



**Nyeri Chemists Limited v Muriithi & 2 others (Civil Appeal
50 of 2017) [2022] KECA 883 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KECA 883 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 50 OF 2017
DK MUSINGA, F SICHALE & S OLE KANTAI, JJA
JUNE 10, 2022**

BETWEEN

NYERI CHEMISTS LIMITED APPELLANT

AND

JANE WANJIKU MURIITHI 1ST RESPONDENT

NYALI BEACH CYCADS LIMITED 2ND RESPONDENT

**DIRECTOR OF LANDS, HOUSING & PHYSICAL PLANNING, THE COUNTY
GOVERNMENT OF NYERI 3RD RESPONDENT**

*(Being an appeal from the Ruling of Environment and Land Court of
Kenya at Nyeri (Waithaka, J.) dated 21st June, 2016 in ELC No. 9 of 2016)*

JUDGMENT

1. The suit at the Environment and Land Court (ELC) at Nyeri has not been heard or determined. What has been heard are two applications the subject of which we will speak to shortly.
2. The appellant (Nyeri Chemists Limited) claimed in the plaint filed in that Court that it was, from 11th March, 1983 the legal actual owner as allottee and in possession of a parcel of land known as Nyeri Municipality Block 1/728 under a Letter of Allotment of the said date (11th March, 1983) measuring 0.506 hectares which it was to be registered as lessee for a period of 99 years from 1st January, 1983. It was further claimed in the plaint that the appellant had paid all requisite dues to the 3rd respondent (The Director of Lands, Housing and Physical Planning, County Government of Nyeri); had developed the land and had leased the land to Kenya Power & Lighting Company Limited which had been in continuous uninterrupted occupation of the land from 1983 to the year 2015 when the 1st respondent (Jane Wanjiku Muriithi) claiming title (Nyeri/Municipality/Block 1/728) had transferred the land to the 2nd respondent (Nyali Beach Cycads Limited). It was further claimed that the appellant was the



registered owner of adjoining parcels of land, Nyeri Municipality Block 1/455 and Nyeri Municipality Block 1/542 on which, with the approval of the 3rd respondent, it had developed Central Hotel Limited, Nyeri, part of which sat on the disputed parcel of land (Nyeri Municipality Block 1/728 – the suit property). It was claimed that neither the 1st nor the 2nd respondent held a valid or lawful title to the suit property; that the appellant had acquired rights as an adverse possessor of the suit property and it was prayed that title issued to the 1st and/or the 2nd respondents be cancelled; that a permanent injunction be issued against the 1st and 2nd respondents restraining them from dealing with the suit property.

3. Contemporaneous with the plaint was an application for injunction to restrain the 1st and 2nd respondents from dealing with the suit property.
4. The 1st and 2nd respondents opposed the suit and the application. In a defence and counter-claim filed on their behalf they denied that the appellant was in possession of the suit property; that Allotment Letter did not constitute title to the suit property; they denied that the appellant had acquired any rights as an adverse possessor of the suit property and in the counter-claim the respondents prayed that the suit be dismissed; judgment be entered in their favour and damages be awarded to them.
5. The Motion was heard by Waithaka, J. who in a ruling delivered on 21st June, 2016 found no merit in it and dismissed it.
6. The day after – by Motion dated 22nd June, 2016 the appellant moved that Court on an application for injunction and review of the said ruling. It was prayed in the main:

“ THAT this Honourable Court be pleased to review its Ruling and Orders of 21st June, 2016 dismissing the Plaintiff’s Notice of Motion dated the 2nd February, 2016 and in place thereof make Orders allowing the said Application and/or such other preservatory Orders as shall be deemed just reasonable and expedient.”

