Gitari v Mati & 3 others (Environment & Land Case 740 of 2013)
[2024] KEELC 831 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELC 831 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT & LAND CASE 740 OF 2013

JM MUTUNGI, J

FEBRUARY 22, 2024

BETWEEN

JOSEPH GACHOKI GITARI ..... APPLICANT

AND

PENINA MUTHONI MATI ..... 1ST RESPONDENT

MOSES MURIITHI GICHUKI ..... 2ND RESPONDENT

JOHN P KARANJA MWANGI ..... 3RD RESPONDENT

JAMES JOE NYAMU MURIITHI ..... 4TH RESPONDENT

RULING

1. This Ruling is in respect of the Notice of Motion application dated 19th December 2022 by Joseph Gachoki Gitari (Applicant) predicated upon the provisions of Order 45 Rule 1 of the Civil Procedure Rules. The Applicant prays for orders:

    1. That the judgment entered herein on 22nd July 2022 be reviewed and set aside.

    2. That the registration of the 1st respondent/plaintiff as the proprietor of L.R No. Kibare/ Mikarara/726 pursuant to the said judgment be cancelled.

    3. That Entries No. 9,10 & 11 of the Green Card for L.R No. Kabare/Mikarara/726 be vacated and cancelled.

2. The application is supported on the grounds set out on the application and the supporting affidavit sworn in support by the Applicant. The Applicant avers that he has been the registered owner of the suit land and has been in occupation of the land since 2013 and has extensively developed the suit land. He avers that he was not a party to the instant suit and that the judgment delivered on 22nd July 2022 by the Honourable Justice E. Cherono ordered for the cancellation of his title without affording him

an opportunity to be heard. The Applicant further avers that the suit land has been transferred to the 1st Respondent who has since threatened him with eviction in a bid to actualize the impugned orders. He contends that the 1st Respondent and other parties in the suit acted fraudulently by deliberately concealing the facts of the instant case. Consequently, the Applicant asserts that he has advanced sufficient reasons to warrant a review and setting aside of the Judgment entered on 22/7/2022.

3. The Application is vehemently opposed by the Plaintiff/1st Respondent, Peninah Muthoni Mati, through a Replying Affidavit sworn and dated on 16th January 2023. The 1st Respondent contends that upon delivery of the judgment, the Defendant's and the Applicant were served with the order and they were granted a thirty days' period to vacate the suit land but they disobeyed the court orders. The 1st Respondent further avers that the Applicant bought the suit land during the pendency of this suit with knowledge of the suit over the suit property. It is her position that the court cancelled the certificates of title held by the defendants as they had been acquired illegally and/or through a corrupt scheme. The 1st Respondent takes the view that the Applicant should seek redress from the 2nd Respondent as he was the one who sold him the land knowing that it was disputed. The 1st Respondent states that the Applicant had not advanced good reasons to warrant a review of the court's order as his claim was based on a title that was bad in law as it had been transferred from a deceased estate without regard to the laws of succession governing the estate of Thiaka Kamau. She prays that the application be dismissed with costs as it lacks merit.

4. The 1st Defendant, Moses Muriithi Gichuki, filed his affidavit in support of the application, dated 8th February 2023. He stated that he became the registered owner of Kibare/Mikarara/726 measuring 0.101 hectares in 2006 vide a court order, which he later sold to Geoffrey Githinji Kamichi on 26th June 2007 who later sold the suit property to the Applicant herein. He further stated that in their joint statement of defence dated 12th July 2012, they (the 2nd Respondent and 3rd Respondent) disclosed that the suit property had been sold to a third party. He averred that the Plaintiff should have joined the Applicant to the suit as she was seeking to have the title of the suit property cancelled.

5. The Applicant filed a further supporting affidavit to the application dated 19th December 2022 in which he clarified that he bought the suit property from Geoffrey Githinji Kimicha and not Thiaka Kamau (the deceased) as he had initially stated in his affidavit. He also stated that the said Geoffrey Githinji Kimicha was not a party in the suit.

6. On 19th June, 2023 the Court directed that the application be canvassed by way of written submissions. The Applicant filed his written submissions on 6th July 2023; the 1st Respondent filed hers on 24th August 2023; while the 2nd and 3rd Respondents filed theirs on 31st August 2023. I have considered the application, the affidavit in support and the Replying Affidavit in opposition and I have considered the submissions by the parties. The singular issue for determination in this matter is whether the Applicant has made out a case to justify the Court to exercise its discretion to review its' Judgment dated 22nd July 2022.

