Kiuna & another (Administrators of the Estate of Kiarie Kiuna - Deceased) v Hinga (Environment & Land Case 11 of 2017) [2024] KEELC 4619 (KLR) (5 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4619 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT & LAND CASE 11 OF 2017

BM EBOSO, J

JUNE 5, 2024

BETWEEN

JOSEPH KIUNA ..... 1ST PLAINTIFF

PETER WANG'ANG'A KIARIE ..... 2ND PLAINTIFF

ADMINISTRATORS OF THE ESTATE OF KIARIE KIUNA - DECEASED

AND

DOMINIC MWAURA HINGA ..... DEFENDANT

RULING

1. This Court [Eboso J] rendered a Judgment in this cause on 20/9/2023. One of the issues that fell for determination in the cause was whether the defendant was a trespasser on the one acre portion of land parcel number Ndeiya/Ndeiya/1419 that was at the centre of the dispute in the cause. The court made a finding to the effect that the defendant was not a trespasser on the one acre portion of the land. It is clear from the relevant analysis in the said Judgment of the court that the above finding was informed by the evidence that was on record. The relevant evidence indicated that the primary claim by the plaintiff was preceded by a land dispute that had been adjudicated on by the defunct Land Disputes Tribunal in which the Tribunal awarded the one acre portion to the defendant together with his siblings. The court noted that the late Kiarie Kiuna, whose estate is the plaintiff in this suit, elected not to challenge the award through the then available legal mechanisms. The Court further observed that the award and the subsequent adoption judgment and decree of the Magistrate Court could not be wished away. Ultimately, the Court found that, in the circumstances, the defendant could not be said to be a trespasser on the one acre portion. Based on the evidence on record, which indicated that the award of the Tribunal and the consequential Decree of the Magistrate Court subsisted, the Court allowed the defendant's counterclaim.

2. Subsequent to that, on 20/11/2023, the plaintiffs brought a notice of motion dated 13/10/2023, inviting this court to exercise review jurisdiction under Order 45 rule 1 of the Civil Procedure Rules

and review its Judgment on the ground that they had "by sheer lack and post-judgment" come across evidence that the Tribunal's award and the consequential decree of the Magistrate Court were set aside vide a "judgment" rendered by Hon Maraga J [as he then was] in Nairobi High Court Misc Civil Application No 153 of 2007. They exhibited copy of a ruling rendered by Maraga J [as he then was] on 27/10/2010. They also exhibited copy of an order made by Wendoh J on 28/2/2007 through which the High Court granted one Francis Njoroge Kiuna leave to apply for judicial review orders of certiorari and prohibition against: (i) The Land Disputes Tribunal Limuru; (ii) Dominic Mwaura Hinga; (iii) Kiarie Kiuna; and (iv) the Limuru Resident Magistrate.

3. The said notice of motion dated 13/10/2023 is the subject of this ruling. It was supported by an affidavit sworn on 13/10/2023 by Peter Wang'anga Kiarie and a supplementary affidavit by the same deponent sworn on 22/1/2024. It was canvassed through written submissions dated 29/1/2024.

4. The case of the applicants is that at the time of trial and Judgment, they were not aware of the order of Maraga J which annulled the award of the Tribunal and the consequential adoption Judgment and Decree of the Limuru Resident Magistrate Court. They contend that after information relating to the outcome of the present case reached the neighbourhood, a neighbour disclosed to them that Francis Njoroge Kiuna had challenged the award of the Tribunal and had obtained an order annulling the award of the Tribunal and the decree of the Magistrate Court. At that point, they approached Francis Njoroge Kiuna who gave them a copy of the ruling by Maraga J, rendered in Nairobi High Court Civil Miscellaneous Application No 153 of 2007.

5. It is the case of the applicants that the said ruling by Maraga J is new and curial evidence that was not within their knowledge. They fault the respondent for concealing the evidence from this Court. They urge the Court to review its Judgment on account of the new evidence.

6. The respondent opposed the application through his replying affidavit sworn on 17/11/2023 and written submissions dated 30/1/2023. The case of the respondent is that, upon initiating this suit at Nairobi ELC in 2016, the applicants filed a notice of motion dated 30/12/2016 in which they sought interlocutory injunctive orders. He contends that, through his replying affidavit to the said application, he exhibited proceedings relating to Limuru SRMC Land Case No 10 of 2006; Kiambu Land Dispute Tribunal Case no LND/16/20/36/2006 and; the Decree of the Senior Resident Magistrate Court in Limuru SRM Land Case No 10 of 2006 dated 8/5/2007. He adds that he duly served his replying affidavit on the applicants, hence the applicants have all along been aware of "the proceedings of the Land Disputes Tribunal and the Decree of the SRM Court in Limuru" which he contends were also in his list and bundle of trial documents.

