcel known as LR No. Nyaribari Chache B/B/Boburia/6776 was registered in the name of her late husband Joakim Ogoti Kinaro. She averred that upon the death of her husband she was appointed as the legal administrator of his estate after successfully carrying out a succession process and obtaining a Grant of Letters of Administration.
10. It was her averment that upon obtaining the Grant of Letters of Administration, she caused the parcel LR No. Nyaribari Chache B/B/Boburia/6776 to be transferred and registered in her name. After the transfer of the said parcel to her name, she caused the same to be subdivided into the suit properties herein and had all of them registered in her name.
11. She further deposed that on or about October, 2010, the 4th, 5th and 6th Respondents lodged complaint(s) with the Land Disputes Tribunal, Kiogoro Division contending that they had allegedly purchased portions of the original parcel from one Aligisina Bosibori Kinaro, now deceased, who was her mother-in-law. It was her deposition that the Tribunal entertained the complaint(s) and



- determined the same in favor of the 4th, 5th and 6th Respondents and recommended the revocation of the titles in respect of the suit properties. The award of the Tribunal was later adopted as an order of the court by the 1st Respondent herein and decrees were extracted by the Respondents.
12. It was her deposition that she filed the Petition to have the award of the Tribunal and the subsequent decree from the 1st Respondent adopting the Tribunal award declared null and void amongst other orders.
 13. The Respondent entered appearance and filed Grounds of Opposition on October 28, 2014 wherein they argued the Petition was res judicata and that the same was not an appeal against a lawful decree and the subsequent dismissal of the judicial review application that had earlier been filed by the Petitioner. They contended that the Petition could not be a solution to a succession process that ought to have been carried out. They further argued that they had sale agreements to the suit properties and that there was no violation of fundamental human rights.
 14. The court directed that the Petition be determined on the basis of affidavit evidence and submissions as it only raised issues of law and involved a review of documents which were not contested.
 15. Upon considering the Petition, the response by the 4th, 5th and 6th Respondents and their subsequent submissions, the court entered judgment in favor of the Petitioner on 19th July, 2019. The court allowed the Petition in terms of prayers a, b, c, d, and e which were;
 - a. A declaration that the Petitioner is entitled to protection under *the Constitution*.
 - b. A declaration that the complaint, proceedings and the attendant award of the land Dispute Tribunal, Kiogoro Division which was subsequently adopted by the Chief Magistrate court vide Kisii CMCC Land Dispute Tribunal Case No. 63 and 66 all of 2011 and the resultant decree(s) were null and void for want of jurisdiction.
 - c. A declaration that the process of enforcement, execution and implementation of the decree arising from Kisii CMCC Land Dispute Tribunal Case No. 63 and 66 all of 2011, culminating into the revocation of the Petitioner's titles over the suit properties was void.
 - d. A declaration that the transfer and registration of titles in respect of the suit properties in favor of the of 4th and 5th Respondents (the applicants herein) was anchored on an illegal and void process and hence and hence the same ought to be nullified.
 - e. An order of cancellation of the titles to the suit properties in favor of the 4th and 5th Respondents and rectification of the register in respect of the suit properties to read the name of the Petitioner.
 16. In arriving at the above findings, the court made the following conclusions;
 - a. The Tribunal lacked jurisdiction to deal with the dispute referred to it and thus its decision was a nullity.
 - b. The Magistrate's Court was not enabled under section 7 of the Land Disputes Tribunal Act No. 18 of 1990 to adopt what were otherwise illegal and void awards from the Tribunal's judgment.
 - c. The expectation was that the Tribunal would have acted within their mandate and jurisdiction under section 3(1) and would have made a valid award and that if there was no valid award any purported adoption of the same would amount to nothing.
 - d. The court cannot validate something that was invalid.



- e. The decision of by this court in the Judicial Review Application; Kisii ELC MSC. Civil Application No. 69 and 70 all of 2011 was not on merit but on a procedural technicality which was that leave had not been sought before instituting them and which did not bar the Petitioner from filing this Petition.
 - f. While the 4th, 5th and 6th Respondents may have genuine and valid claims against the Petitioner, the process and procedure they followed to pursue their claim and/or rights against the Petitioner flouted the law and the court will not sanitize illegalities.
17. It is against this background that this application was filed by the 4th to 6th Respondents seeking a review of the judgment which I have highlighted hereinabove.

