Njagi v Mugambi (Environment & Land Case 9 of 2018)
[2024] KEELC 1118 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1118 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ENVIRONMENT & LAND CASE 9 OF 2018

CK YANO, J

FEBRUARY 29, 2024

BETWEEN

LOISE MUTHONI NJAGI ..... PLAINTIFF

AND

MARGARET CIAMBAKA MUGAMBI ..... DEFENDANT

RULING

1. This ruling relates to a notice of motion application dated 9th June, 2023 by the defendant. The application is brought under section 3,3A of the *Civil Procedure Act* cap 21 Laws of Kenya, order 9 rule 9 and order 45 rule 1 of the *Civil Procedure Rules* 2010 and any other enabling provisions of the Law and seeks for orders that:

    1. Spent.

    2. Spent

    3. The Honourable court be pleased to review its Judgment/decree dated 22nd May 2019 in the following terms;

        a. The area physically occupied by the Respondent and her family over LR Magumoni/ Thuita/1318 is 3.50 acres and not 4.75 acres.

        b. The area physically occupied by the Applicant and her family over LR Magumoni/ Thuita /1318 is one point zero seven (1.07) acres and not 0.25 acres.

    4. The Applicant and the Respondent be respectively registered as proprietors in common over L.R Magumoni/Thuita/1318 in portions of one point zero seven (1.07) acres and 3.50 acres respectively.

5. The Respondent be ordered to surrender the Original title deed to the Land Registrar, Meru South (Chuka) for appropriate insertions/changes and in default the Honourable court do direct the Land Registrar to dispense with its production.

6. The Respondent be ordered to execute the requisite instruments to effect Nos 3 & 4 above and in default the court do empower its Deputy Registrar to execute the same.

7. Proceedings in Embu CMCC Succession No. 184 of 2011 (In the matter of the estate of Njagi Njuki (deceased) be stayed pending the hearing and determination of the application.

8. The Honourable court do issue such further or better order as will meet the ends of justice.

2. The application is supported by the affidavit of Margaret Ciambaka Mugambi sworn on 9th June 2023 and a further affidavit dated 3rd August 2023. The application is premised on the grounds inter alia, that judgment herein was delivered on 22nd May, 2019 declaring that the Respondent is entitled to 4.75 acres of land parcel no. Mugumoni/thuita/1318 registered in the name of the Applicant under the doctrine of adverse possession and the Applicant is left with 0.25 acres. That the registered area of the whole land is 5 acres which the court relied on in passing the judgment. That the land was yet to be subdivided and the Applicant had commissioned M/S Geoland Surveys who went to the ground on 26th May 2023 and carried out a topo cadastral survey in the presence of all the parties which showed inter alia, that the Applicant occupies one point zero seven (1.07) acres and the Respondent 3.50 acres of the said land. That the report further revealed that the surveyed area is 4.57 acres against the registered area of 5.00 acres, hence the need to review the judgment/decree of 22nd May, 2019 which was predicated upon the area physically occupied. It is the Applicant's contention that there is an error on the face of the record and that there is discovery of new and important evidence not within the parties' knowledge even after exercise of due diligence. That it is only fair, apt and in the interest of justice that this application be allowed.

3. In her affidavit in support of the application, the Applicant avers inter alia, that the Respondent is her co-wife. That the Respondent filed the suit claiming to be entitled to 4.75 acres of the suit land under the doctrine of adverse possession. That upon hearing the court (Hon. Justice P. M. Njoroge) on 22nd May, 2019 found in favour of the Respondent. That the judgment was predicated on the fact that the register of the Land showed and still shows the registered area as 5.00 acres.

4. The Applicant avers that the parties embarked on pursuit of the distribution of the estate of their husband in Embu CMCC Succession Cause No. 184/2019, but a serious contest between the two houses occurred leading the court to direct that surveyors go on the ground to ascertain the area occupied by each house. That part of the Parties' deceased husband's estate are parcel Nos. Magumoni/thuita/1319, Magumoni/thuita/1515 And Magumoni/thuita/513.

