



**Mangana v Gwaro & 3 others (Environment & Land Case
69 of 2015) [2024] KEELC 1330 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1330 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 69 OF 2015**

M SILA, J

MARCH 13, 2024

BETWEEN

ELIAS MABEYA MANGANA PLAINTIFF

AND

GRACE NYANCHAMA GWARO 1ST DEFENDANT

ANGELA NYANGANYI GWARO 2ND DEFENDANT

EAST AFRICA UNION LIMITED 3RD DEFENDANT

CHIEF LAND REGISTRAR, KISII COUNTY 4TH DEFENDANT

RULING

1. The application before me is that dated 25 July 2023 filed by the 1st and 2nd defendants. The substantive prayer in the application is prayer 3 and 4 which are drawn as follows :
 - (3) The honourable court be pleased to review, rescind, vary and/or set aside the judgment and decree made on the 29 June 2023 particularly allowing the plaintiff's/respondent's suit and directing the Land Registrar to cancel and/or revoke the title of LR No. Nyaribari Chache/B/B/ Boburia/7754 in the name of the 3rd defendant and compelling the 1st and 2nd defendants/ applicants to transfer the title of the suit property to the plaintiff/respondent forthwith.
 - (4) Consequent to prayer (3) hereinabove being granted the Honourable Court be pleased to dismiss the plaintiff's/respondent's suit herein with costs to the 1st and 2nd defendant's applicants.
2. There is a prayer (5) seeking costs of the application and a prayer (6) seeking such further orders that the court may deem fit to grant.
3. The application is opposed.



4. To put matters into perspective, the suit property, Nyaribari Chache/B/B/Boburia/7754 was first registered in the name of the 1st defendant/applicant, Grace Nyanchama Gwaro as the sole proprietor. On 29 August 2006, the 1st defendant caused the suit property to be registered in her name and that of her daughter, Angela Nyanganyi Gwaro, the 2nd defendant/applicant. On 7 September 2006, the applicants sold the land to the plaintiff for a consideration of Kshs. 850,000/= and the plaintiff paid the purchase price in full. However, the applicants entered into a second sale agreement with the 3rd defendant, the East African Union Limited, which is a limited liability company owned by the Seventh Day Adventist Church, and proceeded to transfer the suit property to the 3rd defendant on 15 October 2009. It is this which prompted this suit with the plaintiff seeking orders that he was the one entitled to be registered as proprietor and for removal of the name of the 3rd defendant from the register. He also sought general damages for breach of contract and costs of the suit. The applicants admitted entering into the sale agreement with the plaintiff but contended that he took too long to pay the purchase price and that there was no consent of the Land Control Board and that they were entitled to enter into the second sale agreement with the 3rd defendant. The defence of the 3rd defendant was that she was a bona fide purchaser for value and had no notice of the earlier transaction.
5. In my judgment I found that the applicants and the plaintiff had a sale agreement which the plaintiff (as purchaser) fully complied with. I held that since the applicants had a valid sale agreement with the plaintiff, which the plaintiff had fulfilled, they could not now sell the property a second time and transfer title to the 3rd defendant. I did not find the 3rd defendant to be an innocent purchaser for value and was of opinion that the 3rd defendant conspired with the applicants to have the land hurriedly transferred to the 3rd defendant in order to defeat the claim of the plaintiff. I ordered the title of the 3rd defendant to be cancelled and in place thereof the plaintiff be registered as proprietor. In addition, I ordered the 3rd defendant to give vacant possession within 30 days and issued an order of permanent injunction against them. I also awarded the plaintiff the costs of the suit.
6. A notice of appeal was filed but it would appear that the applicants have abandoned the intention to appeal and have instead filed this application, which is more or less an application for review, seeking to set aside the judgment herein.
7. The application is based on the grounds that the suit property resulted from the subdivision of the land parcel Nyaribari Chache/B/B/Boburia/2904 which was registered in the name of Joseph Lucas Gwaro (deceased) and who was the husband of the 1st defendant/applicant and father to the 2nd defendant/applicant. It is averred that after his death, the 1st defendant filed Kisii High Court Succession Cause No. 302 of 1995 and obtained a grant on 5 September 1995. Upon obtaining the grant, she proceeded to subdivide the land parcel No. 2904 into the land parcels No. 7751, 7752 and 7753 which were then transferred to third parties. It is stated that after the properties were sold, one Rose Moraa Nyangau, lodged a summons for revocation of grant demanding a share of the original property. It is averred that the said application was heard and determined on 12 July 2023 which decision came after the judgment of this court of 29 June 2023. It is elaborated that following that ruling there is no available property to be transferred to the plaintiff and that there is therefore sufficient cause to set aside the judgment. The applicant has annexed the said ruling of 12 July 2023.
8. The plaintiff filed a replying affidavit to oppose the motion. He avers that this court has already delivered judgment and is functus officio, and further, that the judgment herein takes precedence over any other ruling. He deposes that throughout the transaction the applicants never disclosed to him the details of Succession Cause No. 302 of 1995 yet the 1st applicant was a party and had full knowledge of the same. He does not think that the application meets the threshold for review as there is no new