Issues for Determination

18. From my analysis of the application, the response thereto and rival submissions the main issues for determination are:-
- a. Whether the Defendant/Applicant has met the requirements set out under the provision of Order 45 of the Civil Procedure Rules to warrant this court to review its judgment.
 - b. Whether the court has jurisdiction to determine the application.

Analysis and Determination

Whether the Defendant/Applicant has met the requirements set out under the provision of Order 45 of the Civil Procedure Rules to warrant a review of the judgment

19. The jurisdiction of the Court to review orders is provided under the provisions of Section 80 of the *Civil Procedure Act* which states: -
- 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.
20. Order 45 Rule 1 of the *Civil Procedure Rules* also states: -
- (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.
21. Order 45 is therefore very explicit that a court can only review its orders if the following grounds exist: -



- (a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
 - (b) There was a mistake or error apparent on the face of the record; or
 - (c) There were other sufficient reasons; and
 - (d) The application must have been made without undue delay.
22. The pertinent issue for determination herein, therefore, is whether the applicants has established any of the above grounds to warrant an order of review.
23. On the first element of Whether there is a discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicants at the time the decree was passed or the order was made, the Applicants have raised the issue of failure to consider the succession process of the estate of the late Aligisina Bosibori Kinaro as a new and important issue that was not considered by the court in its judgment.
24. However, the Applicants have not demonstrated that the said issue was not within their knowledge after exercise of due diligence since from the application, it is clear that this was an issue that was at the center of their interests in the suit properties given that it is their allegation that they bought portions that formed part of the suit property from the said Aligisina Bosibori Kinaro.
25. According to the court proceedings, before the delivery of the impugned judgment, the Applicants were accorded sufficient time to file documents during the pendency of the suit but failed to do so. In fact, in the impugned judgement the learned Judge observed that initially the court had directed that the Petition be heard by way of viva voce evidence. The parties were directed to exchange witness statements and file their bundle of documents within 30 days but the Applicants failed to comply and the matter was adjourned to June 19, 2018.
26. On the issue of whether there was a mistake apparent on the face of the record, the Applicant has not demonstrated any such mistake. The Applicant has also not demonstrated any other reasons to warrant the review.
27. On issue of inordinate delay in filing this application, it is clear that this application having been filed on July 19, 2021, exactly two years after the delivery of the judgment, the same has been filed very late in the day and the delay has not been explained at all by the Applicants.

Whether the court has jurisdiction to determine the application.

28. It is important to note that even if the Applicants had met the above requirements this court would not have jurisdiction. This is because in the Petition, the court was only called upon to determine whether the Tribunal had jurisdiction to determine complaints that had been raised by the Applicants and whether subsequent decrees that originated after the adoption of the award by the Chief Magistrate's Court were valid. The final determination was that the Tribunal lacked jurisdiction to deal with the dispute referred to it and thus its decision was a nullity. Further that the Magistrate's Court was not enabled under section 7 of the Land Disputes Tribunal Act No. 18 of 1990 to adopt what were otherwise illegal and void awards from the Tribunals judgment.



29. At paragraph 26 of his judgement the learned Judge observed that;

“While it is possible that the 4th, 5th and 6th Respondents may have a genuine and valid claim against the Petitioner, the process and procedure they followed to pursue their claims and/or rights against the Petitioner flouted the law and the court will not sanitize illegalities. The court’s role is to uphold the rule of law and that is what *the constitution* mandates a Judge to do when he takes oath of office. The court in that regard will not give its seal of approval to what was clearly a flawed process. the Petitioner is thus entitled to feel shortchanged and/or done in by the process through which 4th and 5th Respondent obtained an award, the judgement and the execution thereof. Parties perhaps have to go back to the drawing board to agitate for and pursue their perceived rights.”

30. From the above observation of the court, it is clear that the Petition was heard and determined and therefore the court remains *functus Officio* in as far as the issues contained in the application are concerned. The Applicants have no choice but to follow the advice of my brother Justice Mutungi by going back to the drawing board to agitate for and pursue their perceived rights. This application is clearly not one of the ways through which they can pursue their perceived rights.

31. In the final result therefore, it is my finding that the application by the Applicants is unmerited and the same is disallowed with costs to the Petitioner.

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

J.M ONYANGO

JUDGE

