



REPUBLIC OF KENYA



KENYA LAW
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**Kainamia & 2 others v Kakunia (Environment & Land Case
99 of 2023) [2024] KEELC 3334 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3334 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND CASE 99 OF 2023**

YM ANGIMA, J

APRIL 11, 2024

BETWEEN

PETER NGUGI KAINAMIA 1ST PLAINTIFF

JOHN MURAYA KAINAMIA 2ND PLAINTIFF

PETER MURAYA KAINAMIA 3RD PLAINTIFF

AND

MUNYAO KAKUNIA DEFENDANT

RULING

A. Introduction and Background

1. The record shows that vide a plaint dated 21.06.1979 filed in Nairobi HCCC No. 1994 of 1979 the Plaintiffs sued the late Munyao Kakunia (Munyao) seeking the following reliefs against him:
 - a. A declaration that the Defendant holds Plot No. 90 Ol-Kalou South Settlement Scheme in trust for himself and the Plaintiffs as tenants in common in equal shares.
 - b. An order directing the Defendant to do all acts and things and execute all forms, papers and documents to facilitate the transfer of one-half share of the said plot to the Plaintiffs.
 - c. An order that the Defendant specifically perform the contract by transferring one half share of the said plot to the Plaintiffs.
 - d. Costs of the suit together with interest.
 - e. Such further or other reliefs as the court may deem fit and just to grant.



2. The Plaintiffs pleaded that in 1965 their late father Kainamia Muriama (Kainamia) and Munyao contributed funds towards the purchase of Plot 90 which plot was later on solely registered in the name of Munyao to hold it in trust for himself and Kainamia as per the oral agreement between them. The Plaintiffs further pleaded that upon acquisition of Plot 90 both Kainamia and Munyao settled on the property together with their respective families and they effected various developments thereon.
3. It was the Plaintiffs' case that in breach of the said agreement Munyao had threatened to sell the entire plot and evict the Plaintiffs therefrom and had refused to have the same registered in the joint names of the entitled persons or to partition the same and transfer one half of the plot to the Plaintiffs.
4. The record shows that Munyao filed a defence dated 16.10.1979 denying the Plaintiffs' claim in its entirety. He denied that Kainamia had contributed money towards the purchase of Plot 90 and denied holding the same in trust for himself and Kainamia as alleged or at all. He further pleaded that he was the sole owner of the entire Plot 90 and that he had in 1968 granted Kakunia a revocable licence to occupy part of the land by virtue of being his relative.
5. The late Munyao further pleaded that he had revoked Kainamia's licence in 1977 and required him and his family to vacate Plot 90 peacefully but that he had refused or neglected to oblige. He consequently asked the court to dismiss the Plaintiffs' suit with costs.
6. By the time the suit came up for trial before Hon. Mbogholi Msagha J (as he then was) Munyao had already subdivided Plot 90 into Parcel Nos. 173 and 174 and sold Parcel 173 to a third party. Upon a full hearing of the suit, the trial court believed the Plaintiff's evidence and held that Munyao was holding about one half of Plot 90 in trust for the Plaintiffs and ordered him to transfer 30 acres to the Plaintiffs out of the remainder of the land. The judgment was delivered on 29.04.1999.
7. The material on record further shows that upon delivery of the judgment Munyao, who was still alive, sought to appeal the same. He consequently filed an application dated 07.02.2007 seeking a stay of proceedings (including execution proceedings) pending the hearing and determination of his intended appeal. The record further shows that the application for stay was dismissed by Hon. K.H. Rawal J (as she then was) on 23.05.2007 on account of unreasonable delay in filing it which delay had not been adequately explained.

B. Defendant's Instant Application

8. Vide a notice of motion dated 17.01.2023 expressed to be based upon Sections 1A, 1B, 3A and 63 of the [Civil Procedure Act](#) (Cap.21), Order 40 rules 1 & 2, Order 50 rule 1 of the [Civil Procedure Rules](#), 2010 and Article 40 of [the Constitution](#) of Kenya, 2010, the Defendant sought the following key orders:
 - a. An order for setting aside the judgment dated 29.04.1999.
 - b. A review and setting aside of the decree dated 29.04.1999.
 - c. That the court be pleased to re-open the litigation.
9. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Elizabeth W. Ngugi on 17.01.2023 and the annexures thereto. It was contended that there was discovery of new and fresh evidence in the matter; that the Plaintiffs had no locus standi to file the suit; and that Munyao was not served with the Plaintiffs' bundle of documents. It was further contended that some proceedings and documents in the suit were destroyed or hidden from Munyao and that he was not even aware of the judgment during his lifetime.



