Yako Supermarket (K) Limited & another v National Land Commission & 3 others (Civil Appeal (Application) 14 of 2021) [2024] KECA 125 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KECA 125 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL (APPLICATION) 14 OF 2021

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 9, 2024

BETWEEN

YAKO SUPERMARKET (K) LIMITED ..... 1ST APPLICANT

SUDHIR KHETIA ..... 2ND APPLICANT

AND

NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

THE CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF LAND, HOUSING AND URBAN DEVELOPMENT ..... 3RD RESPONDENT

THE BOARD OF MANAGEMENT KAKAMEGA PRIMARY SCHOOL ..... 4TH RESPONDENT

(Being an Application for Review of the Judgment of the Court of Appeal at Kisumu, (Kiage, Mumbi Ngugi & Tuiyott, JJA.) dated 26th May, 2023 in CIVIL APPEAL No. 14 of 2021)

RULING

1. The application before the Court is dated 23rd July, 2023. It is expressed to be brought under sections 3(2) and 3A of the *Appellate Jurisdiction Act*; Rule 1(2), 35(2) and 42 of the Court of Appeal Rules and Article 159(2)(d) of *the Constitution* of Kenya. In the main, it has a single substantive prayer expressed thus: "that the Court be pleased to review and set aside the decision of Justices P. Kiage; Mumbi Ngugi and F. Tuiyott, JJAs delivered on 26th May, 2023."

2. The articulated basis for the application is that the applicant has discovered new and important matter or evidence which after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time when the judgment was delivered.

3. A short history of the dispute is necessary to establish the context.

4. The applicants instituted the suit through a petition to the Environment and Land Court (ELC). Their contention was that the 1st applicant is the registered owner of all that parcel of land known as Kakamega Town Block II/292 (originally LR No. 1407/208 – plot No. 32) while the 2nd applicant is the registered owner of all that parcel of land known as Kakamega/Municipality Block II/252 (originally LR No. 1407/208-plot No. 32 (jointly, the Suit properties). The applicants claimed that they acquired the suit properties for valuable consideration after exercising all due diligence which disclosed that the suit properties were available for sale and/or allocation, free of any encumbrances and without any defects whatsoever.

5. It was the applicants' claim that despite having exercised due diligence, and despite them being bona fide purchasers for value without notice of any defects in the titles of the Suit properties, the 1st respondent unlawfully and illegally purported to revoke their titles to the Suit properties on the claim that they were illegally acquired public property. The revocation was made vide a decision by the 1st respondent dated 8th October, 2015. The revocation was done following a review of the grants and public hearings conducted in the year 2014. The basis of the revocation of the titles was that the properties were earmarked for public utilities (school playground) and were not available for allocation to the applicants.

6. The applicants pivoted their suit from the constitutional premise that they were the absolute and indefeasible owners of the Suit properties and that, therefore, their property rights are guaranteed, respected and protected by Article 40 and secured in accordance with the principle embodied in Article 60 (1) (b) of *the Constitution* of Kenya.

7. At the ELC, the applicants prayed for the following orders all predicated upon their articulated position that they were bona fide purchasers of the Suit properties for value without notice of any defect in title:

    a. The honourable court be pleased to hold and declare that the petitioners are the registered proprietors of Kakamega/Municipality Block II/252 and Kakamega/Municipality Block II/292 measuring approximately 0.33 hectares and 0.30 hectares respectively and situated in Kakamega District, within Kakamega County.

    b. The honourable court be pleased to hold and declare that under section 14 of the *National Land Commission Act*, 2012 the 1st respondent can only review grants of public land as defined under article 62 of *the Constitution* of Kenya and does not extend to private land as defined by Article 64 of *the Constitution* of Kenya, 2010.

    c. The honourable court be pleased to hold and declare that since Kakamega/Municipality Block II/252 and Kakamega Town Block II/292 are registered in the names of the petitioners herein the same is private land in terms of Article 64 (b) of *the Constitution* of Kenya, 2010, the 1st respondent lacks jurisdiction to review the same allegedly under section 14 of the *National Land Commission Act*, 2012, revoke/or direct the revocation of the certificate of title and that the resultant proceedings, hearing and determination undertaken without jurisdiction and are thus ultra-vires, null and void;

    d. The honourable court be pleased to hold and declare that since Kakamega/Municipality Block II/252 and Kakamega Town Block II/292 registered in the names of the petitioners herein is private land in terms of Article 64 (b) of *the Constitution* of Kenya, 2010, the 1st respondent lacks jurisdiction to review the same allegedly under section 14 of the *National*

