



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Green Valley Enterprises Ltd v Mpeshe & 4 others (Environment & Land
Case 601 of 2013) [2024] KEELC 4651 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4651 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 601 OF 2013**

AA OMOLLO, J

JUNE 6, 2024

BETWEEN

GREEN VALLEY ENTERPRISES LTD PLAINTIFF

AND

NAISANOI MPESHE 1ST DEFENDANT

LAKATIA MPESHE 2ND DEFENDANT

AMOS MPESHE 3RD DEFENDANT

NICHOLAS KUPERE MPESHE 4TH DEFENDANT

TUMPEINE MPESHE 5TH DEFENDANT

RULING

1. The Applicants filed a notice of motion dated 1st November 2023 brought under the provisions of section 1A, 1B, 3A and 80 of the [Civil Procedure Act](#) and Order 45 rule 1 of the [Civil Procedure Rules](#). The application is seeking for the following orders
 1. Spent
 2. Spent
 3. That the judgment delivered on the 24th June, 2021 be reviewed to the extent that the property known as LR No. Kajiado/Ololoitikoshi/Kitengela/ 2020, including its boundaries, is as appearing in the annexure marked TMI.
 4. That there be no orders as to costs of this application.
2. The grounds of the application were that vide the judgment delivered on the 24th June, 2021, this court proceeded to hold among others:



- a. The plaintiff is declared as the lawful owner of all that parcel of land known as Kajiado/O/oo/oitikoshi/Kitenge/a/2020.
 - b. The defendants, their agents, servants and or anyone claiming under them shall vacate and handover the possession of the suit property to the plaintiff within ninety (90) days from the date hereof.
 - c. In the event that the defendants of any of them fail to vacate the suit property within the prescribed period, the plaintiff shall be at liberty to apply for warrants for their forceful eviction from the property.
3. That at the time of delivering this judgment, no survey of the suit property in consideration of the adjacent properties had been done and upon delivering the judgment, the Applicants herein vide their application dated 28th July, 2022 sought to have survey of the property done prior to any eviction. Further that, the application was not prosecuted after the Applicants realized that they did not need an express court order to conduct the said survey. Consequently, the Applicants proceeded to engage the Kajiado District Land Surveyor together with a private surveyor who surveyed the entire parcel of land and was able to among others identify the beacons to their property and that of the suit property herein, establishing that the suit property sits at a distinct location adjacent to the Applicants' property of which the burial site of their relatives sits within the boundaries of their property where they have placed beacons.
 4. Through the supporting affidavit sworn by David Tumpeine Mpeshe, the Applicants contended that the action by the Plaintiff/Respondent of seeking to take over the Defendants/Applicants' relative burial site is based on the dicta of the judgment herein which gives them more acreage of land being 69.4 acres than what its title actually accords them that is 49.4 acres. That the information about the placement of the Plaintiff's land on the ground only came to the knowledge of the Defendants after the survey was done of the entire block.
 5. They stated that no prejudice shall be visited upon the Plaintiff/ Respondent save that all the issues for determination would have been dealt with completely and a resolution of the longstanding dispute would have been arrived at.
 6. In opposition, the Plaintiff/Respondent filed a preliminary objection dated 27th November 2023 on the grounds that the Applicants having lodged an appeal to the Court of Appeal (Nairobi COACA E768 of 2022) against the decision of Honourable Lord Justice S. Okong'o J in Nairobi ELC 601 of 2013 in effect extinguished their right to apply for orders of review. It also pleaded that the application is res judicata as the matters in issue having been heard and determined on merit by Honourable Lord Justice S. Okong'o J through a judgement delivered on 24th June 2021 and Honourable P. Nyamweya through a Ruling delivered on 19th December 2014 on the Notice of Motion application dated 5th June 2014 seeking a survey of Kajiado /Olooloitikoshi /Kitengela/ 2020 in Nairobi ELC 601 of 2013.
 7. Further, that the stay being sought for is res judicata the same having been earlier granted on condition that the Applicants herein do furnish security in the form of either money or bank guarantee equivalent to the market value of the suit property within 30 days, failure to which execution proceedings were to issue and the Applicant has failed to comply with the said conditions. The Plaintiff/Respondent stated that the application is fatally and incurably defective for having failed to comply with the mandatory provisions of the [Land Registration Act](#) No. 3 of 2012.



