

REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT  
AT KISII  
ELCC NO. 222 OF 2017

JACKSON ANDREW NYABUTO ..... PLAINTIFF  
VERSUS  
DAVID OGEKA OMARE ..... DEFENDANT

RULING

*(Application by plaintiff decree/holder to substitute one parcel of land with another after judgment; applicant having sued for adverse possession over a parcel No. 62; this parcel being subdivided to produce parcels No. 6798 and 6799 before the hearing of the case; matter proceeding for hearing on the belief that the parcel No. 62 still existed and judgment entered in favour of the applicant; applicant unable to execute because the parcel No. 62 no longer exists and now seeks substitution of the parcel of land with one of the subdivisions; substitution not possible as there has never been litigation over the subdivided title; court persuaded to set aside the judgment as it was over subject matter that did not exist)*

1. Before me for determination is an application dated 5 June 2025 filed by the plaintiff/decree holder. He seeks the following orders :
  - (i) That the honourable court be pleased to review the judgment and decree of the court issues on the 28<sup>th</sup> of May 2020 and 22<sup>nd</sup> July 2020 respectively by substituting parcel Bassi/Bogetaorio II/62 with Bassi/Bogetoario II/6798.
  - (ii) The costs of this application be provided for.
2. To put matters into context, the applicant commenced this suit through an Originating Summons filed on 23 November 2027. He contended that he has obtained title, through adverse possession, to the land parcel Bassi/Bogetaorio II/62 measuring 0.9 Ha, which title was under the name of the respondent. He claimed that he had purchased 0.22 Ha of this land from the father of the respondent vide a sale agreement dated 1 July 1998 and he took possession hence his claim under adverse possession which was limited to this 0.22 ha. When he filed the Originating Summons, he exhibited an official search for the land parcel Bassi/ Bogetaorio II/62, dated 15 September 2017, which showed that the respondent is the registered proprietor.
3. The respondent appointed the law firm of M/s Momanyi Gichuki & Company Advocates and filed a replying affidavit to oppose the Summons. He more or less denied the claim of the applicant. Hearing proceeded on 25 November 2019 before Onyango J. It was an ex parte hearing as the respondent did not show up. There was further hearing on 18

December 2019 again in the absence of the respondent. Judgment was then delivered on 28 May 2020 in favour of the applicant. The court declared that the applicant has acquired a portion of 0.22 ha of the land parcel Bassi/Bogetaorio II/ 62 by adverse possession and directed the respondent to execute all documents to facilitate transfer of this portion to the applicant. A decree was then issued on 22 July 2020.

4. In his supporting affidavit to the application herein, the applicant has deposed that after obtaining the decree, he prepared the requisite Land Control Board documents for subdivision and transfer, and took them to the respondent to execute. The respondent declined to do so. He then applied to the Deputy Registrar to execute the forms which request was allowed. He submitted the forms to the survey office Kisii and was asked to avail a recent official search. He proceeded to do so but the results he got was that the land parcel Bassi/Bogetaorio II/62 is closed having been subdivided on 17 July 2018 to produce the land parcels Bassi/Bogetaorio II/6798 and 6799. He was surprised by this development and sought the mutation form. He found that one of the two subdivisions, i.e the parcel No. 6798, is registered in the name of the respondent. He contends that the subdivision was carried out with a clear intention of defeating the proceedings herein and the subsequent decree. He states that with the assistance of the surveyor, he has confirmed that his parcel falls within this land parcel No. 6798 in the name of the respondent. It is for that reason that he wants a review of the judgment and decree as sought in this application.
5. Nothing was filed by the respondent to oppose the application and I have given it due consideration.
6. The suit was filed on 23 November 2017 when the land parcel Bassi/Bogetaorio II/62 was in existence. I see from the material supplied in support of this application that this parcel No. 62 was subdivided on 17 July 2018 to produce the parcels No. 6798 and 6799. What this means is that as at 25 November 2019 when the matter proceeded for hearing, there was not in existence this parcel Bassi/Bogetaorio II/62. In essence the subject matter of the suit was no longer there. The court of course was not made aware of the change in circumstances and proceeded to give judgment in favour of the applicant for 0.22 ha out of the land parcel Bassi/Bogetaorio II/62. The judgment was thus over subject matter that was not in existence.
7. Now the applicant urges that the judgment be reviewed so that it reads that it is in respect of 0.22 ha out of the land parcel Bassi/Bogetaorio II/ 6798. I am afraid that this is not possible. There has never been litigation over this land parcel No. 6798 and you cannot

impose a judgment on a differently titled parcel. Adverse possession must be against a particular title of land and this cannot be substituted for another title. In any event, the respondent has not been heard as to whether the applicant should be entitled to adverse possession over the parcel No. 6798 as there has never been any pleadings seeking this land parcel No. 6798. The originating summons herein seeks adverse possession to the parcel No. 62 not the parcel No. 6798. There are no pleadings and there has been no hearing regarding this parcel Bassi/Bogetaorio II/6798.

8. What the applicant has persuaded me to do is to actually set aside the entire judgment because it was a judgment entered by mistake. If the court knew that this land parcel Bassi/Bogetaorio II/62 did not exist, it would not have proceeded to enter judgment for the applicant over it. In other words, there are material facts that were not in the knowledge of the court at the time that the decree was passed which if the court was aware of may not have proceeded as it did.
9. What I will do is set aside the entire judgment, given that it is a judgment over subject matter that did not exist at the time that the judgment was made, as
10. it is in vain for a court to enter judgment on non-existent subject matter. It is now up to the applicant to see what to do with the case. But the applicant needs to learn from his mistakes. He ought to have asked for an order of prohibition and registered it in the register of the land parcel No. 62 so that no dealings are registered.
11. For reasons above, I decline to allow the prayers in this application but proceed to set aside the judgment and decree. There will be no orders as to costs.
12. Orders accordingly.

DATED AND DELIVERED THIS 18 DAY OF NOVEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Atika for the applicant

No appearance on part of M/s Momanyi Gichuki & Company Advocates for the respondent

Court Assistant – Michael Oyuko