



**Kithinji (Suing on her behalf and on behalf of 5 others) v Swale & 8 others (Environment & Land Case 248 of 2016) [2024] KEELC 100 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 100 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 248 OF 2016  
SM KIBUNJA, J  
JANUARY 24, 2024**

**BETWEEN**

**CELINA MUTHONI KITHINJI (SUING ON HER BEHALF AND ON BEHALF OF 5 OTHERS) ..... PLAINTIFF**

**AND**

**SAFIYA BINTI SWALE ..... 1<sup>ST</sup> DEFENDANT  
SHEE KHA BIN MOHAMED ..... 2<sup>ND</sup> DEFENDANT  
ESHA BINTI MOHAMED ..... 3<sup>RD</sup> DEFENDANT  
FATUMA BINTI MOHAMED ..... 4<sup>TH</sup> DEFENDANT  
MANTHURA BINTI MOHAMED ..... 5<sup>TH</sup> DEFENDANT  
BUTHAINA BINTI MOHAMED ..... 6<sup>TH</sup> DEFENDANT  
ATIA BINTI MOHAMED ..... 7<sup>TH</sup> DEFENDANT  
ARAFA BINTI MOHAMED ..... 8<sup>TH</sup> DEFENDANT  
FADHILI BINTI MOHAMED ..... 9<sup>TH</sup> DEFENDANT**

**RULING**

1. Vide the notice of motion dated the 28<sup>th</sup> August 2023, the defendants seeks for amendment of the order (b) made on 29<sup>th</sup> July 2020 to include the suit property, LR No. 398/II/MN (C.R 1006). The application is based on the ten (10) grounds on its face and supporting affidavit of Fadhila Binti Mohamed, the 9<sup>th</sup> defendant, sworn on the 28<sup>th</sup> August 2023, inter alia deposing that the defendants are the registered proprietors of LR NO. 398/11/MN (CR. 1006), suit property; that in the judgement delivered on the 15<sup>th</sup> March 2018, the court declared the plaintiff as the registered owner of the suit land; that the defendants filed an application dated 24<sup>th</sup> April 2019 to set aside the judgement and it



was allowed on the 29<sup>th</sup> July 2020; that the Land Registrar has declined to cancel the provisional title issued to the plaintiff as the order of 29<sup>th</sup> July 2020 did not specify the land reference number, and hence this application.

2. The application is opposed by the plaintiff through the replying affidavit of Celina Muthoni Kithinji, the plaintiff, sworn on 29<sup>th</sup> September 2023 deposing inter alia that the plaintiffs filed their claim under adverse possession and the defendants were served through the Standard Newspaper of 12<sup>th</sup> January 2017; that the defendants did not enter appearance or defend the suit; that the plaintiffs had demonstrated to the court that they have been in occupation of the suit property for periods of between 16 to 60 years; that the court allowed their claim and a provisional certificate of title was issued to them; that the defendants then applied for the judgement to be reviewed and set aside claiming they had not been served, and the application was allowed; that the defendants were also ordered to file and serve their reply to the originating summons in 14 days but they are yet to do so; that their originating summons remains undefended. The defendants filed a further affidavit sworn by Fadhilia Binti Mohamed on the 16<sup>th</sup> October 2023 in response to the replying affidavit.
3. The application was mentioned on the 2<sup>nd</sup> October 2023, when the learned counsel for the plaintiff sought for the application to be heard orally in open court and for the deponent of the supporting affidavits and those mentioned at paragraph 17 to be availed in court with their national identity cards for cross examination, and to confirm whether they were alive. During the hearing of 20<sup>th</sup> November 2023, the 4<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> defendants were present and responded when their names were called out and presented their identification documents. The learned counsel for the defendants confirmed that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, and 7<sup>th</sup> defendants had passed on. He also pointed out that the son and daughter to the 3<sup>rd</sup> and 5<sup>th</sup> defendants respectively had come to court. The court then directed the learned counsel to make their submissions on the application. The court has considered their submissions for and against the application.
4. The issues for the determinations by the court are as follows;
  - a. Whether the defendants have made out a reasonable case for reviewing of the court's order in the manner proposed.
  - b. Who pays the cost of the application?
5. The court has carefully considered the grounds on the application, affidavit evidence presented by both sides, submissions by the two learned counsel, the record and come to the following conclusions:
  - a. Section 99 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya provides that:

“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.”

