Olado v County Government of Busia (Environment and Land Case 70 of 2018) [2025] KEELC 6895 (KLR) (7 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6895 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND CASE 70 OF 2018

BN OLAO, J

OCTOBER 7, 2025

BETWEEN

FRANCIS WAFULA OLADO ..... APPLICANT

AND

COUNTY GOVERNMENT OF BUSIA ..... RESPONDENT

RULING

1. By a plaint dated 6th August 2018 and filed herein on the same day, Francis Wafula Olado (the Plaintiff) impleaded the County Government of Busia (the Defendant) seeking, inter alia, judgment that the Defendant should remove the restriction placed on the land parcel No Bukhayo/Mundika/13570 (the suit land).

2. The Defendant respondent by filing a defence on 29th November 2018 and subsequently, an amended defence and counter-claim on 1st November 2021 pleading that infact the suit land was reserved as a public utility i.e. a Slaughter House and the Plaintiff had obtained the title fraudulently.

3. Thereafter, the Defendant first filed a Notice of Preliminary Objection dated 12th April 2024 and a Notice of Motion dated 24th June 2024. The gravamen of both the Notice of Preliminary Objection and the Notice of Motion was that this suit is statutorily barred by both the provisions of Section 7 of the *Limitation of Actions Act* and Section 3(1) of the Public Authorities Act, that the Plaintiff had not obtained leave of the Court before filing this suit as required under the provisions of Sections 27 and 28 of the *Limitation of Actions Act* and, finally, that the Plaintiff had not served the Defendant with any Notice of Intention to institute proceedings under Section 13A of the *Government Proceedings Act*. The Plaintiff filed responses to the Preliminary Objection. With the consent of the Parties, both the Preliminary Objection and the Notice of Motion were canvassed concurrently by way of written submissions. Vide a ruling delivered on 30th January 2025, I dismissed both the Preliminary Objection and the Notice of Motion with costs to the Plaintiff. I further directed that this being a 2018 case, it be heard on 30th March 2025.

4. While dismissing the Preliminary Objection and the Notice of Motion with regard to the limbs of Limitation of Actions under Section 7 of the *Limitation of Actions Act* and Section 3(1) of the *Public Authorities Limitation Act*, I addressed myself as follows in paragraphs 16 and 18 of my ruling:

    16. "The gist of the Plaintiff's claim is that he seeks an order directing the County Surveyor to establish the boundary of the suit land and also an order for the restriction lodged thereon to be removed. A copy of the title deed for the suit land which is filed herein shows that the same was issued on 2nd July 2018. This suit was filed on 6th August 2018 one month later. The suit land was not in existence in 1977 when the Defendant pleads to have earmarked it for the construction of a Slaughter House or in the 1980's when the same was constructed. Time could only have started to run from 2nd July 2018. Therefore, the Plaintiff's suit cannot be defeated by the provisions of Section 7 of the *Limitation of Actions Act*."

    And with regard to the issue of limitation under Section 3(1) of the Public Authorities Act, this is how I addressed myself at paragraph 18 of my ruling after citing the above provision:

    > " Again, as already found above, the suit land only came into existence on 2nd July 2018 and this suit was filed on 6th August 2018. Further, and as submitted by the Defendant's own counsel, if the Plaintiff's claim is founded on trespass, that is a continuing tort. It cannot be defeated by Section 3(1) of the *Public Authorities Limitation Act*."

    In my said ruling, I was largely guided by the decisions of the Court of Appeal in the case of Isaack Ben Mulwa -v- Jonathan Mutunga Mweke 2016 and also the case of Nguruman Ltd -v- Shompole Group Ranch & 3 others C.A. Civil Appeal No 73 of 2004 [2007 KLR] where the Court cited Clerk And Lindsel On Torts 16th Edition at page 23-01 that:

    > " Every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as the trespass continues."