Submissions

8. The Plaintiff/Respondent filed submissions dated 26/2/2024 in relation to their preliminary objection and the Defendants/Applicants filed submissions dated 5/2/2024 and undated further submissions.
9. In support of the preliminary objection, the Plaintiff/Respondent submitted that the Applicants had earlier filed an application dated 17th December 2021 seeking for orders of stay of execution of the Judgement and leave to file Notice of Appeal out of time. When the same came up for hearing on 28/4/2022, Counsel for the Applicant indicated that they intended to file an application at the Court of Appeal for extension of time and therefore sought leave to amend the application and seek for stay only.
10. That the court granted a conditional order of stay in the terms that the Judgement Debtor do furnish security in the form of either money or bank guarantee equivalent to the market value of the suit property within 30 days, failure to which execution proceedings were to issue and which condition the Applicants failed to meet. Later, the Applicant withdrew their application dated 17/12/2021 on 5/7/2022.
11. That the Applicant filed on 5th July 2022 Court of Appeal civil application E235 of 2022 dated 1st July 2022 seeking extension of time and leave to file and serve their record of appeal in the present appeal, out of time. The said application was allowed and an order issued directing the Applicant to lodge a notice of appeal within 14 days from the date of the Ruling (30th September 2022) and lodge Record of Appeal within 30 days thereafter.
12. That the Applicant through the firm of Ochieng Teddy Advocates filed on 5th October 2022 through the Judiciary e filing portal a notice of appeal in this matter dated 5th October 2022 and on 7th November 2022 a memo of appeal at the Court of Appeal. The same was issued with case number Nairobi COACA/E768/2022 *Naisiano Mpeshe and Lakata Mpeshe and 4 Others v Green Valley Enterprises Limited*. That also, the record of appeal was served on the Respondent's Counsel on 9th November 2022.
13. The Respondent submitted that the review remedy is only available to a party who, though has a right to challenge the decision in question by an appeal, is not appealing or to whom there is no right of appeal. That a person cannot exercise both the right of appeal and review at the same time and in support cited the case of *Orero v Seko* [1984] KLR 238, *Kisya Investments Ltd v Attorney General & another* [1996] eKLR and *The Chairman Board of Governors Highway Secondary School v William Mmosi Moi Civil Application No. 277 of 2005*.
14. That the purpose for not allowing review and Appeal to be pursued concurrently or one after the other is because doing so, would have the effect of res judicata or Sub judice as the Inferior Court, would be handling a matter which has been concluded and or/ live before superior Court. It also contravenes the overriding objective as provided under sections 1A and 1B of the *Civil Procedure Act* whose aim is the disposal of cases expeditiously and avoidance of multiplicity of proceedings.
15. The Respondent further submitted that the judgement of Honourable Lord Justice S. Okong'o J delivered on 24/6/2021 extensively analysed the issue of whether Kajiado/Ololoitikoshi/Kitengela/ 2020 exists on the ground and has been demarcated upon evaluating the evidence produced before him by the Surveyor in charge of Kajiado County and Land Registrar Kajiado County and arrived at a finding that the same exists on the ground and has been demarcated.
16. Further, the question of survey of LR number Kajiado/Ololoitikoshi/Kitengela/ 2020 was initially canvassed through the Plaintiff's Notice of Motion Application dated 5/6/2014 which was opposed



- by the Defendants. That the Court in delivering its Ruling indicated the issues raised will be better and more fully canvassed during full trial and decided on in the light of other evidence touching on the suit property.
17. The Respondent argued that survey of Land Reference Number Kajiado/Ololoitikoshi/Kitengela/2020 should not now provide an avenue for the Defendants/Applicants to seek a review because that survey was a matter which was open for controversy in the earlier proceedings. It was therefore something which was within the knowledge of all the parties and vehemently opposed by the Defendants/Respondents. Therefore the Defendants/Respondents cannot argue that that information was not, and could not by reasonable diligence have ascertained by them during trial and/or before the judgement. In support of its arguments the Respondent cited the case of *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR.
 18. In support of the argument for *res judicata* the Respondent cited also the case of *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR quoted in *Njangu v Wambugu and another Nairobi* HCCC No.2340 of 1991 (unreported) where Kuloba J, held that if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*.
 19. That a motion dated 8/7/2022 for execution of decree was allowed by an order of the Court and the Applicants filed another application dated 28/7/2022 seeking to review the Orders. They stated that the Applicants failed to prosecute the said application and the same was dismissed for want of prosecution on 1/3/2023 by court. That the Applicants then moved to ELC Kajiado where on 26/9/2022 they filed an Originating Summons dated 14/9/2022 seeking stay and reparcellation on the basis that Kajiado/ Kitengela/ 2020 is unsurveyed, undemarcated and does not exist as indicated in ground. That they again filed on 7/11/2022 a similar application, Notice of Motion dated 4/11/2022, seeking interim orders of stay of the eviction pending hearing and determination of the Originating Summons.
 20. They contended that on 6/11/2023 when that application came for hearing before Hon. Lady Justice L. Komingoi in Kajiado, the Defendants/Applicants sought to withdraw the matter and the Suit was withdrawn with Costs. The Respondent submitted that the Applicants cannot go behind their back and further violate provisions of Section 18 and 19 of the *Land Registration Act* and ambush it with an unauthenticated survey report allegedly produced by their “private surveyor” in the absence of the Respondent and now present it to the Court for adoption.
 21. That even if the allegation by the Respondent that Kajiado/ Kitengela/ 2020 is unsurveyed, undemarcated and does not exist on the ground and the boundaries have not been fixed were correct, the proper person mandated to do that is the Land Registrar pursuant to section 18 and 19 of the *Land Registration Act* and in support cited the cases of *inter alia*; *Nelly Atieno Oluoch v Damaris A Nyawalo & 2 others* [2021] eKLR and *Republic v District Land Registrar, Thika Lands Office Ex Parte Busblina Properties Company Limited*.
 22. In response the Applicants submitted that the Respondent having filed a notice of preliminary objection, their facts as adduced remain uncontroverted and uncontested. That the Respondent’s submissions are filled with factual issues among them controverted which can only be brought out through an affidavit.
 23. That the summary of facts for instance that the Plaintiff/Respondent on 18/11/2022 filed an application to set aside the leave granted to appeal out of time, which application was allowed by consent of the parties can only be done through affidavit. In support, they cited the case of *Momanyi*



