



**Onchomba v Kenyanya & 2 others (Civil Suit 95 of 2007)  
[2024] KEELC 1021 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1021 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
CIVIL SUIT 95 OF 2007  
M SILA, J  
FEBRUARY 29, 2024**

**BETWEEN**

**JOYCE NYANSIABOKA ONCHOMBA ..... PLAINTIFF**

**AND**

**JOSEPH KENYANYA ..... 1<sup>ST</sup> DEFENDANT**

**ROSA KENYANYA ..... 2<sup>ND</sup> DEFENDANT**

**MARIA KENYANYA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application before me is that dated 19 June 2023 filed by the defendant/judgment creditor and the substantive prayer is prayer (3) thereof which seeks orders for this court to set aside, review, and vacate the judgment dated 7 February 2014. The application is based on the grounds inter alia that the applicants have discovered new and important matter and evidence indicating that the plaintiff obtained title by way of fraud without undertaking succession proceedings; that the applicants have discovered that there was no succession proceedings under the title South Mugirango/Bosinange/2855 and 2856, emanating from a defrauded title No South Mugirango/Bosinange/2809 from the parent title South Mugirango/Bosinange/439, which was registered in the names of two persons, Nyambeki Makori (deceased) and Nyakundi Makori (deceased); that the applicants have gone through the judgment and there are serious mistakes or error apparent on the face of the record; that the applicants have sufficient reason; that it is necessary for the court to correct the apparent error. The application is opposed.
2. To put matters into context, this suit was commenced by the plaintiff/respondent through a plaint which was filed on 20 August 2007. In the plaint, the respondent pleaded to be the registered proprietor of the land parcel South Mugirango/Bosinange/2855 (the suit land) measuring 1.2 Hectares. She pleaded that in October 2004, the applicants trespassed into the suit land and



commenced cultivation and that in the year 2007, they started erecting structures. She averred that they lodged a complaint at the Nyamarambe Land Disputes Tribunal, being Tribunal case No. 10 of 2006 and a decision in their favour made on 22 October 2006. However, the court was not persuaded to adopt the said decision. In the suit, she asked for an order of eviction of the applicants and for the them to be permanently restrained from the suit land.

3. The applicants filed defence where they denied that the respondent was the registered owner of the suit land. They pleaded that the land was fraudulently hitherto registered in the name of one Mary Bitengo, a stranger from Suneka Division. The particulars of fraud pleaded were as follows: -
  - a. The purported sale of South Mugirango/Bosinange/2855 between Mary Bitengo and the respondent was secretly done without the knowledge of the defendants;
  - b. Mary Bitengo never did succession from the original registered proprietor and the purported transfer was initiated by fraud and misrepresentation;
  - c. Failure to inform the defendants of succession cause if any as they were the true heirs of the original owner;
  - d. The plaintiff's active concealment of the true facts to the Land Registrar that Mary Bitengo was married in Wanjare and she was not a beneficiary at all;
  - e. The plaintiff having the knowledge that the defendants are the true heirs and then acted contrary;
  - f. The plaintiff and one Mary Bitengo deceived the Land Registrar;
  - g. Both the plaintiff and one Mary Bitengo obtained a title deed with unclean hands;
  - h. The plaintiff knew at the time of making the said wrongful representation purchased the piece of land with impunity, fraudulently, falsely and deceitfully from Mary Bitengo the stranger to the suit land.
4. They proceeded to plead that they are the true heirs of the suit land and that they never made any agreement with the plaintiff. They denied that they trespassed into the land in the year 2004 and claimed to have been in possession for over 30 years without the permission of the original owner of the land. They pleaded that the original owner of the suit land was Nyambeki Makori who died in 1984 and that she had no son, and according to Kisii Customary Law, she contracted a woman-to-woman marriage with three women, being Rosa Kenyanya (2<sup>nd</sup> defendant) married in 1975 and had three sons and three daughters; Maria Kenyanya (3<sup>rd</sup> defendant) married in 1970 and had one son and one daughter; and Josephine Makori, married later and had two sons and one daughter. They also raised issue that there was a pending suit, Kisii HCCC No. 66 of 2005 and Kisii HCCC No. 114 of 2002.
5. The suit was heard and judgment delivered by Okong'o J on 7 February 2014 in favour of the respondent. There was filed a Notice of Appeal on 26 February 2014 but it appears that no substantive appeal was ever filed. On 25 July 2022, the respondent, as decree holder, filed an application for the eviction of the applicants from the suit land. The application was not opposed and I allowed it in a ruling delivered on 2 February 2023. That is the status of the case before this application was filed.
6. The supporting affidavit is sworn by Rosa Kenyanya, the 2<sup>nd</sup> defendant. She has deposed that she got married to Nyambeki Makori in 1975 being a woman-to-woman marriage under Gusii customary law. That Nyambeki Makori also married two other women being Maria Kenyanya (3<sup>rd</sup> defendant) and Josephine Makori. She averred that Nyambeki Makori died in 1984; that she has searched in court for the case Kisii High Court Succession Cause No. 30 of 1998 in respect of Nyambeki Makori and