Land Commission Act, 2012, revoke/or direct the revocation of the certificate of title and that the resultant proceedings, hearings and determination undertaken without jurisdiction and are thus ultra-vires, null and void;

e. The honourable court be pleased to hold and declare that the 1st respondent has infringed, infracted and violated the petitioners' inviolable right to a fair administrative action and fair hearing protected under Articles 25, 47 and 50 (1) of *the Constitution*.

f. The honourable court be pleased to hold and declare that the 1st respondent breached the petitioners' legitimate expectation that it would hold its title to the suit property until its title was declared unlawful as by law provided.

g. The honourable court be pleased to hold and declare that the 1st respondent has infringed, infracted and/or violated the petitioners' right to property decreed under Articles 40 as read with Article 60 (1) (b) of *the Constitution*.

h. The honourable court be pleased to hold and declare that the report dated 8th October, 2015 is illegal, irregular, unprocedural and unconstitutional and void for all intents and purposes.

i. An order of certiorari do issue removing into this honourable court for purposes of being quashed the entire order of 8th October, 2015 to the extent that it revoked the petitioners' titles to Kakamega/Municipality Block II/252 and Kakamega Town Block II/292.

j. An order of Prohibition be and is hereby issued prohibiting the 3rd respondent, its servants, agents or in any manner whatsoever from revoking or lodging any caution or caveat or restriction whatsoever on the certificates of lease over Kakamega/Municipality Block II/252 and Kakamega town Block II/292 registered in the name of the petitioners.

k. An order of permanent injunction directed at the 1st, 2nd, 3rd and 4th respondents, their agents, officers or any person whosoever or howsoever acting on their behalf from interfering in any way whatsoever with the petitioner's proprietorship or title Kakamega/Municipality Block II/252 and Kakamega town Block II/292;

l. The honourable court be pleased to award the petitioners general damages against the respondents jointly and severally for losses and inconveniences suffered by the petitioner;

m. The honourable court be pleased to award the petitioners exemplary damages against the 1st respondent for breach of the petitioners' fundamental rights;

n. The costs consequent upon this petition be borne by the respondents in any event on indemnity basis;

o. The honourable court do award interest on (l),

(m) and (n) at the prevailing court rate of 14% from the date of filing of suit till payment in full.

(p) The honourable court do make any such other or further orders as it may deem just and expedient in the circumstances to remedy the violation of the petitioner's fundamental rights.

8. The suit at the ELC was resisted by the respondents. In a judgment dated 29th July, 2020, the ELC (Matheka, J.) dismissed the petition in its entirety. In the consequential part of the judgment, the learned Judge found and held:

> "I find that land parcel No. Kakamega/Municipality Block II/252 and Kakamega Town Block II/292 were initially public land reserved for the 4th respondent that were illegally

alienated into private property and later acquired by the petitioners herein. I find the suit land falls within land that was planned for a playing field for the 4th respondent. The school being a public institution, the land it occupies and utilizes as a playing field is therefore public utility and was not available for allocation. The allocation was irregular and unlawful."

9. Dissatisfied with the decision of the ELC, the applicants proffered an appeal to this Court. This Court, in a judgment dated 26th May, 2023 (Kiage, Mumbi Ngugi & Tuiyott, JJAs) dismissed the appeal and affirmed the ELC judgment in its entirety. The applicants are now before us with the present review application.

10. Quite oddly, the only respondent who answered the application is the 4th respondent despite the other parties having been duly served. Nonetheless, the 4th respondent appeared and put up a spirited opposition to the application.

11. The gravamen of the applicants' case for review can be easily stated. At the ELC, the applicants alleged that the 1st respondent, the National Land Commission, had, without jurisdiction, and without substantive merit, made a determination that the suit properties were public properties which had been allocated to the 4th respondent and were, therefore, illegally allocated to the applicants.

12. The applicants' case was that they were the absolute and indefeasible owners of the suit properties, duly protected by *the Constitution*. They averred that the 1st applicant bought Kakamega Town Block 11/92 from one Michael Odwoma on 5th February, 2011 while the 2nd applicant, who is a director of the 1st applicant, purchased Kakamega Town Block 11/252 from Kito Pharmaceuticals Limited on 20th August, 2011.