7. In grounds in support of the Motion it was stated inter alia that the appellant had obtained new compelling evidence “... of its bona fide ownership of Title Number Nyeri Municipality Block 1/728 subject of this suit ...”; that the 1st respondent had obtained title to the suit property fraudulently; that evidence obtained by the appellant was new evidence which was not available at the time the application for injunction had been heard. The supporting affidavit of Lucy Valerie Wanjiku Kanyonyo, a director of the appellant, deponed that her late father who had incorporated the appellant company had applied for Allotment Letter and also took steps to have a Certificate of Lease issued in respect of the suit property; that the appellant had been in occupation of the land for over 30 years. She produced as part of affidavit evidence some documents including a letter by their lawyer to the Secretary of Lands at Ardhi House and the reply thereto which we reproduce in full as we think it is important for determining this appeal:

“ Ardhi House

1ST Ngong Avenue Road Off Ngong Road

BOX 30089-00100 Nairobi.

Ref. 110708/32

Agnes W. Njoroge & Co. Advocates P.O. Box 14421-00100

Nairobi

Re: Nyeri Municipality Block 1/728



Your letter ref; Awn/Ncl/231/016 of 29th February, 2016 in respect of the above refers.

This is to inform you that this is a long standing matter from early 1980s. The error was discovered immediately after the lease had been prepared and forwarded to Nyeri for registration. Both the purported owner and Nyeri office were duly informed of the anomaly and asked to return the document for rectification. Jane Wanjiku Muriithi accepted but the lease has never been formally surrendered in lieu of preparation of her correct lease for plot number Nyeri Municipality Block 3/237. On 14th January, 1993 she changed her mind and wrongly decided to keep the plot. Official search in Nyeri office confirms that the said lease was registered in 1992 and certificate of lease issued.

By a copy of this letter, the District Land Registrar is requested to place a restriction on the title pending formal surrender of the same as a way of finalizing the matter amicably and enable your client to have their rightful lease.

(Signed)

E.O. Otworu

For: Secretary, Lands

cc.

The District Land Registrar

Nyeri.”

8. The Judge considered the application which was opposed by the 1st and 2nd respondents and considering the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Code* she held that the appellant had not produced new evidence which could not have earlier been obtained with exercise of due diligence. In the event that application was dismissed leading to this appeal.
9. There are nine grounds of appeal set out in the Memorandum of Appeal drawn for the appellant by its lawyers, M/S Agnes W. Njoroge & Company Advocates. It is said in sum that the Judge erred in law and fact in laying too much emphasis on extraneous matters thereby diverting from the course of justice; that the Judge erred in finding that the 2nd respondent’s title needed to be protected; that the application for injunction and that for review should have been allowed; that the 2nd respondent had not proved that it was an innocent purchaser for value of the suit property; that the Judge erred in ignoring the new evidence presented in the application for review. We are asked to set aside the ruling of 18th October, 2016 and substitute therefor an order reviewing the ruling and orders of 21st June, 2016; that we review that ruling and grant an injunction pending determination of the suit at the ELC in Nyeri and we provide for costs of the appeal.
10. When the appeal came up for hearing before us on a virtual platform on 6th December, 2021, learned counsel Miss Agnes Njoroge appeared for the appellant; learned counsel Miss Stella Muraguri appeared for the 1st respondent; learned counsel Mr. Thige appeared for the 2nd respondent and, for the 3rd respondent was learned counsel Mr. Macharia. All parties had filed written submissions and in a highlight of the same Miss Njoroge submitted that the appellant had been in occupation of the suit property since 1983 when the same was allocated to it; that the 1st and 2nd respondents had moved into the suit property in 2016; that the Secretary of Lands at the Ministry of Land Housing and Urban Development had confirmed by letter that the suit property belonged to the appellant and title had been issued to the 1st respondent by mistake. According to counsel, the appellant had no reason to



write to the said Ministry on the issue before dispute on ownership arose and there were serious issues in the suit which required to be heard and determined.