5. The Applicant avers that she commissioned M/S GEoland Surveys to go to the ground and ascertain inter alia, the manner of occupation and the acreage occupied by each house. That the said survey revealed that the Applicant's house occupies 1.07 acres while the Respondent's house occupies 3.50 acres. That this was the positon even when the suit was filed, heard and determined. The applicant has exhibited copies of the register and survey report marked "MCM 1" and "MCM 2" respectively. That the said survey report also revealed that the ground area is 4.57 acres against its registered area of 5.00 acres. The applicant states that this is something that has just come to her attention and did not know about hitherto. That this being so, and adverse possession being predicated upon actual occupation and user of Land on the ground inter alia, it is only just, fair and equitable that the judgment/decree dated 22nd May 2019 be reviewed to be in consonance with the reality on the ground. That as it were,

the decree, as it is, is not implementable on the ground since it exceeds the area on the ground by 0.43 acres.

6. In opposing the application, the Respondent filed grounds of opposition dated 10th July 2023 and a replying affidavit of even date and a further Replying Affidavit dated 3/10/2023. She avers inter alia, that she instituted this case against the applicant for adverse possession and judgment was entered in her favour on 22nd May 2019 wherein it was ordered inter alia, that she was entitled to be registered as the owner of 4.75 acres of the suit land. That the applicant preferred an appeal in the court of Appeal at Nyeri, Civil Appeal No. 157 of 2019 which was withdrawn on 13th June 2023 after the applicant failed to prosecute it for over 4 years. The Respondent avers that during the trial of this case, she provided the court with extensive documentation of her occupation and developments on the suit land for over 50 years and even after the applicant acquired title in 1993. That during the trial, the Applicant failed to produce any evidence that she or her children have any developments on the suit land, and that the court consequently found that they were not likely to be prejudiced by an order that the Respondent be registered the owner of 4.75 acres of the suit land. That the Applicant failed to exercise due diligence during the trial and cannot come around and attempt to retry the matter on purported new evidence which was well within their grasp during the trial.

7. The Respondent avers that having failed to prove her case at the trial and having failed to prosecute her appeal; the applicant is abusing the sacrosanct judicial process to attempt to retry their case by way of review where there is no error apparent on the face of the record and no new evidence that was not within their knowledge at trial. Further, that the applicant made an application for rectification of the Grant issued to both parties in Embu Succession Cause No. 184 of 2019 on 16th August 2019 acknowledging that the respondent succeeded in this case and was awarded 4.75 acres of the suit land. That the Applicant attempted to retry this case yet again in the Succession Court which lacked jurisdiction to make any determination on the suit land, and that sensing that they would not be successful came back to this court for review days before the succession matter was set to be heard. It is the Respondent's contention that the Applicant is abusing the judicial process by failing to exercise due diligence in trial, failing to prosecute the appeal in over 4 years, and misrepresenting to this court that the issue of occupation and extent is a new issue that could not be discoverable in trial after exercising due diligence. That it is only fair, equitable and in the interest of justice that this application be struck out and dismissed. The Respondent has annexed copies of the judgment, the appeal, and pleadings marked "LMN 1", "LMN 2" and "LMN 3" respectively.

8. By way of a rejoinder, the Applicant deposed in her further affidavit that the only issue is the extent of occupation of the land by both parties. That she cannot be accused of not calling a surveyor during the trial to indicate the extent of their respective houses occupation of the land, yet it was the Respondent's case. She stated that she had no notice of the filing of the appeal and the subsequent withdrawal.

9. The Applicant contends that the present application has merits because it will enable the court to know the reality on the ground and make it possible to implement the court decree. That the court cannot issue orders/decrees in vain.

10. The application was canvassed by way of written submissions which were duly filed by both parties through their advocates on record and which I have read and considered.

11. Having considered the application, the response and the rival submissions, I find that the only issue for determination is whether the judgment/decree made on 22nd May, 2019 should be reviewed in the manner sought by the applicant in the application dated 9th June, 2022.

12. Section 80 of the *Civil Procedure Act* cap 21 Laws of Kenya provides as follows:

> " Any person who considers himself aggrieved-
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> a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> 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."

13. In addition, order 45 rule 1 of the *Civil Procedure Rules* provides as follows:

> 1 (1) Any person considering himself aggrieved-
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> a. By decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> 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, 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.
>
> (2) Any party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review."

14. It is clear from the above provision of the law that a court can review its own judgment or order if there is 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 where there is a mistake or error apparent on the face of the record, or for any other sufficient reasons. It is also a requirement that the application has to be made without unreasonable delay. It has also been held that the expression "any other sufficient reason" appearing on order 45 rule 1 has to be interpreted in the light of other specified grounds.