13. On 28th June, 2013, the applicants received a notice from the 1st respondent that the latter had received complaints that the applicants had illegally "grabbed" the two parcels which were public properties initially allocated to the 4th respondent as a playing field for the children. The 1st respondent informed the applicants that it was carrying out a review of the suit properties and invited the applicants or their representatives to make representations. The appellants appeared before the 1st respondent and made representations. They were also represented by counsel.

14. The 1st respondent rendered its decision on 8th October, 2015. It concluded that the suit properties were public properties which had been allocated to the 4th respondent. It further concluded that the suit properties were unlawfully allocated to private individuals. In exercise of the powers conferred to it under section 14 of the *National Land Commission Act*, the 1st respondent proceeded to revoke the applicants' title.

15. It is this decision by the 1st respondent that precipitated the applicants' petition to the ELC. The applicants' main thrust in the case was that they were bona fide, innocent purchasers for value without notice of any defect in the title and after conducting due diligence; and that they were duly issued with certificates of title subsequent to which they heavily invested in the properties – including partly developing structures for a commercial complex and a three-star hotel.

16. The suit was defended by all the respondents. Cumulatively, the respondents argued that the 1st respondent had jurisdiction to review the suit properties; that it did so in a just, open, inclusive and fair process and after giving the applicants an opportunity to be heard; that the suit properties were previously comprised in land parcel No. Kakamega Township/Block II/32, and were all reserved as public land as a playing field for the 4th respondent; that the suit properties were, therefore, not available for allocation or grant from which the appellants could benefit or derive a registrable interest.

17. The respondents faulted the applicants for not carrying out reasonable due diligence in respect of the subject parcels to the extent that they claimed that they were innocent purchasers.

Had they done so, the respondents pointed out, the applicants would have established that there was multiple litigation over the suit properties pitting the 4th respondent against different third parties – including one involving Michael Odwoma, who the 1st applicant purportedly purchased the property from.

18. The ELC found that the 1st respondent had jurisdiction to review the suit properties and to consider the legality and propriety of their conversion into private property. Further, the trial court held that the 1st respondent had rightly directed for the revocation of the titles held by the applicants.

19. In dismissing the petition, the ELC (Matheka, J.) stated:

> "I find no reason to fault the decision of the 1st respondent. The petitioners were not bona fide purchasers as it was not apparent that the vendors they acquired the titles from had valid titles. The 1st petitioner herein avers that on 5th February, 2011, it purchases Kakamega/ Municipality Block II/92 for valuable consideration from one Michael Odwoma. The 4th respondent produced documentary evidence that they had a civil dispute with the said Michael Odwoma from way back in 2004 in High Court Civil Case No. 97 of 2004. The petitioners ought to have conducted due diligence before purchasing the said suit land."

20. The Court of Appeal affirmed the ELC decision in its entirety. In the lead judgment Mumbi Ngugi, JA held:

> "In my view, therefore, the 1st respondent properly exercised its mandate in finding that the suit properties were public property reserved as a playing field for the 4th respondent. It was not available for allocation. The trial court properly found that the appellants did not exercise due diligence before entering into transactions in respect of the properties, and they were not bona fide purchasers for value who would get protection under section 14(7) of the *National Land Commission Act*."

21. In the present application, the applicants now say that they have belatedly found the documents from the Ministry of Lands respecting the suit properties which demonstrate that the procedural requirements for allocation of land were complied with, and that the properties were allocated regularly. The documents, the applicants contend, will show that the properties were not earmarked for a playing ground for the 4th respondent as alleged.

22. The applicants say that these documents, which they have attached to their application (16 documents with respect to Kakamega Block II/292 and 14 documents with respect to Kakamega Block II/252) were not available when they litigated the case before the ELC and during their appeal in this Court. This, they say, is despite their due diligence to get them. This was because the files for the suit properties were missing at the Ministry of Lands. The applicants point out that the ELC Judge noted that the files were missing in her judgment thus:

> "The 1st respondent in its decision found that the records in respect of the suit land were missing from the registry. They found the suit land falls within land that was planned for a playing field."

23. The applicants state that they were only able to get the new documents after the judgment was delivered on 26th May, 2023. They say that they wrote various letters in June, 2023 requesting for the file

documents in relation to the parcels of land and that "after a frantic search for the files from Ardhi House Nairobi and Kakamega Physical Planning Office, the applicants managed to obtain the ..... critical documents which could not be found initially..."

24. Consequently, the applicants seek for a review of the judgment of this Court so that the newly "discovered" evidence can be considered. The applicants argue that the decision of the National Lands Commission dated 8th October 2015 was made without the benefit of the newly "discovered" documents which will inform the Court of the process of allocation of the properties and the history of the parcels from 1951 to date.