established that it does not exist at all. She has continued to aver that they were not informed of the stated succession cause if any. She has further stated that the suit land originated from the land parcel No. 439 whose owner was Makori Nyandwaro (deceased) and that he had transferred the land to his two wives, Nyambeki Makori and Nyabonyi Makori. She has deposed that the judge erred in concluding that the three wives married to Nyambeki Makori were not conferred with any rights for purposes of inheritance, and has proceeded to list those she believes were the rightful beneficiaries. She has averred that in 2001, one Mary Bitengo Michieka changed the title No. 2809 into her name without informing the other beneficiaries; that she later subdivided the land into the parcels No. 2855 and 2856 and sold the suit land. She has annexed what she believes is the grant of letters of administration in respect of Kisii High Court Succession Cause No. 30 of 1997 which shows the estate of Alfred Mariita Gichana. She avers that she stands to suffer substantial loss if she is evicted from the land as she will have no place to stay and it will be in the interests of justice to have the judgment reviewed.

7. The plaintiff opposed the application through Grounds of Opposition. Inter alia it is averred that this court lacks jurisdiction to hear issues relating to distribution of the estate of a deceased person. It is urged that the application is an appeal in disguise and that this court is functus officio in regard to the evaluation of evidence. It is added that there is no cogent evidence of the non-existence of Kisii High Court Succession Cause No. 30 of 1998 or of 1997; that the application has been made after unreasonable delay; that the applicants have only woken up after an auctioneer was nominated to enforce the orders of eviction.
8. I took in brief submissions of Mr. Sagwe, learned counsel for the applicants, and Mr. Mulisa, learned counsel for the respondent.
9. This is an application for review and such applications are governed by Order 45 of the [\*Civil Procedure Rules\*](#). Rule 1 thereof provides as follows: -
  - 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.
  - (2) A party who is not appealing from a decree or order may apply for a 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 the review.
10. From the above it will be noted that a party aggrieved by an order from which an appeal is allowed but not preferred, may seek review on the following grounds:-
  - (i) Discovery of new and important matter or evidence which was not available to the applicant and could not be produced by him at the time the order was made.
  - (ii) Mistake or error apparent on the face of the record; or
  - (iii) Other sufficient reason.



