



**Karinge & 2 others v Muchai (Environment & Land Case
592 of 2016) [2024] KEELC 1491 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1491 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 592 OF 2016**

**A OMBWAYO, J
MARCH 15, 2024**

BETWEEN

PETER KARIUKI KARINGE & 2 OTHERS PLAINTIFF

AND

KARIUKI MUCHAI DEFENDANT

RULING

Introduction

1. This ruling is in respect of the Applicants Notice of Motion application dated 7th December, 2023. The said application is expressed to be brought under Order 45 and Section 80 of the *Civil Procedure Act*.
2. The application is filed under Certificate of Urgency and seeks the following orders:
 - a. Spent
 - b. Pending hearing of this Application there be a stay of execution of the Judgment of court delivered on 15th June, 2023.
 - c. That Judgment of court delivered on 15th June 2023 be reviewed and or set aside.
 - d. Costs of this application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn by the Simon Mwangi Karinge, one of the Applicants. The Supporting affidavit is sworn on 7th December, 2023.

Applicants Contention

4. The Applicants contend that at the time of hearing of this suit, they did not have the transfer forms for the property as the parcel file for the land had disappeared from the registry. He deposed that



consequently, they could not be able to produce the same and on this basis the court found for their competitors and made the judgment in issue.

5. The Applicants depose that they have now come across copies of the transfer from the agent they engaged to do the transfer. They depose that the said documents paint a completely different picture of the whole case and the judgment. It is the Applicants deposition that in the judgment the court found as a matter of fact that the judgement creditor did not have any authority to defend the suit and seek substantive orders therein.
6. The Applicants contend that still after the foregoing, the court proceeded to have orders in favour of the same party who it found had no legal capacity. The Applicants contend that this has now denied them an opportunity to defend the title as it has been unlawfully cancelled which it would have been able to at succession proceedings.
7. The Applicants contend that it is only fair and just that the Judgment and all consequential orders be reviewed and set aside as prayed herein.

Respondent's Response

8. In response to the application, the Respondent filed a replying affidavit sworn by himself. The Respondent deposes that the court pronounced its judgment on 15th June, 2023 and he is surprised that the Applicants have come up with a purported transfer document which they failed to produce during the hearing of the case.
9. He deposes that the applicants also failed to produce any sale agreement they had entered with the deceased Wangari Muchai and the law of contract is clear that an agreement for the sale of land must be reduced into writing. He deposes that a look at the transfer document raises several issues of whether indeed it is a document that can be relied on. He deposes that it does not show that the document was received in the lands office for registration.
10. The Respondent contends that the part which should have a date when the same was received in the lands office for registration remains blank. He deposes that the number given in the presentation book at lands office is also not given and in its place the space is blank. He deposes that in the space provided where the assessment of the registration the fee paid is indicated also remains blank.
11. The Respondent contends that the transfer document is not dated or witnessed before the commissioner of oaths as per the legal requirement. He deposes that the same transfer form has not been signed by the Land Registrar neither are the photographs of the transferees and transferor in their place in the transfer form.
12. He contends that the transfer form is an attempt to seek evidence that the deceased Wangari Muchai had transferred the suit land to the applicants which didn't happen. He deposes that the transfer form is blank on the space provided for the commissioner of oaths witnessing the signing of the transfer to indicate whether the parties who appeared before him/her are known to him or they were identified by another person to the Commissioner of oaths.
13. He deposes that the document sought to be relied on by the applicants seeks a review and is not a legal document as it lacks all the requirements provided for in order for it to qualify to be a transfer document. He deposes that the law is clear on instances when the court can review its judgment upon stumbling into new evidence it did not process during the hearing which is not the case in this instance.
14. The Respondent deposes that the Applicants cannot complain that the court issued orders of cancellation of title yet the Defendant has not filed a succession cause yet they sued him. He deposes



that the title is not reverting to the Applicant but to the owner the deceased Wangari Muchai as the applicants failed to prove she sold them the land during her lifetime.

15. He deposes that the new evidence purported to be a transfer that is not witnessed and not registered in lands office yet the applicants had a title deed and the question is how was it transferred to them without going through the registration process?
16. The Respondent contends that the Applicants have not availed any new evidence in court to persuade the court to change its mind and they have not met the conditions set out in Order 45 subsection 80 of the *Civil Procedure Rules* and *Act* to persuade this court to review its judgment. The Respondent prays the application be dismissed with costs.