7. Order 45, Rule 1(a) and (b) Civil Procedure Rules makes provision for review and provide as follows:-

> "(1). Any person considering himself aggrieved-
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> (a) by a 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, 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."

8. Section 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya makes provision for the substantive Law on review of decrees and orders while Order 45 Rule 1 gives the procedure and the conditions that need to be satisfied by an Applicant for review: -

Section 80 provides thus:-

80. "Any person who considers himself aggrieved-

(a) by a Decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(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.

9. Under Section 80 of the *Civil Procedure Act*, the Court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously.

10. On whether the judgment herein can be reviewed and/or set aside, Order 45 Rule 1 (b) outlines the conditions that must be met in an application for review of a decree or order as follows:

1. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made,

2. Mistake or error apparent on the face of the record, or

3. Any other sufficient reason,

4. The application must be made without unreasonable delay

11. The Applicant's entire claim is that he was not a party to the present suit and did not make any representation in the suit as he did not know of its existence, and could therefore not produce his evidence at the hearing. The Applicant exhibited an abstract of title for land parcel Kabare/mikarara/726 to illustrate that he was registered as per entry No. 7 on 26/3/2013 as owner and was therefore adversely affected by the Judgment. The 1st Respondent in response claimed that the Applicant knew or ought to have known of the existence of the suit for reasons that the Applicant purchased his parcel during the pendency of the suit. She averred that despite the fact that the 2nd Respondent sold his interest in the suit land, he still proceeded with the suit as though he had

an interest in it and the Court entered Judgment against the defendants jointly and severally. She further averred that the Court having found that the 2nd Respondent acquired the suit land illegally, unprocedurally and/or through a corrupt scheme, the subsequent purchasers are doomed to suffer the same predicament. It was her position that the 2nd Respondent sold his interest in the land during the pendency of the instant suit, that he did not inform the Court before or after selling it and as such his intention was to defeat the ends of justice. The 2nd and 3rd Respondent admit that they knew that the 2nd Respondent had sold his interest in the land to third party. It was their position that paragraph 4 of their amended defence dated 12th July 2012 read as follows "...the 1st defendant later sold land parcel number Kabare/Mikarara/726 and he is no longer the owner of the said parcel of land." The 2nd and 3rd Respondent further submits that in paragraph 4 of the witness statement dated 21st December 2018, the 2nd Respondent stated that "...the 1st defendant has since sold his parcel and is no longer the proprietor of the said land but the owner of the land parcel number Kabare/Mikarara/726 is one Joseph Gachoki Gitari who is not a party in this case." The 2nd and 3rd Respondent in their submission faults the Plaintiff/1st Respondent for not taking the action to join the third parties despite this disclosure. The Applicant in support of his submissions placed reliance on the Case of Lilian Wairimu Ngatho & Another –vs- Moki Savings Co-operative Society Ltd & Another, Beatrice Njeri Gachukia & 19 other Interested Parties (2022)eKLR where Oguttu, J stated thus:- "... It is my humble opinion, that if the original title, which was subject of the proceedings, have been subdivided and the resultant subdivision created and transferred in favor of 3rd parties, the it behooved the Plaintiffs/ Respondent herein to have pursued the matter, including seeking amendment and joinder of the parties who(sic) were the beneficiaries of the subdivisions."

12. In the same Case of Lilian Wairimu Ngatho & Another –vs- Moki Savings Co-operative Society Ltd (2014) eKLR Nyamweya J(as she then was) dismissing an application for review stated that:

> " More importantly however, the fact of third parties being on the suit properties was known to the Defendants which is the party that sub-divided the original parcel of land, and sold the sub-divisions to the Applicants or other third parties from whom the Applicants purchased the same. This was done by the Defendants while knowing that this and previous suits were in court. It was incumbent upon the Defendants to join the third parties and/or inform them about the suit involving their investments on the suit property. The Applicants' claim in these circumstances is against the Defendants."