C. Plaintiffs' Response

10. The Plaintiffs filed a notice of preliminary objection dated 05.03.2024 raising, inter alia, the following objections to the Defendant's said application:
 - a. That the application was res judicata by virtue of Nairobi ELC Misc. Cause No. E060 of 2023.
 - b. That the application violated the provisions of Section 4(4) of the *Limitation of Actions Act* (Cap.22).
 - c. That the applicant, Elizabeth Ngugi, had no capacity to file the application.
11. The Plaintiffs also filed a replying affidavit sworn by John Muraya Kainamia on 05.03.2024. The Plaintiffs contended that there was no discovery of new and important evidence to warrant a review or setting aside of the judgment dated 29.04.1999. They asserted that the application was an abuse of the court process and the same was a misrepresentation of the true facts of the case. The Plaintiffs were of the view that the instant application had no merit and that it was an attempt to revive a concluded suit more than 20 years after delivery of judgment. The court was consequently urged to dismiss the application with costs.

D. Defendant's Response to Preliminary Objection

12. The Defendant filed a replying affidavit sworn by Elizabeth Ngugi on 16.03.2024 in response to the preliminary objection. She contended that she had locus standi to file the application by virtue of being the holder of a power of attorney donated by the administrator of the estate of Munyao. She denied that the application was res judicata and asserted that her application in Nairobi ELC Misc. No. E060 of 2022 was of a different nature. The court was consequently urged to overrule the preliminary objection.

E. Directions on Submissions

13. When the matter came up for directions it was directed that both the Defendant's application and the Plaintiffs' preliminary objection shall be heard together. It was further directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Defendant filed written submissions dated 16.03.2024 whereas the Plaintiffs filed submissions dated 18.03.2024.

F. Issues for Determination

14. The court has perused the Defendant's notice of motion dated 17.01.2023, the Plaintiffs' notice of preliminary objection dated 05.03.2024, the Defendant's replying affidavit sworn on 16.03.2024 as well as the material on record. The court is of the opinion that the following are the key issues which arise for determination:
 - a. Whether the Plaintiffs' notice of preliminary objection is meritorious.
 - b. Whether the Defendant has made out a case for review or setting aside of the judgment and decree dated 29.04.1999.
 - c. Who shall bear costs of the application and the preliminary objection.



G. Analysis and Determination

a. Whether the Plaintiffs' notice of preliminary objection is meritorious

15. The court has considered the material and submissions on record on the preliminary objection. It is evident from the Plaintiffs' replying affidavit that Elizabeth Ngugi had filed an application in Nairobi ELC Misc. E060 of 2022 seeking the setting aside of the judgment rendered by Hon. Justice Mbogholi Msagha. It is evident from the material on record that vide a ruling dated 24.11.2022 Hon. Justice L. Komingoi dismissed the said application following a preliminary objection raised by Plaintiffs.
16. It is evident from the said ruling that the court found, inter alia, that the application offended Section 4(4) of the Limitation of Actions Act (Cap.22); that the requirements of Order 45 rule 1 of the Civil Procedure Rules on discovery of new and important evidence had not been demonstrated; and that there was unreasonable delay in filing the application which delay had not been explained. The court further held that the applicant had no locus standi to file the application in the absence of letters of administration for the estate of the late Munyao or a power of attorney from the administrators.
17. The court is thus satisfied that the instant application is res judicata to the extent that the Hon. L. Komingoi J. determined that the earlier setting aside application contravened the Limitation of Actions Act (Cap.22) and that the application had failed to demonstrate the discovery of new and important evidence to warrant a review. There is no indication on record that the said ruling has ever been varied or overturned on appeal. Accordingly, this court is precluded from adjudicating the very same issues which the Hon. Justice L. Komingoi determined vide the ruling of 24.11.2022.
18. Perhaps, the only issue which may be open to reconsideration is the issue of the legal capacity of Elizabeth Ngugi to file the instant application. The Applicant has exhibited a copy of a power or attorney donated by Tabitha Munyao on 15.06.2021. However, the existence of legal capacity alone can be of no help to the Defendant if the key issues for determination in the application for review and setting aside are res judicata. As a consequence, the court finds merit in the first and second points of preliminary objections listed in the Plaintiffs' notice of preliminary objection dated 05.03.2024. The said points of preliminary objection are hereby upheld with the consequence that the Defendant's notice of motion dated 17.01.2023 shall be struck out.