15. The parties herein do not dispute that they are co-wives, both married to the late Njagi Njuki. The applicant is the registered owner of land parcel No. Magumoni/thuita/1318. The Respondent filed this suit seeking that she is entitled to 4.75 acres of the said land by way of adverse possession. Upon hearing the matter, this court (Hon. Justice P. M. Njoroge) on 22nd May 2019 found in favour of the Respondent. The Applicant now states that whereas the registered area of the suit land is 5 acres, the actual area on the ground is 4.57 acres out of which the Respondent occupies 3.50 acres while the Applicant occupies 1.07 acres. That there is need to review the judgment/decree which was predicated upon the area physically occupied since there was a claim for adverse possession. It is the Applicant's contention that the orders sought herein will make it possible to implement the decree of court of 22nd May, 2019.

16. I have perused the court record. In paragraph 12 of the judgment delivered on 22nd May, 2019, the court stated as follows:

> "12. The court notes that there was no surveyor's report tabled to show the court the positioning of the parcels and to confirm if they indeed overlap as claimed by the respondent. The respondent tabled a mutation form dated 12/5/1993 which includes some sketch maps of the properties. This mutation form was not produced by the maker as no one testified before the court in this respect. However, I do note that the back of the sketch map bears a note by the District Surveyor to the effect that "the registered area is more than the computed area by 0.404 Ha." None of the parties made it known if this issue was ever taken forward to be handled by the Land Registrar. Since the evidence of the potential overlap of plots 1318 and 1319 was not tabled and adequately canvassed, I believe the court would be upright at this juncture, to assume that the parcels are distinct."

17. In the judgment, the court noted that there was no surveyor's report tabled to show the court the positioning of the suit parcel and other parcels and to confirm if they indeed overlap. The court further noted that the District Surveyor had indicated that the "registered area is more than the computed area by 0.404 Ha." In my humble view, this in a way lends credence to what the applicant alleges in the application herein. I have also perused the Replying Affidavit sworn by the Applicant on 15th October 2018. The same is also annexed to the Respondent's further Replying Affidavit sworn on 3rd October, 2023 and marked "LMN." In paragraph 13 of that affidavit dated 15th October, 2018 which has been highlighted by the Respondent, the Applicant herein deposed that "the plaintiff does not occupy 4.75 acres of my land but a much less portion...."

18. While it is trite that while exercising the power of review the court cannot sit on appeal over its own decision, it is my view that a court of law in appropriate circumstances can review its judgment or order to conform with the decision made by the court and to facilitate the implementation or enforcement of the orders of court. A perusal of the application herein is one that no doubt is made in furtherance of the implementation of the decree herein. The orders sought in the application for review are meant to ensure the execution of the judgment and decree of this court. It is also trite that a court cannot issue orders in vain. A successful litigant such as the Respondent in this case ought to enjoy the fruits of her judgment. Therefore, the court having found that the Respondent's claim for adverse possession was successful, the Respondent is entitled to the portion that she has proved to be entitled to. That to me is the portion that the Respondent has been in possession and use for a period in excess of 12 years, and is the portion that ought to be registered in her name. However, in view of the alleged difference on the acreage on the title and the area physically on the ground, it is my view that the only way the correct positon can be ascertained is by invoking Section 80 of the *Land Registration Act* by directing the Land Registrar and the District Survey to visit the suit land and verify whether the area in the register tallies with the area on the ground, and if there is a difference, rectify and amend the register accordingly.

19. Consequently, I allow the application in the following terms:

    a. The Land Registrar and the District Surveyor, Meru South (Chuka) are directed to visit the suit parcel of Land LR No. Magumoni/thuita/1318 within 90 days in the presence of the parties or their authorized representatives to confirm the acreage of the land on the ground, and if the same does not tally with the acreage on the register, to effect the necessary amendment and/or rectification of the register.

b. Confirm the area physically occupied by the Respondent and the area occupied by the Applicant and sub-divide the land and issue titles in favour of the Respondent and the Applicant in terms of the area they each occupy.

c. The Applicant will meet the costs of the exercise to be undertaken in (a) and (b) above.

d. Each party to bear their own costs of the application

20. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH FEBRUARY, 2024

In the presence of:

Court Assistant – Martha

Ms. Kaimenyi for Plaintiff/Respondent

Ms. Kerubo holding brief for Arithi for Defendant/Applicant

C.K YANO,

JUDGE