13. I associate myself with Nyamweya J's observations which I find to resonate well with the circumstances in the instant matter as the fact of the Applicant being on the suit property was known to the 2nd Defendant who is the party that sold the original parcel of land to Geoffrey Githinji Kimicha, from whom the Applicant purchased the land from. This was done by the 2nd Defendant while knowing that this suit was pending in court. It was incumbent upon the 2nd Defendant to join the third parties and/or inform them about the suit involving their investments on the suit property. As a consequence, the Applicant's claim in these circumstances should be against the 2nd Defendant and not the 1st Respondent. I do also agree with the observations of Oguttu J that where the suit land has been subdivided as at the time of commencing the suit, then it becomes incumbent upon the Plaintiff to seek for joinder of the persons registered as the proprietors of the resultant parcels because they are entitled to equal protection of the law and need to be aware that their title was under challenge. In the instant case, the Plaintiff did in fact sue the three defendants who were the registered owners of the three resultant parcels of the original suit land. By their own admission, the suit land was sold to two proprietors during the pendency of this instant suit, in 2007 immediately after the suit commenced in 2006 to Geoffrey Githinji Kimicha and in 2013 to the Applicant, with the knowledge of the 2nd and

3rd Respondent who did not inform the Court about the transaction. Expecting the Plaintiff to keep up with the many times the land changes hands is placing unnecessary burden on the Plaintiff's part.

14. The Plaintiff pleaded the doctrine of lis pendens. The doctrine of lis pendens is a common law principle which was incorporated under Section 52 of the Indian Transfer of Property Act, 1882 (now repealed) which was applicable to Kenya. This Section provided as follows:-

> "During the active prosecution in any Court having authority in British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose."

15. The intent of Section 52 of the ITPA 1882 (now repealed) was to prohibit the transfer of a property the subject of Court proceedings to a third party during the pendency of a suit. The Court in the Case of Carol Silcock v Kassim Sharrif Mohamed [2013] eKLR, cited the Case of Abdalla Omar Nabhan Vs The Executor of the Estate of Saad Bin Abdalla Bin Abuod & Another, (2013) eKLR where it was held that:

> "...the purposes of the principle of lis pendens is to preserve the suit property until the suit is finally determined or until the court issues orders and gives terms on how the suit property should be dealt with. The doctrine of lis pendens is founded on public policy and equity."

16. In Manwji vs U.S. International University and Another (1976-80) KLR 229 Justice Madan, while addressing the purpose of the principle of lis pendens adopted the holding in Bellamy vs Sabine (1857) 1 De J 566, 584 where Turner L J held as follows:-

> "It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceedings."

17. In the same Case, Cranworth L J observed as follows:

> "Where a litigation is pending between a Plaintiff and Defendant as to the right of a - particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigating parties but also on those who derive title under them by alienation pending the suit whether such alienees had or had no notice of the proceedings. If that were so, there could be no certainty that the proceedings would ever end..."

18. I entirely agree with the above passage. It will be a mockery of justice for the court to subject the Plaintiff to yet another rigour of litigation as against the Applicant. The argument by the Applicant, the 2nd and 3rd Respondent flies in the face of the very mischief that the principle of lis pendens is supposed to address.

19. In the Abdalla Omar Nabhan case (Supra), Angote J held as follows:

> " In the absence of an injunctive order, a party may dispose of a property to a third party but the final judgment or order of the court shall issue as though such a sale or transfer never took place and the judgment shall be binding on the third party. The court shall not be concerned with the developments or investments that such a third party would have put in the property because everybody is presumed to have known about the existence of a suit in respect to such a property.....A party who purchases a property and invests in it while a suit is pending, does so at his own risk notwithstanding the absence of an injunctive order duly registered against the title."

20. That is the unfortunate situation that the Applicant has found himself in this matter. It does not matter that he was not aware of the pending suit. The fact remains that the suit property was transferred to him pendente lite.

21. Certainly, the doctrine of lis pendens is in tandem with the provisions of Sections 1A and 1B of the *Civil Procedure Act*, which provides for the overriding objectives that should guide the courts in all Civil matters, otherwise known as the oxygen principle (O2). In the Case of Mradula Suresh Kantaria Vs Surech Nanillal Kaptaria; Civil Appeal Number 277 of 2005, the Court of Appeal observed as follows:

> " In this regard, we believe one of the principles of the double O principle is to enable the Court to take case management principles to the centre of the Court process in each case coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap."

22. The Applicant further averred that the Judge made an error when he ordered for the registration of the 1st Respondent as the proprietor of the suit land instead of the estate of the deceased, which he contended was an error apparent on the face of the record and hence this application.

23. In the Case of Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR John M. Mativo Judge (as he then was) laid out the following principles in regard to applications for review: -

> " (i). A Court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
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> (ii). The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
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> (iii). An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
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> (iv). An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
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> (v). A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/Judgment of a coordinate or larger Bench of the tribunal or of a superior Court.
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> (vi). While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development

cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

(vii). Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the Court/Tribunal earlier.