11. Miss Muraguri submitted that the appellant was not entitled to orders of the ELC because it had first claimed ownership of the suit property then changed course to claim ownership by adverse possession. According to counsel there was no material for the ELC to consider on review as the letter obtained in June, 2016 could have been obtained earlier. Further, that the 1st respondent had title to the suit property which was indefeasible and she had legally transferred the same to the 2nd respondent.
12. Mr. Thige submitted that the 2nd respondent was the registered owner of the suit property after it had been transferred to it by the 1st respondent. He associated himself with submissions of the 1st respondent.
13. Mr. Macharia took the middle ground of leaving the matter to the 1st and 2nd respondents.
14. In a rejoinder, Miss Njoroge submitted that the main claim in the plaint was on ownership of the suit property; adverse possession was an alternative prayer. Further, that whether or not the Letter of Allotment given to the appellant conferred legal rights was a triable issue to be determined on evidence.
15. When we heard the appeal we extended an injunction order that had been granted by this Court until the date of Judgment which we set at 18th March, 2022.
16. We have considered the whole record, submissions made by counsel and the law and this is the view we take of this appeal.
17. In the Notice of Appeal lodged by the appellant on 19th October, 2016 the appellant is dissatisfied with the whole ruling delivered on 18th October, 2016 and appealed against it.
18. The Judge in the said ruling set out in full the provisions of Order 45 *Civil Procedure Rules*. That provision requires that a person who is aggrieved by a decree or order from which an appeal is allowed but no appeal has been preferred or, by a decree or order from which no appeal is 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.”
19. The conditions set require that the aggrieved party who is not appealing but who discovers new and important matter or evidence which was not available to him earlier; or discovers an error or mistake apparent on the record may apply for review. He may also apply for any other sufficient reason and he should do so speedily without unreasonable delay. That is captured in Section 80 of the substantive Act, *Civil Procedure Act*.
20. The appellant approached the ELC on an application for review. The material placed before the Judge included a Letter of Allotment issued to the appellant in 1983 by the Department of Lands in respect of the suit property. Also before the Judge was affidavit evidence that the appellant had taken possession of the land, developed it and had been in occupation for a period of about 30 years. The suit property had openly been let to Kenya Power and Lighting Company Limited for many years, amongst other tenants. The letter dated 22nd April, 2016 by the Secretary of Lands, Ministry of Land Housing and Urban Development explained that the suit property was the subject of a long standing dispute on ownership; that there was an error in preparation of the lease and when the error was discovered the



lands office in Nairobi required that the lease be returned for rectification. The 1st respondent had not returned the lease as required. The District Land Registrar, Nyeri was required in a copy of that letter to place a restriction on the title pending surrender of the title so that the lands office could issue a title to the appellant.

21. The Judge did not find any new material on which she could grant orders in the review application. With respect, we do not agree with that position at all.
22. The appellant demonstrated that it had been allocated the land; it had been in possession for a long time and it had developed the land. Evidence was placed before the Judge where the lands office, which had issued title to the 1st respondent, had freely acknowledged that the title issued to the 1st respondent was issued by mistake or in error. That office not only challenged the title issued to the 1st respondent but it instructed its Nyeri office to place a restriction on the title, which we understand to mean that the title was subject to cancellation.
23. As we stated at the beginning, the suit at ELC has not been heard and we should not speak more to the issues in dispute because we may embarrass the Judge who will eventually hear the suit.
24. We are of the opinion that the letter dated 22nd April, 2016 from the Ministry of Lands Housing and Urban Development was a new and important matter or evidence which the appellant had not obtained before. That new information was not available to the appellant before and as we noted earlier, the application was filed immediately after the ruling dismissing the application for injunction.
25. We allow the appeal; we review the ruling and orders of Waithaka, J. given on 21st June, 2016 and we substitute therefor an order of injunction to restrain the respondents from dealing with the property Title Number Nyeri Municipality Block 1/728 pending hearing and determination of Nyeri ELC No. 9 of 2016. We give costs of the appeal to the appellant.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2022.

D.K. MUSINGA, (P)

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