5. The Defendant has taken the view that I erred in making those findings. It has therefore approached this Court vide a Notice of Motion dated 18th March 2025 and premised under the provisions of Sections 3, 3A and 80 of the *Civil Procedure Act*, Order 10 Rule 11, Order 45 Rule 1 and 2 and Order 51 of the Civil Procedure Rules seeking the substantive prayer that the ruling delivered on 30th January 2025 be set aside, reviewed and/or varied. The Motion is supported by the affidavit of Clement Makana the Defendant's Rates Officer. There is also a mention of one Vincent Wanjala as supporting it but I think that must be a typographical error as the said Vincent Wanjala is neither a party nor a representative of the Defendant. The main grounds upon which the Motion is premised are set out in paragraphs 1 and 2 as follows:

    1. "That in delivering the ruling dated 30th January 2025 on the Defendant's application dated 16th April 2024, the Honourable Court made a mistake or error apparent on the face of the record by determining that the land onto which the Slaughter House ..." was not in existence in 1977," that ... "the suit land only came into existence on 2nd July 2018" and that consequently thereof, "the cause of action in this case could only have occurred when the suit land was created following the issuance of the title deed on 2nd July 2018."

    2. "That the determination was despite the land onto which the Slaughter House is constructed having physically existed as early as way back in the 1980's even prior to creation of the suit land herein Bukhayo/Mundika/13570 apparently sub-divided from Bukhayo/Mundika/2543

derived following sub-division of the original parent title Bukhayo/Mundika/1689 duly acquired by the Government."

In his supporting affidavit also dated 18th March 2025, Clement Makana has deposed, inter alia, that the Defendant constructed a Slaughter House in the year 1980's on a piece of land known as Bukhayo/Mundika/1689 initially registered in the name of one Stephen Olado the Plaintiff's late father and which had been acquired by the Government in the year 1982 as per the Gazette Notice NO 1146 as 1147 dated 16th April 1982 and no adverse claim was made by the Plaintiff's father. That since the construction of the Slaughter House in the 1980's a permanent structure has existed in the present location. That on 28th October 2016 following the obtaining of a Grant in respect of his late father's Estate, the Plaintiff proceeded to illegally and fraudulently sub-divide the land parcel NO Bukhayo/Mundika/1689 to give rise to the suit land as well as other parcels of land being Bukhayo/Mundika/13569, 13571 and 13572. It is therefore not correct to conclude that the Slaughter House was not in existence in 1977 and only came into existence on 2nd July 2018. The Slaughter House physically existed on the land as early as in the 1980's and that is when time started to run which is much earlier than 2nd July 2018.

6. The Motion is opposed and the Plaintiff filed a replying affidavit dated 3rd April 2025 in which he has averred, inter alia, that the Defendant has not accounted for the 45 days taken before the filing of this Motion yet such an application must be made without un-reasonable delay. That the Defendant has not pointed out any patent error which needs a correction.

7. The Motion has been canvassed by way of written submissions. These have been filed by MR E. Wambura the Defendant's Principal Legal counsel and by Mr Otanga instructed by the firm of Bogonko Otanga & Company Advocates for Plaintiff.

8. I have considered the Motion, the rival affidavits and the submissions by counsel.

9. Section 80 of the *Civil Procedure Act* as read together with Order 45 of the Civil Procedure Rules provides for parameters within which a Court should consider an application for review of a decree or order. Section 80 reads:

> " 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(1) of the Civil Procedure Rules on the other hand provides that:

1(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."

Therefore, while Section 80 of the *Civil Procedure Act* provides for the law on review, Order 45 Rule 1(1) of the Civil Procedure Rules provide for the procedure.

10. It is clear from the above that a party seeking for review of a Judgment or Order must prove:

    1. Discovery of new and important matter or evidence; or
    2. Demonstrate that there is some mistake or error apparent on the face of the record; or
    3. Provide any other sufficient reason; and
    4. File the application without unreasonable delay.

    In the case of Francis Origo & Another -v- Jacob Kimali Mungala C.a. Civil Appeal No 149 of 2001 the Court stated thus:

> " In an application for review, an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly, the applicant must make the application for review without unreasonable delay."