7. The respondent adds that, in light of the above, the applicants "cannot bring themselves within the purview of Order 45 on "new evidence" or "evidence not within their knowledge after exercising due diligence". The respondent urges the court to dismiss the application for review.

8. The Court has considered the application, the response to the application, and the parties' respective submissions. The court has also considered the relevant legal frameworks and jurisprudence. The key issue to be determined in this ruling is whether the application under consideration satisfies the threshold for review of a judgment under Order 45 rule 1 of the *Civil Procedure Rules*.

9. The court's jurisdiction to review its own judgments is donated by Section 80 of the *Civil Procedure Act* which provides as follows:

> " Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

10. The jurisdiction is regulated by the framework in Order 45 rule 1 of the *Civil Procedure Rules* which provides as follows:

> " 1. (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is hereby 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.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

11. Our superior courts have in the past outlined clear principles and guidelines that guide the exercise of the jurisdiction of a court to review its own judgments and rulings. In *Mohamed Fugicha v Methodist Church in Kenya (Through its Registered Trustees) & 3 others* (2020) eKLR, Civil Application No 4 of 2019, the Supreme Court of Kenya emphasized that the jurisdiction of a court to review its own judgment was never intended to give a party the opportunity to canvass an appeal before the same court. The Supreme Court emphasized that where review is sought, the applicant has to demonstrate to the satisfaction of the court the grounds for review.

12. The Supreme Court of Kenya had earlier outlined this principle in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* (2017) eKLR. The Court quoted with approval, the following principle that was outlined in *Sow Chandra Kanta & another v Sheik Habib* 1975 AIR 1500, 1975 SCC (4) 457:

> " A review of a judgement is a serious step and a reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility"

13. The Supreme Court similarly adopted the following principle that was articulated in *Northern India Caterers (India) v Governor of Delhi* 1980 AIR 674:

> " It is well settled that a party is not entitled to seek a review of a judgement delivered by this court merely for the purpose of rehearing a fresh decision of the case. The normal principle is that a judgment pronounced by this court is final and departure from that

principle is justified only when circumstances of a substantial and compelling character make it necessary to do so"

14. The Court of Appeal in *Daniel Macharia Karagacha v Monica Watithi Mwangi*, Civil Appeal No 159 of 2000 rendered itself on the relevant principle as follows:

> " Review is only available where there is an error of law apparent on the face of the record or there is a discovery of new and important matter of evidence which the applicant could not by exercise of due diligence have placed in his pleadings or before the Judge when he heard the earlier application."

15. In the present application, the plaintiffs/ applicants contend that they were not aware that the award of the Tribunal and the adoption judgment and decree of the Resident Magistrate Court had been set aside. They add that when information relating to the Judgment of this court reached the neighbourhood, a neighbour volunteered information to the effect that one Francis Njoroge Kiuna had caused the award of the Tribunal and the decree of the Senior Resident Magistrate Court to be annulled by the High Court. They contend that on receiving the information, they approached Francis Njoroge Kiuna who confirmed that, indeed the High Court had annulled the award and decree and gave them details of the case number, to wit, Nairobi High Court Miscellaneous Application No 153 of 2007. The applicants add that this is the point at which they became aware of the above said High Court proceedings and ruling that had annulled the award and the decree. The applicants contend that the ruling is a crucial piece of evidence that has a bearing on the dispute and on the judgment of the court.

16. The respondent does not agree with the above position. He contends that, through his replying affidavit filed in this suit in 2017; and through his trial bundle, he availed to the applicants documents relating to the proceedings of the Tribunal; the award itself; the adoption proceedings; and the decree of the Senior Resident Magistrate Court. It is the case of the respondent that the applicants have not met the threshold set out in Order 45 rule 1 of the *Civil Procedure Rules*.

17. The Court has considered the respondent's response and examined the documents which he annexed to his replying affidavit sworn on 1/3/2017. The exhibited documents were as follows (i) Exhibit DM1a – Official Search relating to Ndeiya/Ndeiya/1419; (ii) Exhibit DM1B – Official Search relating to Ndeiya/Ndeiya /1420; (iii) Exhibit DM2a – proceedings relating to Limuru Senior Resident Magistrate had Case No 10 of 2006 and proceedings relating to Ndeiya Division Kiambu District Case No LND/16/20/36/2006; (iv) Exhibit DM2b – Decree in Limuru Senior Resident Magistrate Land Case No 10 of 2006; (v) Exhibit DM3 – Photographs; and (iv) Exhibit DM4 – Burial Authorization relating to the remains of Samuel Wanganga Kiuna.