25. The applicants further argue that the decisions of the National Lands Commission, ELC and the Court of Appeal all found that the suit properties Kakamega/ Municipality Block II/252 and Kakamega/Municipality Block II/292 were earmarked for public utilities and not available for allocation to the Applicants on the basis of averments in affidavits "without any supporting documentation because the files from lands and the County Offices could not be traced." The newly "discovered" documents will, therefore, show that the procedural requirements for allocation of land were complied with and that the suit properties were allocated regularly.

26. Mr. Obuya, learned counsel for the applicants, appeared before us during the hearing of the application and amplified these arguments which are in the applicants' written submissions. None of the respondents filed written submissions but Mr. Sifwoka, counsel for the 4th respondent, appeared during the plenary hearing of the application. We allowed him to orally argue in opposition to the appeal. He raised three points in opposition.

27. First, Mr. Sifwoka argued that the Court has no jurisdiction to entertain the application. His argument is that to the extent that the application is expressed to be brought under section 3(2) of the *Appellate Jurisdiction Act*, it was misconceived because that section only applies to pending appeals. This Court, Mr. Sifwoka further argued, having rendered its final decision on the applicants' appeal, is functus officio.

28. Second, Mr. Sifwoka contended that even if the Court was minded to consider the application, the applicants had not demonstrated that they had put in efforts to obtain the documents before the litigation was completed. In particular, he pointed out that no evidence was placed before the Court to demonstrate that the applicants made any efforts to get the documents they now seek to rely on before June, 2023.

29. Third, Mr. Sifwoka argued that the application should be disallowed because it is, in his opinion, fairly obvious that the applicants are on a fishing expedition: having failed to convince the ELC and this Court of the merits of their case, they are now trying to patch up their case. Counsel relied on Wanje & 93 others V. A.K. Saikwa. [1982-88] KLR Vol.1. pg.462 to make the argument that applications to adduce additional evidence should be disallowed when the effect is to re-start the case afresh and needlessly prolong litigation.

30. We have considered the application, the affidavit in support thereto and its annextures, this Court's judgment dated 26th May, 2023, the written submissions by the applicants, as well as the oral submissions by the advocates for both the applicants and the 4th respondent. The singular question for determination is whether the application for review of the judgment of this Court and the adduction of additional evidence is merited.

31. Despite earlier hesitation, this Court has now firmly established that it has inherent and residual jurisdiction to review its judgments/orders. An early statement of this jurisprudential position was

made in Benjoh Amalgamated Limited & Another vs Kenya Commercial Bank Limited [2014] eKLR where the Court stated:

> " It is our finding that this Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice."

32. Likewise, in Standard Chartered Financial Services Limited & 2 Others vs Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 Others [2016] eKLR, this Court asserted:

> " We reiterate that position and stress that this Court is clothed with residual jurisdiction to reopen and rehear a concluded matter where the interest of justice demands but that such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principle of finality in litigation."

33. As the applicants readily acknowledge, the jurisdiction to review is one that is exercised very sparingly and, as the Court stated in Benjoh Amalgamated Case, with great circumspection. In pertinent words, the Court held:

> " The jurisprudence that emerges from the case- law from the aforementioned jurisdictions shows that where the Court is not of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court)."

34. The bottom line is that while the Court has jurisdiction to review its decisions, the threshold for the exercise of that jurisdiction is quite high. The Court will only do so where exceptional circumstances are present and the Court is called upon to avert a gross injustice. The question that confronts us is whether the applicants have met this high threshold for invoking the Court's residual jurisdiction in the present application.

35. In answering this question, it is important to recall that the applicants are asking the Court not only to review its decision based on the materials which were before it when it rendered the decision but to permit them to adduce additional evidence. In other words, the applicants must jump through a double hoop: to persuade the Court that the very high threshold for the exercise of review jurisdiction has been met; and that the equally exacting threshold for adduction of additional evidence has been satisfied. Both these tests must be taken simultaneously since the applicants' basis for asking for a review is the newly "discovered" documents which they want to be considered.

36. This means that this Court must consider the principles laid down in our jurisprudence for admitting additional evidence at the appellate level as it considers whether the case for review has been made out. The Supreme Court, addressing its own inherent right to admit additional evidence at the appellate

level, has propounded the applicable principles for admission of additional evidence at the appellate level in Mohammed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR.