Submissions

17. The Applicants filed submissions on 29th January, 2024. They submit that in evidence, it came out clearly from the evidence of the Nakuru Land Registrar that the parcel file in respect of the parcel in issue could not be traced in the registry. They submit that he gave the list of documents that should be in the said parcel which include transfer documents.
18. They submit that from this evidence, it is clear that the said documents in their completed form were not in the custody of the Plaintiffs at the hearing. They submit that they also had no prior knowledge of the apparent disappearance of the parcel file. They submit that this clearly shows that the said documents were not in their custody at the hearing and they could not have availed their copies due to the foregoing and now that the same is available, it is in the interest of justice that they should be allowed to re-open the case and produce the said documents.
19. The Applicants submit that in the Replying Affidavit in opposition to this application, the Respondent does not deny the fact that the parcel file disappeared from the custody of the Land Registry. They submit that he only raises question which can only be answered on cross-examination at the production of the said documents after a review. They submit that no prejudice will be suffered by the Defendant if the application is allowed as he will be able to cross-examine on the same.
20. The Applicants further submit that on page 38 of the judgment, the court found as a fact that the Defendant lacked the requisite *locus standi* to institute or maintain the suit. They submit that she further concludes that the proceedings instituted by a person who lacked the legal capacity are indeed a nullity. They submit that paragraph 123 of the judgment in the quoted page clearly state that the Defendant has no *locus standi*; “to seek orders in respect of the estate of the late Wangari Muchai as set out in the counterclaim.”
21. The Applicants submit that having made the above findings, the judgment proceeds to issue orders prayed by the Defence in its counterclaim and this is a clear error on the face of the record which should be corrected by way of review as prayed.
22. The Applicants submit that this is a land dispute and land is dear and of utmost importance to Kenyans. They submit that by failure to produce crucial documents that were not within the possession of their reach, they have been denied land belonging to them. They submit that this is a serious miscarriage of justice and given the fact that it is a land matter, it is a sufficient reason to allow a review of the judgment to enable production of these documents which will completely alter the findings of the court.
23. The Applicants submit that the effect of the current judgment is to punish the applicants for carelessness of the Land Registry in misplacing the parcel file which was in their custody. They submit that it is important to note that a green card was produced which clearly shows that the parcel was transferred from the late Wangari to the deceased. They submit that re-opening the case for purposes



- of production of the documents in the misplaced parcel file is a sufficient reason and this court should so find.
24. The Respondent filed submissions on 21st December, 2023. They rely on Order 45 of the Civil Procedure Rules 2010 and Section 80 of the Civil Procedure Act. He submits that an application for review is not as of right but one which calls for the court to exercise its discretion as to whether to entertain the said application. Reliance is placed on the case of Parliamentary Service Commission v Martin Nyagah Wambora & Others [2018] eKLR.
 25. The Respondent submits that the applicant has not laid a satisfactory basis for the court to grant the review orders sought. He submits that the applicant has sworn an affidavit which is undated and this offends the requirements of the Oaths and Statutory Act, Cap 15 of the Laws of Kenya which makes it mandatory for affidavits to be dated.
 26. He submits that the applicant has attached a copy of transfer allegedly done by Wanagri Michai of identification number 0744929 in favour of the applicants. He submits that a closer look at the alleged transfer shows that the alleged transferors name is misspelt and there is an omission on the digits of her identification number. The Respondent submits that it is indicated as Wangari Michai instead of Wangari Muchai. He submits that her Identification number is indicated as 0744929 instead of 0744929/63.
 27. The Respondent submits that from the said copy of transfer, photographs of the transferees are missing, the alleged instrument is undated, signature and stamp for the person certifying the instrument is also missing and undated. He submits that the alleged instrument was not presented to the land registry for registration.
 28. He further submits that the undated affidavit sworn by Simon Mwangi Karinge claims to have gotten the said transfer document from an agent who apparently was to do the transfer. He submits that the said transfer was not done and the said agent has not sworn an affidavit to that effect. He submits that there is nothing in the application that calls for the court to exercise its discretion in favour of the applicant.
 29. The Respondent submits that it is a futile expedition for the applicant to claim that he came across the documents and evidence that was not within their reach at the hearing of the suit. He submits that the applicant has since discovered that they need to give impetus to title to the suit property which was cancelled. Reliance is placed on the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Ltd (2020) Civil Appeal No 60 & 62 of 2017 eKLR.
 30. The Respondent urged the court to apply the doctrine of acquiescence in favor of the himself against the Applicant who chose to sleep on his right during hearing of his case and has failed to furnish this court with cogent reasons why the said documents were not produced or why they could have not procured at the time of the hearing. Reliance is placed on the case of Joshua Ngatu v Jane Mpinda & 3 others ELC Case No 15 of 2018.
 31. The Respondent submits that this Honourable court is being invited to sit on an appeal of its own judgment which is not permissible in law. He submits that an issue that is so contested as in this case cannot be reviewed by the same court which had adjudicated upon it. Reliance is placed on the cases of Pancras T Swai v Kenya Breweries Limited (2014) eKLR, Francis Origo & Another vs Jacob KumaliMungala Civil Appeal 149 of 2001 (unreported), National Bank of Kenya Ltd vs Ndungu Njau Nairobi Civil Appeal No 211 of 1996 and Nyamogo & Nyamogo vs Kogo [2001] E.A 174.
 32. He submits that the applicant has not discovered any new evidence or important to warrant the granting of the orders of review. He submits that this is a clear case of appeal and not review for the



