



**Kitulu & 8 others v Ndolo (Environment & Land Case
241 of 2017) [2024] KEELC 4319 (KLR) (22 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4319 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 241 OF 2017**

TW MURIGI, J

MAY 22, 2024

BETWEEN

MUEMA KITULU & 8 OTHERS PLAINTIFF

AND

ELIZABETH KAMENE NDOLO DEFENDANT

RULING

1. By a Notice of Motion dated 26th April 2023 brought under Sections 1A, 1B, 3A & 100 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, the Applicants seek the following orders:-
 1. Spent.
 2. That this Honourable Court be pleased to vary the final judgment herein issued on 19/03/2018 by substituting Title Reference No.1757/6 with Land Reference No. 1757/19.
 3. That the costs of this application be awarded to the Applicants.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Muema Kitulu sworn on even date.

The Applicants'case

3. The deponent averred that on 19th March 2018, this court delivered its judgment in the following terms:-
 - a. That this Honourable Court do direct that the Plaintiffs be registered as the proprietors of all those portions of all that portion of 40 acres or thereabouts within LR No. 1757/6 (formerly L.R No. 1757 hereinafter the "suit property").



- b. That a permanent injunction do issue to restrain the Defendant, by herself, her agents or servants from trespassing into, alienating or in any manner interfering with the Plaintiff's use and enjoyment of the suit property.
 - c. An order directing the registrar of title to excise each of the Plaintiff's parcel out of L.R No. 1757/6 registered in the name of the Defendant and to transfer and vest the same to the Plaintiffs herein.
 - d. Costs of the suits.
4. He further averred that on 22nd December 2022, the Applicants successfully applied for amendment of the decree to enable them to subdivide the suit property. That while in the process of implementing the amended decree, they established that the Defendant had secretly subdivided the suit property into several portions without their knowledge or consent in order to subvert the conclusion of this matter.
 5. That upon seeking advice from Fred Akala, a registered Surveyor and examining the subdivisions, they established that the nine properties belonging to the Applicants fall within L.R No 1757/19 measuring approximately 800 hectares.
 6. The Applicants contended that unless the amendment is effected, the Land Registrar will not be able to implement the judgment and decree issued by this court thereby denying them the fruits of their judgment.

The Respondent's Case

7. In opposing the application, the Respondent filed grounds of opposition and a replying affidavit through her duly appointed agent. The Respondent, argued that the instant application is incompetent for the reason that the suit herein was concluded by the Court of Appeal.
8. According to the Respondent, Section 80 of the [Civil Procedure Act](#) allows review of a decree or order from which an appeal is allowed by the Act but from which no appeal has been preferred unlike in the present case, where the appeal has already been concluded.
9. The deponent argued that the Applicants are inviting the court to reopen the case as the pleadings specifically indicate the suit property as L.R. No. 1757/6. According to the Respondent, the application herein is ousted by Order 45 Rule 3(2) since there is no discovery of new evidence. Urging the court to dismiss the application, the Respondent submitted that the court has no jurisdiction to hear and determine the application.

The Response

10. In a supplementary affidavit dated 5th June 2023, the Applicants asserted that the application is premised on Section 100 of the [Civil Procedure Act](#) and not on Section 80 of the [Civil Procedure Act](#) as read together with Order 45 of the Civil Procedure Rules.
11. The parties were directed to canvas the application by way of written submission.

The Applicants' Submissions

12. The Applicants' submissions were filed on 13th June 2023.
13. On their behalf, Counsel outlined the following issues for the court's determination:-



1. Whether the final decrees of the court can be corrected in the interest of justice for purposes of their due enforcement thereof?
2. Costs and on what scale?
14. As regards the first issue, Counsel submitted that Sections 1A, 1B and 3A of the *Civil Procedure Act* confers wide discretion upon the court to do justice in infinite circumstances. To buttress this point, Counsel relied on the case of *Safaricom Limited vs Ocean View Beach Hotel Limited & 2 Others* (2010) eKLR and *Nicholas Kiptoo Arap Korir Salat v IEBC & Others* (2013) eKLR.
15. Counsel further submitted that it is in the interest of justice to allow the application as prayed.

The Respondent's Submissions

16. The Respondent's submissions were filed on 18th July 2023.
17. On her behalf, Counsel outlined the following issues for the court's determination:-
 1. Whether this court has jurisdiction to vary/amend the final judgment issued on 19th March 2018.
 2. Who should be condemned to shoulder the costs of the application.
18. As regards the first issue, Counsel submitted that by dint of Section 80 of the *Civil Procedure Act*, an application to review or amend the judgment should be done before an appeal is filed. Counsel submitted that the present application has been filed too late in the day as the suit has already been appealed and concluded. Counsel submitted that the application to vary or amend the judgment by substituting the L.R No. 1757/6 with 1757/19 is an indirect attempt to re-open the case and as such the court has no jurisdiction to hear and determine the same.
19. Counsel further submitted that Section 100 of the *Civil Procedure Act* is limited to amendment of any defect or error in any proceedings in a suit. It was submitted that the correction in paragraph 6 of the supplementary affidavit is neither a defect nor an error.
20. It was further submitted that the Applicants have not been desirous to prosecute the suit to their best interest as they have never attempted to lodge a caveat to ensure that their interest in the suit property are protected. It was argued that nothing prevented the Applicants from executing the decree since the year 2018 when the judgment was delivered as there was no stay of execution pending the hearing and determination of the appeal
21. Counsel asserted that equity does not aid the indolent. Concluding his submissions, Counsel contended that the Applicants have approached the court with unclean hands as they did not disclose to the court that the appeal is concluded
22. On costs, Counsel urged the court to dismiss the application with costs.

Analysis And Determination

23. Having considered the application in light of the pleadings, the respective affidavits and the rival submissions, the issues for determination is whether the judgment and decree issued by this court can be amended
24. It is not in dispute that the judgment herein is in favour on the Plaintiffs/Applicants.



25. The instant application is premised on Section 100 of the *Civil Procedure Act* which provides that;

“The court may at any time and on such terms as to costs or otherwise as it may think fit amend any defect or error in any proceedings in a suit, and all necessary amendment shall be made for the purposes of determining the real question or issue raised by or depending on the proceedings.”

26. Explaining the court’s inherent power to recall its own judgment, Sir Charles Newbold P held in the case of *Lakshmi Brothers Ltd Vs R. Raja & Sons* (1966) EA 313 at page 315 as follows: -

“Indeed, there has been a multitude of decisions by this court, on what is known generally as the slip rule, in which the inherent jurisdiction of the court to recall a judgment in order to give effect to its manifest intention has been held to exist. The circumstances, however, of the exercise of any such jurisdiction are very clearly circumscribed. Broadly these circumstances are where the court is asked in the application subsequent to the judgment to give effect to the intention of the court when it gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted. I would here refer to the words of this court given in *Raniga case (2)* (1965) E.A. at p. 703 as follows: -

“A court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given, or in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention.”

These are the circumstances in which this court will exercise its jurisdiction and recall its judgment, that is, only in order to give effect to its intention or to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter.”

27. The Court of Appeal had earlier on held as follows in *Vallabhadas Karsandas Raniga Vs Mansukhlal Jivraj and Others* (1965) 1 EA 700(CAN): -

“It appears to us that s.3(2) of the *Appellate Jurisdiction Act*, 1962 (NO. 38 of 1962) confers on this court the same jurisdiction to amend judgment, decrees and orders that the High Court has under s. 99 of the *civil procedure act*, making it unnecessary to look to the inherent powers of the court....It appears to us further that the words “at any time” in s. 99 clearly allow the power of amendments to be exercised after the issue of a formal order....”slip orders” may be made to rectify omissions resulting from the failure of counsel to ask for costs and other matters to which their clients are entitledA court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when the judgment was given or, in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought before the court when judgment was given on the appeal, the court would, on application or indeed of its own motion, have made the order for refund now sought, which was, in our opinion, necessarily consequential on the decision on the main issues.”

28. The Applicants further relied on Section 3A of the *Civil Procedure Act* which grants the court power to make orders that are necessary for the end of justice and to prevent abuse of court process. The principal consideration for the court that passed the decree ought to be the correctness of the decree.



29. The Plaintiffs contended that while in the process of implementing the decree, they discovered that the Defendant had subdivided the suit property without their knowledge or consent. On her part, the Respondent asserted that the Applicants have not laid any basis for the review of the judgment as required by the law.
30. Section 80 of the *Civil Procedure Act* as read together with Order 45 Rule 1 of the Civil Procedure Rules governs the law on review and sets out the conditions therein.
31. In the present case the Applicants are not seeking to review the judgment of the court but to vary and/or amend the Title Number in view of the subdivision arising from the suit property. It is not in dispute that the suit property was known to the Plaintiffs and the Defendant is LR No. 1757/6
32. The record shows that the suit property was subdivided on 19th October, 2019 thereby giving rise to LR Nos. 1757/19, 1757/20, 1757/21, 1757/22, 1757/23, 1757/24, 1757/25, 1757/26, 1757/27, 1757/28, 1757/29, 1757/30. The amendment sought is consequential to the courts judgment that legal title in the nine parcels within the suit property be transferred to the Plaintiffs herein. The amendment sought will not change the judgment or the subject but give effect to the clear intention of the court. No prejudice will be occasioned to the Defendant herein.
33. In the circumstances and in associating with the two decisions and the legal provisions cited above I am satisfied that the amendment will give full effect to the intention of the court when judgment was delivered.
34. In the end I find that the application dated 26th April, 2023 is merited and the same is allowed in the following terms:-
 - i. The final judgment herein issued on 19th March, 2018 is hereby varied to the extent of substituting Title Land Reference No. 1757/6 with Land Reference No. 1757/19.
 - ii. The Applicants are awarded costs of the application.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF MAY, 2024.

IN THE PRESENCE OF:

Court assistant Alfred.

Ms. Chania for the Applicant.

Ms. Chematia for the Respondent.