The ruling sought to be reviewed was delivered on 30th January 2025 by way of electronic mail. I have not heard the Defendant claim that the ruling was not received on the same day of delivery. The Motion herein is dated 18th March 2025 although it is not clear when it was filed. But certainly, it must have been filed on or after 18th March 2025. That was over one and a half months after the delivery of the ruling. In the case of Francis Njoroge -v- Stephen Maina Kamore 2018 eKLR, the Court emphasized the need for such an application to be made timeously. The Defendant has not explained the delay herein which I find to be unreasonable in the circumstances. It has been stated before that it is the explanation of any delay which will enable the Court to exercise its discretion in favour of the party moving the Court. The Defendant having failed to move the Court timeously or to explain the delay of 45 days, this Motion must be dismissed.

11. But I will go further and interrogate the grounds upon which the Defendant seeks the orders herein. From the Motion and supporting affidavit, it is clear that the ground upon which the Defendant seeks a review of the ruling delivered on 30th January 2025 is for an error or mistake apparent on the face of the record. A mistake or error apparent on the face of the record must mean a mistake or error which is evident per se from the record. It must be manifest or self-evident. In the Indian Supreme Court case of ARibam Tuleshwar Sharma -v- Aribam Pishak Sharma Air 1979 SC 1047 [1979 4 SCC 389) the Court held that it has to be kept in mind that an error apparent on the face of the record must be such an error which must strike one on merely looking at the record. It must also be noted that a good ground of appeal may not necessarily be a good ground of review of a Judgment or order.

12. From the Motion, it is clear that the error or mistake which the Defendant is relying on is that this Court, in the ruling, determined that the suit land came into existence on 2nd July 2018 yet it was

infact in existence way back in 1977. This is how Clement Makana has deposed in paragraph 8 of his supporting affidavit:

> " That it is therefore not correct to conclude that the land onto which the Slaughter House is constructed was not in existence in the year 1977 and that the same had only come into existence on 2nd July 2018".

I must therefore determine whether this Court made an error or mistake in that finding.

13. It is common ground and which cannot be disputed, that the title deed to the suit land was issued on 2nd July 2018. A copy thereof is among the documents which the Plaintiff has filed. On the basis of that, this Court made a finding that the suit land came into existence when the title thereto was issued. However, in his submissions, counsel for the Defendant has sated as follows on that issue:

> " However to the contrary, we submit that the correct position is that, the land onto which the Slaughter House is duly constructed was in place even prior to the illegal sub-division and issuance of title on 2nd July 2018 as exemplified by the Gazette Notice NO 1146 and 1147 dated 16th April 1982 following acquisition of land parcel number Bukhayo/Mundika/1689 by the Government. The land duly acquired measures 0.036 Hectares."

When then does registered land come into existence? I find the answer in the case of Dr Joseph Arap Ngok -v- Justice Moijo Ole Keiwua & Others C.A. Civil Appeal Civil Application No 60 of 1997 where the Judges said the following:

> " What is not shown is the date on which H.E the President approved the application for consideration for allocation of the suit property. Mr Otieno-Kajwang who appeared for the applicant argued that the approval by H.E the President amounted to his client obtaining title to the suit property. This argument, of course, cannot stand. It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held." Emphasis mine.

The Defendant has of course pleaded in its defence and counter-claim that the suit land was created through a fraudulent process. At this point, this Court is not determining the manner in which the Plaintiff obtained his title. That will be a matter for trial to be determined by the evidence adduced. However, on the face of the record, there can be no doubt that the suit land was created on 2nd July 2018 when the title thereto was issued and not before. I do not see how that finding can be termed as an error or mistake apparent on the face of the record when the copy of the title deed and binding precedents are clear that the suit land was not in existence in 1977. In view of the above, I am not persuaded that there is any error or mistake on the face of the record to warrant any review of the ruling herein.

14. The up-shot of all the above is that this Court makes the following disposal orders in respect to the Notice of Motion dated 18th March 2025:

    1) The Motion is devoid of any merit.

    2) It is dismissed with costs to the Plaintiff.

BOAZ N. OLAO

JUDGE

7TH OCTOBER 2025

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 7TH DAY OF OCTOBER 2025.

BOAZ N. OLAO

JUDGE

7TH OCTOBER 2025