Ē Associates Advocates v Nairobi City County, Nairobi Civil Appeal No. 379 of 2018, where the Court of Appeal cited Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi Another (2014) eKLR for the proposition that submissions cannot take the place of evidence.

24. They stated that at the time of delivery of the impugned judgement, a survey of the suit parcel had not been done and they have sought the Kajiado District surveyor to proceed to survey the area and correctly demarcate the boundaries between the suit property and the Defendant's properties. They added that there is currently no dispute as to the boundaries as appearing in the survey report.
25. The Applicant submitted that the conditions set in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010 being the law setting out review, are disjunctive and operate independently and the Applicants have satisfied the same. It is their submission that the survey report demarcating the boundaries of the suit property was completed on 24/7/2023 and that this is new evidence that was not within the knowledge of the court at the time of its decision which had the court been aware that the Plaintiffs property and its boundaries are distinct from the property occupied by the Defendant, an order of eviction would not have issued.
26. Further, they submitted that as regards whether there is a mistake or an error apparent on the face of the record, by virtue of the court passing judgment of eviction of the defendants without knowing where the Plaintiff's land was located and its clear boundaries as distinct from the defendants' property, there was an error apparent on the face of the record.
27. The Applicants contended that the first ground of the preliminary objection that they have filed an appeal thus the court does not have jurisdiction to hear and determine the review application should collapse ab initio. The reason being, there is currently no appeal filed. That they had sought this court for leave to file an appeal out of time through the application dated 4/7/2022 which application was abandoned and withdrawn.
28. That there is no pending appeal in Nairobi COACA E768 of 2022 as stated by the Respondent and what is pending is an application to extend time to file an appeal. It is their averment that the Respondent has not produced any evidence to show any record of appeal being filed and neither has there been any notice of appeal filed to showcase the commencement of an appeal. In support of their argument, the Applicants cited the case of Yani Haryanto v E. D. Ē F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992.
29. The Applicants submit that their application is not res judicata as there is no pending application and or determined application determining any issue of review of the impugned judgement. That what the Plaintiff has attempted to allege is that the issue of survey was already determined vide the ruling of the court delivered on the 19th December, 2014 but the said ruling dealt with the question of whether there should be a survey which request was already done and concluded. That the issue pending is whether there should be a review of the judgment and whether the concluded survey should be made part of the judgment.
30. On the ground of PO that the Applicants have not complied with the provisions of the Land Act, they submitted that there is no specific provision mentioned alleged to have been breached thus annihilate the right to fair hearing of the Defendants/Applicants. The Applicants posit that the Plaintiff's/ Respondent's P.O does not meet the threshold set out in the case of the Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696 as it is filled with issues of facts because for the court to find out whether there is appeal or not, the court must establish whether the issues raised in the application have been determined or not.



Analysis and determination:

31. It is trite that Preliminary Objection is purely based on points of law. The Respondent raised grounds in support of the preliminary objection which grounds have been refuted by the Applicants. Courts have guided litigants that a ground of res judicata is best raised and argued by way of notice of motion where pleadings are annexed to enable them determine whether the current suit/application is res judicata. Justice L. Gacheru held in the case of *Margaret Njeri Gitau v Julius Mburu Gitau & 2 others* [2022] eKLR

“Since a Preliminary Objection cannot be raised on disputed facts and as to whether or not the matter is Res Judicata, will require the probing of evidence, the Court finds and holds that what has been raised does not amount to a Preliminary Objection.”