evidence discovered. It is added that the application is not competent as the applicant has already preferred an appeal.

9. Nothing was filed by the 3rd and 4th defendants towards the application.
10. I invited counsel to file submissions and I have seen the submissions of counsel for the applicants and those of counsel for the plaintiff. I have taken these into account before arriving at my decision. I have also read the ruling dated 12 July 2023 in the succession matter.
11. In my opinion, the following issues are for determination :
 - i. Whether the court is functus officio;
 - ii. Whether the filing of a notice of appeal bars the filing of a review application;
 - iii. Whether the judgment herein needs to be set aside in light of the ruling dated 12 July 2023 in Kisii High Court Succession Cause No. 302 of 1995.

Issue 1 : Whether this court is functus officio

12. The respondent in his affidavit has urged that this court is functus officio. However, in the submissions filed by counsel for the respondent, I have not seen this argument being pursued. I do not know whether it is because counsel thought that there was no substance in the deposition, but whatever the case, a court has jurisdiction to review a judgment and it cannot be said that it is functus officio when faced with such an application. This jurisdiction is provided for in Section 80 of the [Civil Procedure Act](#), Cap 21, Laws of Kenya, and order 45 Rule 2 of the [Civil Procedure Rules](#) which provides as follows :-

S.80. Review

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.

Order 45 Rule 1: Application for review of decree or order

- (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.
13. From the above, it will be seen that the court has jurisdiction to review a judgment. Indeed this is clear from Section 80 above, which is explicit, that one may apply for review of the judgment. Order 45 provides for the same power and provides for the ingredients which one needs to satisfy in order to be entitled to apply to court for review which is an issue that I will address later.
14. For now I think there can be no doubt that the court is given power to review a judgment and the court is not therefore functus officio.

Issue 2 : Whether filing of a notice of appeal bars filing of review application

15. From a reading of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*, it is not permissible for one to file an application for review where an appeal has been preferred. There would be no dispute where an appeal was filed and determined and I suppose there would be not much argument where a substantive appeal has been filed and is pending hearing. In our case, none of the two scenarios has occurred but there is filed a Notice of Appeal. The question is whether the filing of a notice of appeal is akin to filing an appeal for purposes of an application for review.
16. In her submissions, counsel for the respondent referred me to the case of *Serephen Nyasani Menge vs Rispah Onsase* (2018) eKLR and *Moses Mwangi Karanja vs David Macharia Gakuyu* (2020) eKLR to press the point that in this instance the application for review cannot be entertained as it is ousted by the clause relating to appeal. I have looked at the two decisions. I do not think that the case of Serephen Nyasani captures the situation that we have at hand as that was a case emanating from the Magistrates' Court and there would be no Notice of Appeal filed for one to appeal to this court. In any event, in that case, what happened is that the Magistrates' Court made an order upon an application. Aggrieved by the order the applicants filed an application for review. That review application was dismissed. He then filed an appeal against the refusal to review which appeal was dismissed. He now wanted to be allowed to file an appeal against the initial ruling. The court dismissed the application reasoning that the applicant had already exhausted an appeal against the review order and she cannot be allowed to go back to try her luck with an appeal. This is not what we have here because no appeal has been heard thus the case of Serephen Nyasani cannot be applicable to our scenario.
17. The other case of Moses Mwangi Karanja is actually a case where there was filed an application for review of a judgment after a notice of appeal had been filed. After delivery of the judgment the applicant filed a Notice of Appeal and filed an application for stay of execution pending appeal which was dismissed. He subsequently filed the application for review. In dealing with the application, the court (Oundo J) was of the view that by filing his Notice of Appeal, the applicant had exhausted process of review and could not be permitted to have a second bite at the cherry. This decision is not binding on me and I respectfully decline to pursue it.
18. My view of the matter is that a Notice of Appeal, without a substantive appeal having been filed, does not take away one's right to seek a review of the judgment. I posited as much in the case of *Rosemary Wanjiru Njiraini vs Officer in Charge of Station Molo Police Station & Another* (2019) eKLR, which decision was cited to me by counsel for the applicants. In that case, I analysed in depth whether the filing of a Notice of Appeal negates ones path to review and I came to the conclusion that it does not. This was after I had gone through various Court of Appeal decisions on this debate. Among the