simple reason that the application will subject parties herein to serious cross-examination which is not within the ambit of review.

33. The Respondent relies on the case of *Parliamentary Service Commission vs Martin Nyaga Wambora & others* [2018] eKLR. He submits that the issues raised by the applicant ought to be addressed by way of appeal and not an application for review. He submits that the applicant on realizing its time of filing an appeal was exhausted gambled and chose to bring the current application which was unwarranted, a waste of courts time and endless attempt to deny the judgment holder to enjoy the fruits of a lawful judgment. He prays the court dismiss the present application with costs to the defendant/respondent.

Analysis And Determination

34. I have considered the application, the affidavit in support of the application, the replying affidavit and submissions filed. In my view, the question that arises for determination is whether the judgment of the court delivered on 15th June, 2023 should be reviewed and or set aside.
35. The Applicants claim is that they have come across documents and evidence that was not within their reach at the hearing of the suit whose effect will substantially affect the judgment in the matter. The Respondent in his submissions stated that the issues raised by the Applicants ought to be addressed by way of appeal and not by an application for review.
36. The Applicant's Notice of Motion application is premised on Order 45 and Section 80 of the *Civil Procedure Act*.

Section 80 of the *Civil Procedure Act* provides:

“ 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.”

37. The provisions of Order 45 Rule 1 provides for the review of a decree or order 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 from whom 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 the judgment to the court which passed the decree or made the order without unreasonable delay. (Emphasis mine)

38. The preconditions which are evident from part (b) above are: Discovery of new and important matter or evidence., Mistake or error apparent on the face of the, record and any other sufficient reason.



39. In *Republic –vs- Public Procurement Administrative Review Board & 2 Others* the court held that: -
- Section 80 gives the power of review and Order 45 sets out *rules*. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.
40. The crux of the Applicant’s application is production of copies of transfer forms from the agent they engaged to do the transfer. The Respondent has raised various issues with the production of the purported transfer document which are: it does not show that the document was received by the land office for registration, the number given in the presentation book at the lands office is also not given and in its place is blank, the space provided where the assessment of the registration to be paid remains blank, the transfer document is not dated or witnessed before a commissioner of oaths, the transfer form has not been signed by the Land Registrar and the photographs of the transferees and the transferor are not in the transfer form.
41. This court has been called upon to make a determination whether the produced copies of the transfer meet the threshold of new and important evidence as contemplated by Order 45 Rule 1 of the *Civil Procedure Rules* to warrant the review or setting aside of the judgment delivered on 15th June, 2023.
42. This court notes that in the supporting affidavit of the Applicant, he deposes at paragraph 4 that he came across copies of the transfer from the agent they engaged to do the transfer. This court is not convinced with this explanation as both parties were given sufficient time to prepare for the trial of the case. The transfer of land is not received in the presentation book, is not attested, is not registered by the Registrar of Lands.
43. The Applicant thus had adequate opportunity to adduce the copies of the transfer form. Preparation for trial cannot be an afterthought. This court finds the Application dated 7th December, 2023 lacks merit and is hereby dismissed with no order as to costs. It is so ordered.

DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 15TH DAY OF MARCH 2024

A.O. OMBWAYO

JUDGE