32. However, the present case is distinguishable by virtue of the fact that a ruling and a judgement was entered in the same file that the objection of res judicata is taken up. There is nothing which precludes this court from reading the record and the judgement rendered to determine whether the issues raised are res judicata. I will therefore determine the question of res judicata as a ground in opposition to the application for review and decline to dismiss it as is being urged by the Applicants.

33. The second issue for the court to determine is whether the Applicant has satisfied any of the conditions set out in section 80 of the *Civil Procedure Act* and or Order 45 of the *Civil Procedure Rules*. Order 45 of the Civil Procedure Rules provides that a court can only review its orders on the grounds that there is discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or there was a mistake or error apparent on the face of the record; or there are other sufficient reasons and the application must have been made without undue delay.

34. In the case of *Alpha Fine Foods Limited V Horeca Kenya Limited & 4 Others* (2021) eKLR, Mativo J stated:-

“The power of review can be exercised by the court in the event of discovery of new and important matter or evidence which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. As the Supreme Court of India [15] stated: -

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” ... means a reason sufficiently analogous to those specified in the rule”

35. The Judgement was rendered in this matter on 24th June 2021 while the present application was made 1st November 2023 which is approximately two years three months after the judgement. In the grounds in support of the motion, no explanation has been given for the undue delay nor is there any reasons



- offered in the affidavit in support of the application. Order 45 required the Applicants to move the court without delay and in this instant, they are guilty of laches with no explanation to make the court exercise discretion in their favour.
36. Be that as it may, I will look into the application whether it meet the grounds of review or otherwise. The learned trial judge also gave a summary of the defence and counter-claim found at pages 2-4 of the judgement. In the last paragraph at page 4, the judge noted that the Defendants had admitted that the Plaintiff is the registered owner of the suit property Kajiado/Kitengela/2020 but claimed that they had been in adverse possession of the same under the provisions of section 7 of the Limitation of Actions Act. In this application, the Applicants argue that the judge would have reached a different decision had he been presented with a survey report they hope the court will adopt if their application is allowed.
37. The law allows for review if the Applicants satisfy the Court that the said evidence could not be accessed despite conducting due diligence. The Applicants have not explained to the court any hindrance they had which barred them from accessing the survey report annexed as TM1 which they now want the court to adopt. Besides, the lack of explanation, a perusal of the judgement shows there was never an issue raised for the determination of the sizes of the suit property and the title Kajiado/Kitengela/1862. If it was part of the evidence adduced but which the judge failed to consider then such an issue would form a ground for appeal and not review.
38. Further, as regards the newness of the evidence sought to be introduced, the judge referred to the evidence of PW2 who was the County Surveyor and PW3 who was the Land Registrar for Kajiado County. The trial judge observed that PW2 confirmed that the suit title had demarcations on the ground with its locations confirmed with the Registry Index Map. He was not persuaded by the sketch drawings produced by the Defendants/Applicants to prove that the suit property did not exist on survey maps and the grounds. This was a decisional finding and not an error on the face of the record. The Defendants were thus aware of the evidence of the County Surveyor (PW2) and they had opportunity to apply for time to obtain and produce their alternative survey report during defence hearing but which opportunity was missed. If they are unhappy with the judge's finding on the location/demarcation of the Plaintiff's land as per the documents produced before him, their option is to appeal the decision and not approach this court to sit on appeal on its own finding.
39. Both parties referred to the ruling rendered by Nyamweya J (as she then was) on 19th December 2014 on the application brought by the Plaintiff/Respondent. The Plaintiff had sought for an order to have the District Land Registrar and District Land Surveyor, Kajiado to conduct a survey on the suit property and which application was vehemently opposed by the Defendants. Consequently, the prayers sought (in the motion dated 5.6.2014) were denied and the Plaintiff was told that they had the liberty to call the two land officials as their witnesses. Thus, all along since 2014, the Defendants knew about the need to have the survey undertaken and is barred from referring to evidence that could not be retrieved after doing due diligence.
40. The issue of the demarcation having been determined after a full hearing, I agree with the Respondent/Plaintiff that the same is now *res judicata*. Without prejudice to the doctrine of *res judicata*, the Applicants also want the Court to make a finding on the boundaries of Kajiado/Kitengela/2020 based on a document (TM1) which does not meet the threshold of section 64-69 of the Evidence Act Cap 80 of the Laws of Kenya.
41. The upshot of the foregoing is that I find the application is guilty of laches, *res judicata* and without any merit. It is dismissed with costs to the Plaintiff/Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JUNE 2024.



A. OMOLLO
JUDGE