decisions was the case of *Noradbco Kenya Limited vs Gloria Michele*, Court of Appeal at Mombasa, Civil Appeal No. Nai 258 of 1997 (1998) eKLR where Pall JA had this to say :

“I agree that the remedy of review is open only when the applicant having a right of appeal has not already preferred an appeal or when no appeal is allowed by law from the order or decree pronounced by the court. But the short point in question here is : Can the lodging of the notice of appeal be tantamount to preferring an appeal itself? The filing of a notice of appeal in my humble view cannot deprive a party of his right under O.44 r.1 of the *Civil Procedure Rules* to apply for review and the notice of appeal cannot be tantamount to preferring an appeal.”

19. The same conclusion was reached by the Court of Appeal in the case of *Haryanto vs ED & F. Man (Sugar) Ltd*, Civil Appeal No. 122 of 1992 and *I.C Kamau Ndirangu vs Commercial Bank of Africa Limited*, Court of Appeal at Nairobi, Civil Appeal No. 125 of 1993 (1994) eKLR.
20. I think the above is sufficient to dispel any argument that the filing of a Notice of Appeal, by itself, extinguishes the right for one to apply for review. I will now move to whether the review is merited in the circumstances herein.

Issue 3 : Whether the judgment herein needs to be set aside in light of the ruling dated 12 July 2023 in Kisii High Court Succession Cause No. 302 of 1995.

21. It is apparent that while this case was ongoing, there was also running concurrently a hearing of an application to nullify grant in Kisii High Court Succession Cause No. 302 of 1995. It is unfortunate that the attention of this court was never brought to this proceeding and it is only after the judgment of this court that the applicants are now informing court of the same.
22. Be that as it may, I have gone through the ruling of 12 July 2023 issued in the said succession cause which is in respect of the estate of Joseph Luka Gwaro also known as Joseph Gwaro Ondande (deceased). From it, I deduce that Joseph Gwaro died on 10 April 1989. At the time of his death, he was the proprietor of the land parcel Nyaribari Chache/B/B/Boburia/2904. On 18 July 1995, a petition for letters of administration was filed by Grace Nyanchama Gwaro, who is the 1st defendant/applicant herein. In that petition, she averred that the deceased left her, as his widow, and two sons, Peter Gwaro and Samuel Gwaro, who were then minors. She was duly issued with letters of administration and the grant was confirmed on 18 September 1995. On 2 December 2009, Samuel Gwaro filed an application for revocation/annulment of grant. He died before his application was heard and he was substituted with Rose Moraa Nyangau and John Gwaro who are his wife and son. It was the case of the objectors that Joseph Luka Gwaro had two wives, that is Eunice Bina and Grace Nyanchama, and that Grace was not entirely truthful in her application for a grant. It also emerged that Samuel Gwaro was a son of one Aska who never got married to the deceased but was taken to the home of the deceased and raised by one of his aunts. It did emerge that after Grace had obtained the grant, she subdivided the land parcel No. 2904 into the land parcels No. 7751 – 7755 and distributed them as follows :

No. 7751 – transferred Peter Gwaro (her son);

No. 7752 – sold and transferred to Dinah Kemunto Omurwa ;

No. 7753 – subdivided into the parcels No. 7862 and 7863 with the parcel No. 7863 given to one Hellen Abea and Grace retaining the parcel No. 7862;

No. 7754 – (the suit land herein sold to the respondent and the 2nd defendant);



