



Makworo (Being Administrator of the Estate of Makworo Nyamareri) v Orina (Environment and Land Case 647 of 1994) [2024] KEELC 1067 (KLR) (28 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1067 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND CASE 647 OF 1994**

M SILA, J

FEBRUARY 28, 2024

BETWEEN

**DAVID MOMATA MAKWORO PLAINTIFF
BEING ADMINISTRATOR OF THE ESTATE OF MAKWORO NYAMARERI**

AND

NAFTAL BOSIRE ORINA DEFENDANT

RULING

1. The application before me is that dated 21 November 2022 filed by the plaintiff/decree holder. He seeks the following orders :-
 - a. This Honourable Court be pleased to review its decree dated 12 November 2002 to read that the total acreage for land parcel Ekerubo Settlement Scheme/50 is not 47 acres but 52.08 acres and the entitlement for the plaintiff and defendant is or should be 26.08 acres each and not 23.5 acres.
 - b. Costs of this suit be provided for.
2. This is an old case that was filed in the year 1994. The original plaintiff was uncle to the defendant and he sued him seeking orders to have the land Ekerubo Settlement Scheme/50, which was registered in the name of the respondent, divided into two. In his pleadings, the plaintiff averred that he contributed to the purchase of the land and was thus entitled to a half a share of it. According to his pleadings, his half share would be 23.35 acres and he explicitly asked for an order for transfer of 23.35 acres. Upon hearing the case, the court was persuaded that the plaintiff had proved his case and granted the orders in the plaint, in a judgment that was delivered on 1 October 2002. Ultimately a decree was issued in the favour of the plaintiff in the following terms –



- a. A declaration that both the plaintiff and defendant jointly bought one share in Ekerubo FCS Limited and are thus entitled to land now registered as Ekerubo/50 measuring 46.7 acres.
 - b. A further declaration that being joint owners of land Ekerubo/50 which measures 46.7 acres the plaintiff is entitled to ½ share which measures 23.35 acres.
 - c. That the defendant be ordered to transfer the ½ share measuring 23.35 acres in land Ekerubo/50 to the defendant.
 - d. The defendant, his agent and/or servants be permanently restrained from interfering with or evicting the plaintiff from ½ share in land Ekerubo/50 which measures 23.35 acres.
 - e. Costs of this suit.
3. After judgment was delivered, the plaintiff died. He was substituted by his legal representatives for purposes of executing the decree. It is apparent from the record that the respondent did not cooperate towards execution of the decree and the applicant made an application to have the Deputy Registrar execute the requisite documents. In a ruling delivered on 1 October 2020, the court (Onyango J) allowed this application and directed the Deputy Registrar to execute the transfer forms to effect the decree.
 4. In this application, the applicant avers that in a bid to execute the decree, he engaged the services of a survey firm by name of Golflex Consultants who upon carrying out survey of the land found that its total acreage is 52.08 acres and not 47 acres. He therefore believes that his entitlement is half of 52.08 acres, that is 26.04 acres, and not 23.35 acres as noted in the decree. That is why he seeks review of the decree.
 5. Nothing was filed by the respondent to oppose the application and I have given it due consideration.
 6. This is an application for review and Order 45 applies. Order 45 Rule 1 states 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.
 7. 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.
8. In this application, the applicant more or less states that it is at the time of execution that he has discovered that the suit land measures 52.08 acres and not 47 acres. It may be a new discovery, but the size of the land was one which could have been established even before the suit was filed, and at the time of trial for land does not expand. In other words, this is not new evidence which could not have been made available and could not be produced by him when the decree was made. The applicant of course does not base his application on any error or mistake apparent on the face of the record for there is none. In his pleadings, the plaintiff asked for land measuring 23.35 acres and that is what the court gave him. I also do not think that there is any sufficient reason to vary the decree. First, this is a judgment that was passed in the year 2002 which is about 22 years ago. Secondly, the subject matter is land to which the aspect of possession needs to be considered. If the decree is to be expanded in terms of acreage, it may very well interfere with land that has been in possession of the defendant for all these years, which may lead to displacement of the defendant and an award to the plaintiff for land which he has never been in possession of and which he never thought of claiming in the first instance. I have looked at the survey report and the only thing it mentions is the acreage and it does not give any indication on the possession and settlement on the ground.
9. Whichever angle I look at the application, I am unable to bring myself to allowing it. I proceed to dismiss it but make no orders as to costs. The plaintiff remains entitled to land only measuring 23.35 acres which is what he asked for in the plaint. The decree to be executed to grant him 23.35 acres.
10. Orders accordingly.

**DATED AND DELIVERED THIS 28 DAY OF FEBRUARY 2024 JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
AT KISII**

Delivered in presence of: -

Mr. Soire for the Plaintiff/Applicant

No appearance for the Defendant/Respondent.

Court assistant - David Ochieng