18. The Court has also examined the respondent's list and bundle of trial documents in the present suit. The trial bundle contained the following 8 documents which were all produced by the respondent during trial: (i) Certificate of Death for Samuel Ng'ang'a Kiuna; (ii) Photographs of the Family of Samuel Nganga Kiuna during his burial; (iii) Certificate of Official Search for title number Ndeiya / Ndeiya/1419; (iv) Certificate of Official Search for Title No Ndeiya/ Ndeiya/1420; (v) Proceedings in Limuru SRMC Land Case No 10 of 2006 – Limuru; (vi) Decree in SRM Land Case No 10 of 2006; (vii) Photographs of destruction to property; and (viii) Burial Authorization.

19. A scrutiny of the above exhibits does not disclose any document or information relating to Nairobi High Court Misc Civil Application No 153 of 2007 and the ruling that was rendered in the said suit. It is therefore not true that the respondent disclosed to the applicants information relating to the said

High Court Case and the High Court ruling that is said to have annulled the award of the Tribunal and the consequential decree of the Magistrate Court.

20. The applicants are administrators of the estate of the late Kiarie Kiuna. It emerges from the Grant of Letters of Administration dated 16/11/2010, which was produced during trial, that Kiarie Kiuna died on 27/6/2008. The ruling which the applicants are waving is expressed as having been rendered by Maraga J on 27/10/2010. The Learned Judge [Hon Maraga J] noted as follows at Page 2 of the ruling:

> " Though served, the respondents did not attend court during the hearing of the application on the 7th October 2010 and I saw no reason to adjourn the matter. I have however perused the Replying Affidavit of Dominic Mwaura Hinga, the second respondent. His contention is the suit piece of land is ancestral land which was registered in the name of the exparte applicant in trust for himself and his siblings."

21. It is clear from the evidence on record that, at the time the ruling was rendered by Maraga J, Kiarie Kiuna was deceased and a grant relating to his estate had not been issued. Secondly, there is no evidence that has been tendered to controvert the applicants' contention that they were not aware of the ruling that annulled the award of the Tribunal and the consequential decree of the Senior Resident Magistrate Court. Thirdly, it is clear that the respondent was privy to the proceedings in Nairobi High Court Miscellaneous Civil Application No 153 of 2007, the cause in which the said ruling was rendered by Maraga J. He opposed the Miscellaneous application through a replying affidavit.

22. Is the High Court ruling dated 27/10/2010 an important piece of evidence that is directly relevant to the dispute and to the Judgment that was rendered by this Court? The applicants came to Court vide a plaint dated 30/12/2016. They contended that the respondent had trespassed on land parcel number Ndeiya/Ndeiya/1419. The respondent filed a statement of defence and counterclaim dated 20/6/2018. He denied being a trespasser and pleaded as follows at paragraph 14 of his defence and counterclaim.

> " 14. In response to paragraph 10 of the plaint, the defendant affirm that as per the Decree of the Land Tribunal sitting in Senior Resident Magistrate's Court, Land Case No 10 of 2006 – Limuru, the plaintiffs' father, Kiarie Kiuna (deceased) was to surrender 1 Acre of his portion to the defendant and his other siblings which 1 Acre portion is where the defendant rightly constructed his home only for the plaintiffs to illegally, unlawfully and unjustifiably demolish his home."

23. The respondent further pleaded as follows in paragraphs 27 and 28 of his defence and counterclaim:

> " 27. Being greatly aggrieved by the manner in which the mother property was sub-divided, the defendant lodged a claim as against his brother Francis Njoroge Kiuna who was solely registered as the owner of Title No Ndeiya/Ndeiya/1420 and the plaintiffs father, Kiarie Kiuna (deceased) who had unfairly allocated himself a greator portion of Title No Ndeiya/Ndeiya/1419 at the Land Tribunal sitting in Senior Resident Magistrate's Court, Land Case No 10 of 2006 – Limuru where a decree was issued inter alia providing that the plaintiff's father, Kiarie Kiuna (deceased) surrenders 1 Acre of his portion to the defendant and his other siblings.