23. The court (Ougo J) after analyzing the issues was of opinion that Grace was not honest in her petition. Inter alia, she had listed Samuel as a minor while he was 26 years old when the petition was filed and not all beneficiaries were listed. In the final paragraph of the ruling, the court proceeded as follows :

“ 20. Should the grant issued on the 5th September 1995 be revoked as sought by the objector ? The petitioner did conceal material facts plus she sold parts of the land parcel of the estate without a certificate of confirmation of grant contrary to the law. In the circumstances its only appropriate that the grant issued on the 5th September 1995 be revoked. I revoke the said grant. Any transaction made on the basis of the grant dated 5.9.1995 is hereby nullified. Rose Moraa has a right to pursue the inheritance due to Samwel. To enable the parties move in the matter a fresh grant will be issued in the names of Grace Gwaro and Rose Moraa forthwith. Any of the administrators shall be at liberty to apply for confirmation of grant within 60 days from the date grant is issued. Since this is family matter each party shall bear its own costs”.

24. It is discernible that the court nullified all the transactions entered into by the 1st defendant/applicant and that would include the sale transactions herein. Though the court did not make any explicit order to cancel the titles emanating from the parcel No. 2904 I would assume that this is the effect of nullification of the grant and nullification of the transactions that ensued thereafter and that the title No. 2904 is restored. There is therefore nothing that can be transferred to the plaintiff/respondent.
25. The judgment of the succession court is in my opinion, new evidence which could not be brought to the attention of the court when the court made the judgment, for it came later, though I must yet again castigate the applicants for not disclosing the fact that the title was also under challenge in the succession cause. It was a material fact that needed to be revealed to the court and to the parties herein. Probably they would have applied to be joined in the succession matter or they would have applied to stay this suit. What the applicants did was to expose two courts to a potential conflict of decisions, which is in fact what has happened, for the plaintiff has judgment in his favour whereas in another matter the subject matter given to him has been nullified and returned to the source, that is the estate of the deceased. It was wrong, very wrong, for the applicants and their counsel to keep quiet about the pendency of the application to nullify the grant. I in fact observe that the same counsel that was acting for the respondent in the succession matter, who is the 1st applicant, is the same counsel appearing for the applicants herein. Counsel had an overriding duty to court and an obligation to inform the court of the succession cause so that this court would be guided in making the appropriate orders. If it had been brought to my attention that the succession matter was pending, I would most likely have stayed the suit to await its outcome as indeed happened in two other suits, being Kisii ELC Numbers 352 and 459 of 2013 where there was a dispute relating to the parcel No. 7751.
26. Anyway, we certainly have a ruling that affects this case and we cannot run away from that. It follows that there is not only new evidence but also sufficient cause to review the judgment herein. The title herein needs to revert back to the original land parcel and there cannot be a transfer of the suit land to either the plaintiff or the 3rd defendant. Neither plaintiff nor 3rd defendant can retain title to the land given that it has been nullified. The land in dispute must be taken back to the succession court for distribution.
27. My hands are tied and I will have to set aside the judgment herein as it is apparent to me that the plaintiff cannot get the land as sold to him. He however had a case that the land was sold to him and he expected



to be the registered proprietor thereof. What I will do is to substitute the judgment making an order of registration of title in the name of the plaintiff with an order that the plaintiff be compensated by the 1st and 2nd defendants/applicants with a sum of money equivalent to the current value of the suit property. My reasoning is that if all had gone as expected the plaintiff would now be holding title to the suit land and would be richer for the value of the suit land. He needs to be put in the position that he would have been if he had received title to the suit land. I therefore direct that the suit property be valued by the Kisii District Government Valuer within the next 30 days and the valuation report be filed in court so that the court can make specific the amount of money payable to the plaintiff. Any costs that may be incurred for the valuation be shouldered by the applicants and if the plaintiff has to make payment in order to have the valuer proceed, such costs will be recoverable from the applicants. The applicants and 3rd defendant will still shoulder the costs of the suit as in the original judgment. I will however make no orders as to the costs of this application.

28. Orders accordingly.

DATED AND DELIVERED THIS 13 DAY OF MARCH 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of:-

Mr. Kipkemboi present for plaintiff/respondent

Mr. Mulisa present for 1st & 2nd defendant/applicant

Mr. Bigogo for 3rd defendant – Absent

Mr. Wabwire present for 4th defendant

Court assistant – David Ochieng'