b. Whether the Defendant has made out a case for review or setting aside of the judgment and decree dated 29.04.1999

19. The court has already found and held that the instant application is res judicata in view of the ruling dated 24.11.2022 in Nairobi ELC Misc. E060 of 2022. Even if the court were to consider the application on merit, it is evident from the material on record that there is absolutely no merit in the application for review.
20. There is no demonstration of discovery of any new and important matter or evidence as required under order 45 rule 1 of the Civil Procedure Rules. All the issues raised in the application are matters which were well within the actual or constructive knowledge of Munyao at the material time, or which, with due diligence could have been discovered and which ought to have been raised before the trial judge during the hearing of the suit. If, as alleged, Munyao was not served or served with all necessary documents to enable him effectively defend himself that could not, by any stretch of imagination, constitute "discovery" of new and important matter over 20 years after delivery of judgment.



21. It is also evident from the material on record that the application is predicated upon some falsehood and perjury. For instance, in paragraph 13 of the supporting affidavit sworn by Elizabeth Ngugi on 17.01.2023 she swore that:

“That the late Munyao Kakunia was not aware of the said judgment and never knew of its existence.”

22. However, a perusal of the court file reveals a different story. The record shows that vide a chamber summons dated 15.08.2002 the late Munyao sought leave of court to change advocates after judgment. He swore a supporting affidavit on 25.07.2022 in which he acknowledged that judgment was delivered against him on 29.04.1999.

23. The record further shows that vide a letter dated 12.03.2002 Munyao requested the Deputy Registrar of the court to supply him with copies of proceedings, the judgment and “any subsequent orders”. It is also evident that vide a chamber summons dated 07.02.2007 Munyao applied for stay of proceedings (including execution proceedings) pending the hearing of his intended appeal to the court of appeal. He also swore a supporting affidavit on 07.02.2007 in which he stated, inter alia, that:

“2. That this matter was heard on 30th, 1st November, and 1st December, 1998 and 1st March, 1999 and judgment delivered on 29th April, 1999 and a decree subsequently issued.

3. That I had requested for certified copies of the proceedings and judgment to enable me file an appeal in the Court of Appeal against the said judgment.

4. That, however, proceedings have been going on to enforce the judgment which I intent to appeal against and my intended appeal may be rendered nugatory if these proceedings are not stayed.”

24. So, if Munyao was not made aware of the existence of the judgment why did he swear the 2 supporting affidavits? Why did he apply for stay pending appeal? And why did he request for copies of the judgment and “subsequent orders” if he was not aware of the existence of the judgment?

25. It is also evident from the material on record that the Defendant has not explained the inordinate delay in filing the application for review of the judgment delivered in 1999. There is no explanation for the delay of about 24 years since delivery of the judgment hence the Defendant would not be entitled to succeed on the application for review. The court is thus of the opinion that the instant application is not only frivolous and vexatious but also an abuse of the court process.

c. Who shall bear costs of the application and the preliminary objection

26. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to deprive the successful litigants of costs of the action. Accordingly, the Plaintiffs shall be awarded costs of the application and the preliminary objection.

H. Conclusion and Disposal Orders

27. The upshot of the foregoing is that the court finds merit in the Plaintiffs’ preliminary objection. The court further finds no merit in the Defendant’s application for review of the judgment dated



29.04.1999. As a consequence, the court makes the following orders for disposal of the application and the preliminary objection:

- a. The first and second points of the Plaintiffs' notice of preliminary objection dated 05.03.2024 are hereby upheld.
- b. Consequently, the Defendant's notice of motion dated 17.01.2023 is hereby struck out in its entirety.
- c. The Plaintiffs are hereby awarded costs of both the preliminary objection dated 05.03.2024 and the notice of motion dated 17.01.2023.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU THIS 11TH DAY OF APRIL, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Ndichu for the Plaintiffs

N/A for the Defendant

C/A - Vanessa

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Y. M. ANGIMA

JUDGE