37. In that case, the Supreme Court laid out the principles to be considered in determining whether an appellate Court should accept the adduction of additional evidence. The Court laid out the following principles:

> "79. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:
>
> a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
>
> b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
>
> c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
>
> d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
>
> e. the evidence must be credible in the sense that it is capable of belief;
>
> f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
>
> g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
>
> h. where the additional evidence discloses a strong prima facie case of wilful deception of the Court;
>
> i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
>
> j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
>
> i. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other."

38. After laying down this criterion, the Supreme Court also remarked:

> " We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by- case basis and even then sparingly with abundant caution."

39. With both these guidelines as well as the principles applicable in exercising the Court's review jurisdiction firmly in mind, we have come to the conclusion that this is not a fit case for allowing review and consideration of additional evidence. We say so for at least four reasons.

40. First, and most importantly, we are simply not persuaded that the applicants have demonstrated before us that they exercised due diligence to obtain the documents they now wish to be considered while the litigation was still on-going. All the applicants have annexed are various letters written after this Court's judgment to request for the files from the Ministry of Lands. There has been no demonstration whatsoever that the applicants made any efforts to trace those documents while the case was pending trial or even during the pendency of the appeal. The letters attached to the application were all sent to the Ministry of Lands in June, 2023 – a month after the judgment of this Court. To benefit from the exceptional jurisdiction of review and to be permitted to adduce additional evidence after a case has been concluded, a party is required to demonstrate palpably that they did everything possible to get those documents while the trial was on-going or were otherwise unaware of their existence. We are not persuaded that either case is proved here.

41. Second, and related to the first, we note that although the applicants were the petitioners and they had the onus to prove their case on a balance of probabilities, they made no efforts to use the available procedural mechanisms such as "Notice to Produce" or other evidence discovery procedures to ensure that the documents were produced. Indeed, they did not even predicate their case on the missing documents at all. All the applicants have done is to point to a paragraph in the ELC judgment where the learned Judge pointed out that the 1st respondent had noted that the files for the suit properties were

> "missing." The applicants have made no effort to explain why it would have been futile for them to utilize the available procedural mechanisms to get the documents during the pendency of the trial. In this case, the applicants were not only aware of the existence of the evidence they now seek to produce but they were also in a position to procure it using the procedural mechanisms available to litigants.

42. Third, the probative value of the additional evidence the applicants seek to adduce is reasonably impugned. This is because the documents are not authenticated: there is no forwarding letter from the Ministry of Lands; and no affidavit by an official confirming that, indeed, the documents are bona fide and are from the files of the suit properties in the Ministry. All the applicants have relied on to demonstrate authenticity is a stamp stating that they are "certified" – but the purported certification is by an unknown official of the Ministry of Lands. In short, the credibility of the documents sought to be produced is seriously called into question.

43. Fourth, the context suggests that the applicants are simply patching up their failed suit. The fact that the documents were missing was never part of their case at the trial court or before this court on first appeal. It seems to have assumed monumental importance only upon the findings of this Court. In particular, the present application seems specifically tailored to respond to this Court's holding (as per Mumbi Ngugi, JA) that:

> "In my view, the onus was on the appellants to prove that they were bona fide purchasers for value, without notice. To do so, they needed to show, inter alia, that the vendors

had apparent valid title. There was no evidence presented before trial court regarding the vendors' titles. In particular, no evidence was presented to show how the suit properties were allocated to the vendors or the initial allottees of the suit properties; whether they had applied for the allotment; and whether the procedural requirements for allocation of public land were complied with before a grant was issued.....

The appellants did not produce any document to show that the process of alienation and allocation of government land was followed before the suit properties were registered in the names of the persons who sold it to them. All they presented before the trial court was the certificate of lease in their names."

44. In their original suit before the ELC, the applicants did not attempt to show that the original allottees who sold the suit properties to them had valid titles. Neither did they attempt to demonstrate how the suit properties were allocated to the initial allottees. Finally, they did not attempt to show that the correct process of alienation and allocation of the suit properties was followed. Their suit was based primarily on the indefeasibility of the titles they had. It is, therefore, a little-disguised afterthought for them to belatedly seek to introduce evidence aimed at strengthening the weak links in their case identified by this Court on appeal. Our review jurisdiction must never be used to permit a party a second bite at the cherry.

45. The upshot is that the application dated 23rd July, 2023 is without merit. It is hereby dismissed with costs to the 4th respondent who is the only one who responded to the application.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF FEBRUARY, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR