



Abud & 2 others v Shuruti; Attari (Suing as a Legal Representative of the Estates of Hatim Mohamedali Jevanjee and Ebrahim Mohamedali) & 3 others (Proposed Interested Parties) (Environmental and Land Originating Summons 29 of 2010) [2024] KEELC 4625 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4625 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 29 OF 2010**

EK MAKORI, J

JUNE 12, 2024

BETWEEN

MBARAKA ABDALLA ABUD 1ST APPLICANT

MBARAK AWADHI OMAR 2ND APPLICANT

ANSWAR SALIM MOHAMED 3RD APPLICANT

AND

SALEH BIN ABDALLA SHURUTI RESPONDENT

AND

ZAID HUSSEIN EBRAHIM AT'TARI (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATES OF HATIM MOHAMEDALI JEVANJEE AND EBRAHIM MOHAMEDALI) PROPOSED INTERESTED PARTY

AHMED SHEIKH AMINMSELLEM PROPOSED INTERESTED PARTY

MOHAMED LATIF DIAMOND PROPOSED INTERESTED PARTY

ZAINABU MOHAMED DIAMOND PROPOSED INTERESTED PARTY

RULING

1. On 26th June 2015, this Court (Angote J.) allowed the Originating Summons dated 7th April 2010 in this manner:
 - a. A declaration be and is hereby made that the applicants are entitled to all that parcel of land they occupy and described as sub-division No. 224/III/MN by adverse possession.



- b. The Chief Land Registrar, be and is hereby directed to register sub-division No, 224/III/MN in favour of the three Applicants with a certificate of title.
 - c. Each party is to bear his own costs.
2. The orders of this Court were executed, and from the materials and submissions before this Court, suit property has long been subdivided and sold to other third parties, some of whom have died. Their estates are due for distribution, with the subdivided land subject to those Succession Causes. It is important to note that the proposed interested parties are not legally part of the initial OS, but their potential inclusion could significantly affect the proceedings. This sequence of events sets the stage for the current application.
3. Since this Court issued its judgment on 26th June 2015 – the matter went to a lull. However, on 25th July 2023, a new application was brought, dated 20th July 2023, seeking to revisit by way of review of the previous decision and join new interested parties. This application, which marks a crucial turning point in the case, is significant and requires careful consideration:
 - i. That this Court be pleased to join the 1st, 2nd, 3rd, and 4th Proposed interested parties to this suit as interested parties.
 - ii. The Court, in its authority, be pleased to set aside/review the judgment delivered on 26th June 2015, the decree issued on 14th July 2015, warrants, attachments, consequential orders, provisional certificate of title issued on 20th May 2016, transfer, subdivision, and sale of the suit property.
 - iii. This Court is pleased to revert the title of the suit property to the estates of Ebrahim Mohamedali Moshin Mohamedali and Hatim Mohamedali Jevanje.
 - iv. Costs of this application be provided.
4. Parties filed responses to the application. The applicant relied on the Notice of Motion dated 19th July 2023, the Supporting Affidavit sworn on the even date by Zaid Hussein Ebrahim Attari. The 2nd proposed interested party, Ahmed Sheik Ahaminmsem, filed a Replying Affidavit sworn on 11th October 2023, while the proposed third and fourth interested parties, Mohammed Latif Diamond and his wife Zainab Mohammed Diamond, also filed a Replying Affidavit sworn by the former on 26th October 2023. The Court directed that the application be canvassed by way of written submissions. Parties complied.
5. I frame the issues for the determination of this Court based on the averment and the submission by the parties as follows:
 - a. Whether the court should set aside/review the judgment delivered on 26th June 2015, the decree on 14th July 2015, warrants, attachments, consequential orders, provisional certificate of title issued on 20th May 2016, transfer, subdivision, and sale of the suit property.
 - b. Should the 1st – 4th Proposed Interested Parties be joined as parties to this suit?
 - c. Whether the Court should nullify the registration of the applicants and the subsequent registrations of 2nd – 4th interested parties and revert the title to the estates of Ebrahim Mohamedali, Moshin Mohamedali, and Hatim Mohamedali Jevanje.
 - d. Who should shoulder the costs of this application?



6. The Applicant avers that in Section 38 of the *Limitation of Actions Act*, a claimant in a claim of adverse possession must join the registered proprietor of the property when instituting the claim to the suit. This legal requirement, backed by significant legal precedents, forms the basis of the applicant's claim.
7. The applicant in this application avers that the judgment handed down by this Court on 26th June 2015 and all consequential orders should be reviewed and set aside for the following reasons. There was an apparent error on the face of the record since the valid and legally registered owners, when filing the OS, were not named as respondents. This oversight, which has significant implications for the case, is evidenced by the certificate of title produced as 'Z-5' on page 19 of the application entry 4, showing the deceased persons as the registered owners as of 7th April 2010. As of 7th April 2010, when the OS was filed, they were not sued as the owners.
8. The applicant states that Section 38 of the *Limitation of Actions Act* requires the registered land proprietor to be named a respondent when filing a suit for adverse possession. The section provides that:

“Where a person claims to have become entitled by adverse possession to land... he may apply to the High Court for an order that he is registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”
9. According to the applicant, the evidence and submissions provided show that Ebrahim Mohamedali, Hatim Mohamedali, and Moshin Mohamedali (all deceased) were the registered proprietors of the suit property when instituting this suit.
10. The Applicants in the OS failed to name the aforementioned registered owners or their Legal Representatives as respondents/defendants in this suit for adverse possession and serve them with the court process. The Courts have long settled this position in the following precedents. The Court of Appeal in *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR held that:

“a claim for adverse possession can only be maintained against the registered owner of the subject land.”

In *Abdirashid Adan Hassan v Estate of WHE Edgley* [2022] eKLR, the Court similarly held that:

“a claim for adverse possession must be brought against the registered proprietor of the subject land.”

In *Essolly Enterprises Limited v Benjoh Amalgamated Limited* [2019] eKLR, the Court held that:

“an order of adverse possession can only be made against a Respondent who is registered as an owner of land, and that the person sued must be the registered owner.”
11. Having demonstrated such an omission, the applicant believes that the Court is bound to set aside and review the judgment of 26th June 2015 and restore the registered ownership of the suit property to Ebrahim Mohamedali, Hatim Mohamedali, and Moshin Mohamedali or their estate through the first proposed interested party.
12. The applicant contends there is a discovery in this matter in that the applicants, in the OS dated 7th April 2010 and the Supporting Affidavit of Mbarak Awathi Omar, did not annex a certified extract of the title to the suit property showing the registered owner at the time of filing the OS. What was annexed was the first page of the title without entries - Annexure 'MAO-2' in support of the OS already



on record. This first page did not indicate that the respondent in the OS was the registered owner. To conceal this, the applicant filed a search annexed as ‘MAO-2’ showing Saleh Bin Abdalla Shuruti as the registered owner. Though not a necessary document in adverse possession proceedings, the search did not support the first page of the title, which contained no entry. In fact, in the entire judgment, there is no finding that Saleh Bin Abdalla Shuruti, the respondent in the OS, was the registered owner or that an extract of the title had been filed. Even if the Court were to find so, that would be an error on the face of the record. The applicant further states that order 37 rule 7(2) of the Civil Procedure Rules mandatorily requires an application for adverse possession to be:

“supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”

13. The applicant asserts that in the absence of the certified extract of the title, the obvious conclusion is that the OS application did not comply with the provisions of Order 37 Rule 7(2). On discovery of this new and incurable omission, the resulting judgment should be set aside as of right. In Essolly Enterprises Limited v Benjob Amalgamated Limited [2019], eKLR affirmed that it is mandatory to annex a certified extract of the title and struck out a suit for adverse possession for failing to do so thus:

“... the Plaintiff must place a certified copy of the extract of the title before the court to prove that the person he has sued is the registered owner. The Originating Summons dated the 30th May 2013 was not accompanied by a certified copy of the register, and none was annexed to the Supporting Affidavit... It will be noted that sub-rule (2) makes it mandatory that a person filing a claim for adverse possession needs to annex a certified extract of the title... the rules do require that one needs to annex an extract of the register to a claim for adverse possession.... For the above reason, I find and hold that the Plaintiff has not proved on a balance of probabilities, and I have no option but to strike out this suit.”

14. Further, in Abdirashid Adan Hassan v Estate of WHE Edgley [2022], eKLR affirmed that it is mandatory to annex a certified extract of the title and that any other evidence does not conclusively prove ownership thus:

“... the proceedings must be in respect of the correct parcel of land and whose ownership is verified by an annexed extract of title in terms of Order 37 rule 7 of the Civil Procedure Rules. In the instant case, the Plaintiff only adduced a deed plan as Plaintiff’s Exhibit 2 which is inconclusive proof of ownership of the property. In determining the issue of adverse possession, this Court cannot extinguish an ‘non-existence and unknown titles.’”

15. The applicant is of the view that there is a sufficient reason to set aside the judgment and all resulting documents because instead of the applicants in the OS annexing the certified extract of the title, the applicant for adverse possession annexed a document purporting to be a copy of the certificate of postal search dated 16th September 2009. The second proposed interested party is a registered owner of Subdivision No. MN/III/11190 C.R NO. 76768 and a joint registered owner of Subdivision No. MN /III/11889 C.R No. 76767 did not annex a certified extract of the title in his response to the present application. Instead, he reproduced the document as annexure ‘D’ in his replying affidavit, alleging that Respondent Saleh Bin Abdalla Shuruti was the registered owner of the suit property at the time. The applicant contends the document is doctored because it did not reflect the actual status of



the title to the suit property at the time since the said Saleh Bin Abdalla Shuruti was never a registered owner of the suit property or the registered owner. Section 36(1) of the Evidence Act requires that:

“in estimating the weight, if any, to be attached to a statement in a document, the Court should have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.”

16. The applicant concludes that this Court should not attach any weight to the statement in the said document purporting that Saleh Bin Abdalla Shuruti was the registered owner of the suit property since the applicants in the OS had an incentive to conceal or misrepresent facts because he was not the registered owner at the time. Despite the applicants in the OS misreading the Court that by 2010, they had the suit property for more than 12 years uninterrupted, the evidence on record indicates that the property is undeveloped and only contains the old structures that were constructed by the deceased as depicted by the annexed photographs.
17. The respondents in this application aver that the Sections of the law relied on by the applicant do not confer jurisdiction on this Court to issue the orders sought. On Order 45(1) of the Civil Procedure Rules, the respondent aver that the error talked about is not an error on the face of the record. According to them, there is none. In the OS, the plaintiffs attached an official search and the position of the register, which showed that the suit property belonged to the one Swaleh Bin Abdallah Shuruti. The Court considered that the plaintiffs had resided on the suit property for uninterrupted twelve years and had acquired the land by dint of adverse possession. That the title had been extinguished despite the ownership.
18. The respondents aver that there has been an inordinate delay in bringing this application. This Court's judgment was delivered on 26th of June 2015. The current application was brought nine years later. Gazette Notice No. 6559 was also published on 4th September 2015, which stated the intention of the Registrar to issue a new title document. The applicants herein did not raise any qualms.
19. Because of the delay, the intended interested parties aver that the suit property has changed hands to themselves and other third parties, who claim they purchased the land as innocent purchasers for a value.
20. Looking at the record, this Court (Angote J.) relied on the documents attached to the OS, which showed one Swaleh Bin Abdallah Shuruti to have been the registered owner of the suit property, annexed to it was a copy of the title and search conducted in 2009. The plaintiffs alleged they had been in the suit property for over 30 years. The defendant they had sued could not be found. He had let them live there all those years. The applicant had annexed a letter from the Chief to show they were staying on the suit property for all those years. The record shows that since this suit was filed in 2010 and the judgment delivered in 2015, much has happened on the suit property. It has changed hands to third parties. The substratum of the original suit property has long mutated.
21. The second proposed interested party /respondent argues that the Court should not set aside the judgment obtained on 26th June 2015 and have the title revert to the Estate of Ebrahim Mohamedali, Hakim Mohamedali, and Muhsin Mohamedali for failing to join the registered owners. He avers that he purchased Parcel No. 2224/II/MN CR NO. 2119 at Kanamai Kikambala, Kilifi County, in April 2017 at a consideration of Kshs 8,000,000/-. It was subdivided into two portions – No. 1188 and 11890. A portion of that land was hived off for a public road and surrendered to the Government. He sold 2/3 of Parcel No. 11889/III/MN to Mohamed Latif Diamond and his wife, Zainabu Diamond.



- Portion No. 11890/III/MN was exchanged with parcels No. 4/77, 4/78, 4/95 & 4/96 belonging to Harith Ali Abdulkadir, who died on 10th August 2021. Plot No. 4/77 and 4/78 were sold to Joyce Wanjiru Koigi.
22. The second proposed interested party avers that he did due diligence when purchasing the property and discovered that the land was in the plaintiff's name. The allegations raised by the applicant were never in the public domain.
 23. The third proposed interested party confirmed purchasing a portion from the second interested party after due diligence, oblivious to the applicant's allegations. He and his wife, the fourth interested party, are innocent purchasers of value without notice.
 24. That the initial title and search in which this Court (Angote J.) acted in the OS was in the name of Saleh Bin Abdalla Shuruti as of 17th September 2009. Before the property was registered and title issued to the applicants in the OS, the Land Registrar caused the intention to gazette and did so in Gazette Notice No. 6559 dated 4th September 2015.
 25. The second, third, and fourth interested parties question where the applicant (in this application) was when all the transactions touching on the suit property happened. The grant concerning the estate of Hatim Mohamedali Jeevanjee was confirmed on 10th December 2003, while that of Ebrahim Mohamedali Jivanjee was confirmed on 14th November 2008. Eight years lapsed before the Originating Summons herein were brought. No caution was placed on the register, and no grant or Certificate of Confirmation was placed on the register for transmission purposes.
 26. I have considered the application and what it seeks. Plot No. 224/III/MN was registered in Saleh Bin Abdalla Shuruti, per the postal search dated 16th September 2009. The letter from the Chief dated 28th March 2010 confirmed that the applicants in the Originating Summons were in occupation. They claimed to have lived on the suit property for over 30 years.
 27. In *Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira* [2022] eKLR, the Court set out the conditions to be achieved before a Court of law can review its judgment or orders:

“In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from several authorities: -

 - i. A court can review its decision on either of the grounds enumerated in order 45 rule 1 and not otherwise.
 - ii. The expression "any other sufficient reason" appearing in order 45 rule 1 has to be interpreted in the light of other specified grounds.
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.



- vi. While considering an application for review, the court must confine its adjudication with reference to material available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case, the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof, and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 *CPC*. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”

28. The applicant in this application has ably brought out what he believes is an erroneous decision by this Court that needs to be set aside ex debito justitiae. The applicant is not only asking this Court to review the impugned orders but also substitute the same with other further orders that will affect other third parties who were never parties in this suit. They are the proposed intended interested parties. If the Court proceeds to act in the manner suggested by the applicant, it will not only have reopened the entire suit but also would, at the same time, have re-heard it and substituted the orders complained with “new” expansive orders. I do not think that is the province of review under Order 45 of the *Civil Procedure Rules*. This Court could have arrived at an erroneous decision, but that decision cannot be corrected in the manner proposed by the applicant by rectifying the alleged error and substituting the same with fresh and expansive orders to affect persons who were never parties in the initial suit and some who have not been joined in this application.

29. This Court’s judgment emanated from an OS filed on 7th April 2010. The judgment was delivered on 26th June 2015. The suit was, therefore, filed fourteen years ago, and the judgment was delivered nine years ago. The document complained to have been the basis of the error, and the search indicated the registered proprietor of the suit property was Saleh Bin Abdalla Shuruti. The applicant alleges the actual proprietors were all deceased. The confirmation of the grant of the estate of Hatim Mohamedali Jeevanjee was on 10th December 2003, while that of Ebrahim Mohamedali Jivanjee was on 14th November 2008. No caution was placed on the register. No grant or Certificate of Confirmation was placed on the register for transmission purposes. From 2003 (when the first grant was confirmed) or put it 2008 (when the second grant was confirmed), no explanation has been provided as to why the applicant could not distribute the estates of the deceased.



30. The worst part is that the land has long changed hands. It has been subdivided, and several innocent third parties have acquired it—some of whom are not parties to this application. Reversing the pendulum and starting the matter afresh will be a Herculean task. The proposed interested parties claim to be innocent purchasers for value. This will mean a whole new cause of action. The original substratum of the suit has long changed. A review application in the manner the applicant suggests will not be a panacea.
31. On the second, third, and fourth issues I framed for this Court's decision, the review sought has been brought inordinately late. I see no need to join the other proposed interested parties, innocent purchasers for value; there is no pending suit. They were never parties in this suit. Dragging them to this OS will not resolve the issues raised in the current application. The orders sought to rectify the register will be final and against the intended proposed third parties who may have no chance to defend. The orders proposed will affect other parties not joined or proposed to be joined; therefore, they will not be applicable here. The application suffers severe laches and delays. The same is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 12TH DAY OF JUNE, 2024.

E. K. MAKORI

JUDGE

In the presence of:-

Mr. Karina, for the Applicants

Court Assistant: Happy

In the absence of:-

Mr. Odongo, for the 2nd, 3rd and 4th proposed intended interested parties