The above provision and section 100 of the same Act were extensively discussed in the case of [Leonard Mambo Kuria versus Ann Wanjiru Mambo](#) (2017) eKLR where the court stated thus:

“The application of these two sections [Sections 99 and 100 of the [Civil Procedure Act](#), CAP 21] has been considered before in several decisions. They vest a general power to the courts to correct or amend their records. As such they are an exception to the doctrine of ‘functus officio’-- the principle that once a decision has been given, it is (subject to any right of appeal) final and conclusive. It cannot be revoked or



varied by the decision-maker. As the court stated in the case of *Jersey Evening Post Limited vs. Ai Thani [2002]JLR 542 at 550:-*

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available”.

- b. In the case of *Republic v Attorney General & 15 others, Ex-Parte Kenya Seed Company Limited & 5 others* [2010] eKLR, the court examined the mechanics of the application of section 99 and stated that:-

“27. It is a codification of the common law doctrine dubbed ‘the Slip Rule’, the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the court, which would otherwise become functus officio upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section.

28. Some of the applications of the rule are fairly obvious and common place, and are easily discernible like clerical errors, arithmetical mistakes, calculations of interest, wrong figures or dates. Each case will, of course, depend on its own facts, but the rule will also apply where the correction of the slip is to give effect to the actual intention of the Judge and/or ensure that the judgment/order does not have a consequence which the Judge intended to avoid adjudicating on.

The Australian Civil Procedure has provisions in pari materia with section 99. As was stated in the case of *Newmont Yandal Operations Pty Ltd v The J. Aron Corp & The Goldman Sachs Group Inc* [2007] 70 NSWLR 411, the inherent jurisdiction extends to correcting a duly entered judgment where the orders do not truly represent what the court intended.

29. Nearer home the predecessor of this Court in *Lakhamshi Brothers Ltd v R. Raja & Sons* [1966] EA 313 endorsed that application of the rule, that is, to give effect to the intention of the court when it gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted. Spry JA in *Raniga Case (supra)* also stated as follows: -

A court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond



doubt, as to the order which it would have made had the matter been brought to its attention.

30. What is certainly not permissible in the application of section 99, is to ask the court to sit on appeal on its own decision, or to redo the case or application, or where the amendment requires the exercise of an independent discretion, or if it involves a real difference of opinion, or requires argument and deliberation or generally where the intended corrections go to the substance of the judgment or order”.

In the instant matter, it has not been disputed that the court entered a judgement in favour of the plaintiffs on the 15<sup>th</sup> March 2018. The defendants had not entered appearance or defended the originating summons by then but subsequently moved the court vide their application dated the 24<sup>th</sup> April 2019 to inter alia have the judgement set aside. The court through the ruling of 29<sup>th</sup> July 2020 allowed the defendants application and inter alia ordered that “b. The Land Registrar be and is hereby directed to cancel the provisional title issued to the applicants pursuant to the said decree.” That is the order that the defendants seeks to be amended to include the reference of the suit property.

- c. The objection to the application by the plaintiffs primarily on the basis that the defendants have not complied with order (c) of the 29<sup>th</sup> July 2020 “to file and serve their response to the originating summons within 14 days of the delivery of this ruling” is in my view without basis, as the setting aside order was not conditional to a reply to the summons being filed within the prescribed time.
- d. It is not disputed that the Land Registrar has declined to cancel the provisional title of the suit property issued to the plaintiffs/applicants pursuant to the judgement of 15<sup>th</sup> March 2018, for reasons that the reference of the land was not specified in the order of 29<sup>th</sup> July 2020. The defendants’ application for amendment of the order is to enable the Land Registrar act as ordered under order (b) of 29<sup>th</sup> July 2020. The suit emanates from a dispute on adverse possession of LR No. 398/II/MN and it is understandable that the Land Registrar took caution in requesting for the details of the suit property to be included in the order before effecting it. I find the court has the residual or inherent powers to allow the amendment so as to give effect to its orders of 29<sup>th</sup> July 2020. It is also important for the parties to note that the order of 29<sup>th</sup> July 2020 to set aside judgment of 15<sup>th</sup> March 2018 was to pave way for the defendants to file their pleadings and the suit to be heard and determined on merit.
- e. Having found merit in the application, the next issue to determine is costs. Ordinarily, cost follow the events unless otherwise directed by the court as provided for under section 27 of the *Civil Procedure Act*. As the loser in this application is not to blame in any way for the failure to have the details of the suit land incorporated in the order of 29<sup>th</sup> July 2020, it is only fair that the costs of the application abide the outcome of the suit.
6. In view of the foregoing findings, the court orders as follows:
- a. That the defendants’ notice of motion dated the 28<sup>th</sup> August 2023 be and is hereby allowed in terms of prayer (2).



b. That the costs be in the cause.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED ON THIS 24<sup>TH</sup> DAY OF JANUARY 2024**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Plaintiffs: Mr. Odunga.

Defendants: Mr. El Kindy

Wilson – Court Assistant.

