



**Sirimani v Oyienga & another (Civil Appeal 144 of 2019)  
[2024] KECA 858 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KECA 858 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 144 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
JULY 19, 2024**

**BETWEEN**

**JOHN SENEMA SIRIMANI ..... APPELLANT**

**AND**

**OKERO OYIENGA ..... 1<sup>ST</sup> RESPONDENT**

**STEPHENE OKERO ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the Ruling of the High Court of Kenya (J.M. Mutungi, J.) dated 31st May 2019 in HCCC No. 352 of 1996)*

**JUDGMENT**

1. The appellant, John Senema Sirimani, had filed Kisii HCCC 352 of 1996 against the respondents seeking their eviction from parcel No. Majoge/Bosoti/48 which he claimed was registered in the name of his late father Sirimani Onkundi. He also sought an injunction to restrain the respondents from re-entering the said parcel. By a judgment dated 28<sup>th</sup> March, 2003, the court (Wambilianga, J.) dismissed the suit as plainly misconceived, and stated that the respondents, were the rightful owners of the suit land Majoge/Bosoti/1731 which was validly subdivided from Majoge/Bosoti/48, after the appellant's late father had sold a portion to the 1<sup>st</sup> respondent.
2. The appellant, then, filed an application dated 17<sup>th</sup> July 2018 under Orders 45 and 51 of the Civil Procedure Rules; and Sections 51 and 63(e) of the Civil Procedure Act, seeking eviction of the respondents as well as nullification of title granted to the respondents and that the subdivided property reverts to the original land parcel Majoge/Bosoti/48 and to the appellant.
3. The basis of his prayers was that he was the true owner of the suit property; and that the respondents irregularly and unlawfully subdivided the suit land, trespassed onto his land, causing irreparable loss and damage; that he became the registered owner of Majoge/Bosoti/48 following Kisii Succession



Cause No. 370 of 1995 where he was awarded the land previously owned by his father, who died on 24<sup>th</sup> August, 1974; and that his father could not have subdivided the suit property to produce land parcels 1730 and 1731 as alleged by the respondents as the appellant's father was already dead; that the only remedy lay in scrutiny of the documents; and an order of nullification of the title deeds.

4. The respondents did not file a response despite court directions to do so.
5. In a ruling dated 31<sup>st</sup> May 2023, the court (Mutungi, J.) was of the view that the application by the appellant was essentially an application for review of the judgment dismissing the appellant's suit, and the question for determination before it, was whether the appellant had laid proper basis for such an application.
6. Drawing from Order 45 Rule 1 which lays down the provisions to be met for an application for review to be successful, this includes discovery of new and important matter or evidence that was unavailable even with exercise of due diligence, at the time the decree was made; mistake or error apparent on the face of the record; or sufficient cause to warrant review; and that the application must have been made without undue delay.
7. In this regard, the court noted that the application was primarily based on the fact that the appellant was the registered sole owner of land parcel Majoge/Bosoti/48 in 1996 following succession after the death of his father in 1974 whereas the subdivision and transfer of said parcel was effected in 1992 long after the appellant's father's death, and as such the subdivision of parcel 1731 was fraudulently executed. The question the court posed was whether or not this constituted discovery of new and important evidence, mistake or error apparent on the face of the record.
8. The learned judge drew from the evidence on record, which showed that the appellant's assertion that upon his return to Kenya from Tanzania in 1974, he found the respondent in occupation of his father's land, and he did not know anything about subdivisions 1730 and 1731; the evidence presented by the 1<sup>st</sup> respondent on how he purchased the land; the documents presented by the Assistant Land Registrar demonstrating the 1<sup>st</sup> respondent made the application for subdivision in 1971, consent granted the same year and transfer executed in the same year - all events taking place before the appellant's father died; the admission by the Assistant Land Registrar that the register in respect of plot 48 was inadvertently not closed; and left intact after the subdivision and transfer; which explained why the appellant was entered as the registered owner of plot No. Majoge/Bosoti/48.
9. The learned judge was not persuaded that the appellant satisfied any of the conditions necessary to warrant review; and held that he could not sit on appeal on a judgment from a court with concurrent jurisdiction. The application was, thus, dismissed.
10. It is this ruling which forms the basis of this appeal, where the appellant challenges the ruling of the Superior Court on 8 grounds of appeal which in our view can be condensed to the issue of ownership of the suit property:

whether the subdivision was proper; and whether the application for review was merited.
11. The appellant alludes to the discovery of new and important evidence, in that the trial judge was not privy to the fact that the suit property had two green cards, the genuine one on 22<sup>nd</sup> May 1969 registered by the appellant's father on the same date and the second one on 25<sup>th</sup> May 1977, and by this time the father of the appellant was dead.
12. The appellant hinged his application for review on the fact that his father died in 1974 while the transactions complained of were executed in 1992. This does not amount to discovery of new matters



as the evidence on record produced by the Assistant Land Registrar already demonstrated that the application for subdivision was made in 1971, consented to and transferred in the same year, 1971. All the documents relating to the application for consent for subdivision of Majoge/Bosoti/48; the document showing when the consent was given; the signed transfer document; the boundary certificate for plots 1730 & 1731 dated 21<sup>st</sup> December 1971, signed by the parties was readily available even at the hearing.

13. This Court in Civil Appeal No. 2111 of 1996, *National Bank of Kenya v. Ndungu Njau*, held that;

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect expansion of the law”.

14. The appellant fell far too short of the threshold; and we find that the learned judge took into account the evidence that had been presented, the law and the legal principles applicable, to make a well-reasoned outcome. We detect no error on the part of the learned judge, and we hold that this appeal is not merited; and is thus dismissed. The respondent having not attended court, we make no orders on costs.

**DATED AND DELIVERED AT KISUMU THIS 19<sup>TH</sup> DAY OF JULY, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