28. It is in light of the above Tribunal Decision that the defendant with the blessing of his siblings moved and constructed his house within the 1 Acre portion of Title No Ndeiya/ Ndeiya/ 1419." [sic]

24. It is clear from the above verbatim excerpts from the respondent's defence and counterclaim that the defence and counterclaim were anchored on the award of the Tribunal and the consequential Decree of the Senior Resident Magistrate Court. His oral testimony took the same trajectory. He orally testified thus:

> " This dispute was adjudicated by the Land Disputes Tribunal. The Tribunal directed that I be given one acre. I took possession of the one acre and constructed thereon. After one week, the plaintiffs demolished the house. I have a counterclaim in this suit."

25. Trial in this suit proceeded on the basis of the misleading pleadings. The Court rendered a Judgement on the basis of the false evidence that had been tendered by the respondent to the effect that the award of the Tribunal and the consequential decree of the Resident Magistrate Court subsisted. As a direct consequence, this Court made the following key findings in the Judgment that is the subject of the present review application:

35. Consequently, it follows that unless and until the award of the Tribunal and the consequential decree are set aside as by law provided, the defendant cannot be said to be a trespasser on the one-acre portion of land parcel number Ndeiya/Ndeiya/1419. That is my finding on the first issue.

36. Similarly, for the same reasons, unless the award of the Tribunal and decree of the magistrate court are set aside as by law provided, the defendant, together with his siblings, are entitled to be registered as proprietors of the one-acre portion of parcel number 1419.

37. The third issue is whether the said one acre portion forms part of the free estate of the late Kiarie Kiuna. The Tribunal having awarded the one-acre portion to the defendant together with his siblings, the one-acre portion ceased to be part of the free property of the late Kiarie Kiuna. The plaintiffs were wrong in inviting the Succession Court to distribute the entire 8 acres as the free estate of Kiarie Kiuna. The one-acre portion of Ndeiya/ Ndeiya/1419 was not and is not part of the free estate of the late Kiarie Kiuna. The plaintiffs were obligated to disclose to the Succession Court that one acre out of the eight acres had ceased to be part of the free property of Kiarie Kiuna. They withheld the information.

38. In light of the court's finding on the preceding issues, it follows that the plaintiffs have failed to prove their case and are therefore not entitled to the reliefs sought in the plaint.

39. On the reliefs sought in the counterclaim, the defendant presented evidence to the effect that, together with his siblings, they are entitled to the one-acre portion pursuant to the award of the Tribunal and the decree of the Limuru SPM Court in Land Case No 10 of 2006. Consequently, the court is satisfied that the defendant is entitled to payers (a), (b), (c) and (d) of the counterclaim.

26. From the above analysis, it is clear that the High Court ruling dated 27/10/2010 is directly relevant to this dispute and directly impacts the Judgment of the Court. It is also clear that the respondent, while privy to the proceedings that annulled the award of the Tribunal and the consequential decree of the Resident Magistrate Court, concealed this fact from this Court and prosecuted his defence and counterclaim on the premise that the award of the Tribunal and the consequential decree of the Senior

Resident Magistrate Court subsisted. What has emerged in the present application is that both the award and the decree had been annulled by the High Court. It has also emerged that the respondent was privy to the High Court proceedings that annulled the award and the decree. It has further emerged that the respondent concealed this evidence from the Court and misled the Court to believe that the award and the decree subsisted. For the above reasons, the Court is satisfied that the applicants have met the threshold for review of a judgment under Order 45 rule 1 of the *Civil Procedure Rules*.

27. What disposal orders are appropriate in the circumstances? Trial in this suit proceeded on the premise that the award of the Land Disputes Tribunal and the consequential adoption judgment and decree of the Magistrate Court subsisted. It has now emerged that both the award and the consequential judgment and decree were annulled by the High Court through a ruling rendered by Maraga J on 27/10/2010. In the circumstances, it is the view of this Court that the appropriate review order is one that sets aside both the trial proceedings and the Judgement dated 20/9/2023. A fresh trial will thereafter be held before a different Judge of this Court. For concealing the above material evidence and facts from the Court, the respondent will bear costs of the application.

28. In the end, the plaintiffs' application dated 13/10/2023 is allowed in the following terms:

    a. The Judgment dated 20/9/2023 is hereby reviewed and wholly set aside under Order 45 rule 1 of the *Civil Procedure Rules*.

    b. Fresh trial shall be conducted before a different Judge of this Court.

    c. The defendant shall bear costs of the application dated 13/10/2023.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 5TH DAY OF JUNE 2024.

B M EBOSO

JUDGE

In the Presence of: -

Ms Kimani for the Plaintiffs

Mr Rono for the Defendant

Court Assistant: Hinga