(viii). A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

(ix). Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

(x). The power of a Civil Court to review its Judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

24. I wish to state that I am in full agreement with the exposition of the applicable principles succinctly explained by Mativo, J (as he then was) in applications for review. The application for review on grounds of error apparent on the face of the record should be just that and not on any other ground. An error apparent on the face of the record must be such an error which must strike one on simply looking at the record and would not entail any protracted process of reasoning on points where there may plausibly be two opinions. Where an error on a substantial point of law stares one in the face, and there could possibly be no two opinions, a clear case of error on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may possibly be two opinions cannot be said to be an error apparent on the face of the record. Again if a view adopted by the court in the original record is a possible one, it cannot be an error apparent in the face of the record even though another view was also conceivable. In other words, it must be an error and it must be one which must be manifest on the face of the record. Under the guise of review, parties are not entitled to rehearing of the same issue. An error can be said to be apparent on the face of the record only if such error is patent and can be located without any elaborate argument and without any scope for controversy with regard to such error, which stares at the face by a mere glance at the Judgement.

25. In the instant case, the 2nd and 3rd Respondents argued in the original record that the Plaintiff/1st Respondent was not the registered owner and thus the orders she was seeking were not amenable. In paragraph 3 of their written submission filed on 11th May 2022, they stated "The Plaintiff also seek to have the 3 parcels of land registered in her name. It's on record as per the evidence and also the exhibits produced, that the Plaintiff has never at any one time been the registered owner either of the original parcel number Kabare/Mikarara/354 or the resultant portions of sub division. Her prayers are therefore misplaced and without any legal basis." Additionally, the 2nd Defendant/3rd Respondent in his written statement dated 21st December 2018, stated that Peninah Muthoni Mati could not be registered as the proprietor of the suit land as she was never the proprietor of the suit land. The issue was

tackled in the Judge and in my view the defendants should have appealed the decision of the Learned Trial Judge if they were dissatisfied with the outcome. What the Applicant is doing is challenging the locus standi of the Plaintiff/1st Respondent. In the case of Julian Adoyo Ongunga v Francis Kiberenge Abano (2016) eKLR, Justice A. Mrima commenting on the issue of locus standi stated as follows:

> " Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties."

26. I agree with the observations of Mrima, J that the issue of locus standi of a party is vital in a civil matter. Having raised it at the trial court, and the Court having decided on the issue the recourse that would be available for the defendants was to appeal the decision of the Learned Trial Judge because sneaking it back as an error apparent on the face of the record cannot serve any purpose as this will amount to re hearing an issue that was dealt with at the trial. Be that as it may, and for the avoidance of doubt, I have perused the record of the original file and I have seen that the Plaintiff/1st Respondent did in fact produce letters of administration issued to Peninah Muthoni Mati on 16th August 2006 by the Senior Resident Magistrate. She filed the instant suit as the Legal Administrator of the estate of Thiaka Kamau. Section 2 of the *Civil Procedure Act* defines legal representative as follows;

> " means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued".

On the evidence presented before the trial Court it was evident that the Plaintiff/1st Respondent was acting in the capacity of the Legal Representative of the estate of Thiaka Kamau and it cannot amount to an error apparent on the record as claimed by the Applicant.

27. The issue that now remains outstanding is whether the Applicant has established any one of the conditions prescribed under Order 45 Rule 1 of the Civil Procedure Rules 2010 upon which review may be granted. In my view the Applicant having not been a party in the proceedings resulting in the impugned Judgment, the only available ground upon which he could possibly review was to demonstrate there was sufficient cause to warrant a review of the Judgment. On the evidence there is no doubt that the Applicant purchased the suit property when the present suit was pending in Court. The person who sold the property to him was aware or ought to have been aware of the pendency of the suit. It did not matter that there was no injunction/restriction registered against the title. The Lis pendens principle was applicable in the circumstances of the instant matter. The Applicant took the risk that there was no pending litigation affecting the property. Unfortunately, the present litigation was pending and the person who sold the property to him was aware of the fact. The decision of the Court binds all those who are party to the suit and any other persons who the parties to the suit may have transacted with during the pendency of the suit in regard to the property the subject matter of the suit. That indeed is the essence of the Lis pendens principle.

28. Thus it is my finding that no sufficient cause has been demonstrated to warrant a review of the Judgment delivered on 22nd July 2022. The Notice of Motion application dated 19th December 2022 is without any merit and the same is ordered dismissed.

29. I order that each party bears their own costs of the application.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH VIDEO LING THIS 22ND DAY OF FEBRUARY 2024.

J. M. MUTUNGI

ELC - JUDGE