11. In all these, the application needs to be made without unreasonable delay.
12. Looking at the application, it would appear that it is made on grounds that there is discovery of new evidence and that there is a mistake apparent on the face of the record. From the supporting affidavit, it would appear that the alleged new evidence is discovery that there were no succession proceedings covering the land parcels South Mugirango/Bosinange/2855 and 2856 and that these two titles fraudulently resulted from the parcels No. 2809 and 439.
13. I have carefully gone through the record of this case. I can discern that there was an original land parcel South/Mugirango/Bosinange/439. This land was owned by one Makori Maage who had two wives, Nyambeki Makori and Nyabonyi Makori. This land was divided into two portions, one for Nyambeki and one for Nyabonyi. The land for Nyambeki Makori is the land parcel No. 2809. Nyambeki Makori only had daughters and no son. One of her daughters is the person mentioned in this application as Mary Bitengo. It would appear that Mary Bitengo moved to succeed the land that belonged to her mother and that is how she became registered as proprietor of the land parcel No. 2809. She then subdivided it into two parcels, being the parcel No. 2855 (the suit land) and the parcel No. 2856. She sold the suit land to the plaintiff/respondent herein and retained the parcel No. 2856.
14. The parcel No. 2856 was subject to the suit Kisii HCCC No. 114 of 2002, Rosa Kenyanya & Another vs Mary Bitengo Michieka. It will be observed that Rosa Kenyanya is the 2<sup>nd</sup> defendant herein and the deponent of the supporting affidavit. In that case, she contested the title of Mary Bitengo, raising the same issues raised in the suit herein, i.e that Mary Bitengo failed to inform them of any succession cause and fraudulently obtained title to the parcel No. 2809 which she later subdivided. That suit was heard and dismissed by Musinga J (as he then was) in a judgment delivered on 23 July 2010. In that judgment, Musinga J held that Rosa Kenyanya was not married to Nyambeki Makori in a woman-to-woman marriage and there was no obligation to involve her in the process of applying for letters of administration for the estate of Nyambeki Makori. Within that suit, the court file in respect of the estate of Nyambeki Makori was produced, and the record shows that this was Succession Cause No. 30 of 1998.
15. What the applicants have produced in this application, and which they allege is the new evidence that they have discovered, is records in respect of Succession Cause No. 30 of 1997 but that is not the succession cause in respect of the estate of the late Nyambeki Makori. It cannot be said that there is any discovery of new and important evidence in respect of the estate of Nyambeki Makori. First the issue relating to the succession cause was part of the pleadings of the defendants which I have taken the trouble to set out at the beginning of this ruling. Secondly what the applicants allege to be discovery that there was no succession in respect of the estate of Nyambeki Makori has no bearing to this case at all. The file in respect of the estate of Nyambeki Makori was produced in the suit Kisii HCCC No. 114 of 2002 and the record shows that it is Kisii High Court Succession Cause No. 30 of 1998 not Succession Cause No. 30 of 1997 which is what the applicants have annexed. I don't see why the applicants say that there was no succession cause at all. In any event, the issue that there were never succession proceedings in respect of the late Nyambeki Makori is not new given that it was one of the issues pleaded in the defence. If at all the applicants thought that there was no succession cause, or that a grant of letters of administration was procured fraudulently by Mary Bitengo, they had opportunity to raise that during the hearing and avail evidence of the non-existence of such a case. They cannot wait for nine years after judgment to now allege that they have discovered that the succession cause does not exist, forget for a moment that I have demonstrated that the succession file exists and was indeed produced during the hearing of the suit Kisii HCCC No. 114 of 2002. The question over the grant of letters of administration held by Mary Bitengo was exhaustively canvassed in Kisii HCCC No. 114 of 2002 and the judge saw absolutely nothing at all. Moreover, the plaintiff herein was a purchaser



from Mary Bitengo, and was not the one who obtained the grant, and she cannot thus be called upon to answer questions regarding issue of the grant of letters of administration in respect of the estate of Nyambeki Makori.

16. Whichever angle you look at it, there is no new evidence that has been provided within this application, and certainly no new evidence that has all of a sudden come to the attention of the applicants, and which could not be provided during the hearing of the case.
17. The other issue is that there is an error apparent on the face of the judgment but I have seen no error at all. The learned judge proceeded to evaluate the pleadings and the evidence and concluded that the applicants have no right over the suit land. That cannot be said to be an error on the face of record. If the applicants think that judgment ought to be in their favour, the avenue is to appeal, not to seek a review. I need not say any more on that.
18. The applicants say that executing the judgment will be unjust to them but I see nothing here. It is their continued presence in the suit land which is unjust to the plaintiff who is the successful litigant and deserves the fruits of her judgment. The applicants have lost two successive suits and cannot allege that they are entitled to continue being in possession of the suit land.
19. I think I have said enough to demonstrate that there is no merit in this application and it is hereby dismissed with costs.
20. The orders of eviction may be executed forthwith if the applicants do not give vacant possession.
21. Orders accordingly.

**DATED AND DELIVERED THIS 29 DAY OF FEBRUARY 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of:

Mr. Sagwe for the defendants/applicants

Mr. Mulisa for the plaintiff/respondent

Court Assistant – David Ochieng

