



Mukangah v Odhiambo (As Personal Rep. of the Estate of Bundenjiana Abungu Ojiambo); Esakha (Suing as the Legal Rep. of the Estate of Odhiambo Onyango) (Interested Party) (Environmental and Land Originating Summons 88 of 2017) [2024] KEELC 5448 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5448 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 88 OF 2017

BN OLAO, J

JULY 25, 2024

BETWEEN

WILLIAM ODUORY MUKANGAH PLAINTIFF

AND

URSULA NABWIRE ODHIAMBO (AS PERSONAL REP. OF THE ESTATE OF BUNDENJIANA ABUNGU OJIAMBO) DEFENDANT

AND

DENNIS OTIENO ESAKHA (SUING AS THE LEGAL REP. OF THE ESTATE OF ODHIAMBO ONYANGO) INTERESTED PARTY

RULING

1. The dispute between William Oduory Mukangah(the Plaintiff herein) and Ursula Nabwire Odhiambo(the Defendant herein and sued as the personal representative of the Estate of Bundejiana Abungu Ojiambo(the Defendant herein) over the ownership of the land parcel No Bunyala/ Mudembi/1049 (the suit land) was heard by Omollo J. By a judgment delivered on 15th April 2020, the judge found in favour of the Plaintiff. A Decree followed that the Plaintiff had acquired the suit land by way of adverse possession, that the Defendant should execute the relevant documents to transfer the suit land into the names of the Plaintiff and that he be permanently enjoined from interfering with the Plaintiff's portion of the suit land.
2. The Defendant was aggrieved by that judgment and lodged a Notice of Appeal herein on 30th April 2020.
3. I now have for my determination the application dated 19th January 2024 by Dennis Otieno Esakha (the Interested Party/Applicant) herein and acting as the legal representative to the Estate of Odhiambo Onyango) in which he seeks the following orders:



- a. That the judgment delivered herein on 15th April 2020 and the resultant decree and all consequential orders be reviewed and set aside and that the Plaintiffs' case be heard de novo with the Interested Party/Applicant's participation.
 - b. In the alternative to prayer (a) above, the judgment that was delivered herein on 15th April 2020 and the resulting decree and all consequential orders be reviewed and set aside and the Plaintiff's case be struck out with costs to the Interested Party/Applicant.
 - c. That all the entries that were made on the register of land parcel No Bunyala/Mudembi/1049 in implementation of the judgment delivered on 15th April 2020 and all consequential orders be cancelled forthwith and the ownership of the said parcel of land be restored into the name of Odhiambo Onyango (deceased) as previously effected by the County Land Registrar vide the subject's land register at entry No 8 dated 4th March 2021.
 - d. That costs of this application be provided for.
4. The application is premised on the provisions of Sections 1A, 1B, and 3A of the [Civil Procedure Act](#), Order 45 Rules 1, 2 and 3 and Order 51 of the Civil Procedure Rules as well as all enabling provisions of the law. It is based on the grounds set out therein and also supported by the affidavit of the Interested Party/Applicant of even date.
 5. The gravamen of the application is that there is a discovery of new and important evidence of a decisive character which was not available at the time of the trial in that the judgment herein was obtained on the basis of a fraudulent succession in respect to the Estate of one Odhiambo Onyango in Succession Cause NO 56 of 1990 who was the owner of land parcel No Bunyala/Mudembi/1049 situated in Elukhariarea Butula Sub County as well as Succession Cause no26 of 1996 which was in respect of land situated in Nambuku in Samia Sub County. As a result of a fraudulent transmission, the suit land was transferred from Odhiambo Onyango and thereafter to Bunjenjiana and finally to the eventual title holder who is the Defendant herein. That the Estate of Odhiambo Onyango the bona fide owner of the suit land has never been succeeded nor was he a party in this case yet his extended family including the Interested party/Applicant are the ones in exclusive possession of the suit land as well as the land parcel No Bunyala/Mudembi/1063 being their ancestral land. That in the year 2016, the Plaintiff hurriedly erected a building on the suit land but which was removed by the Interested Party/Applicant who only came to learn about this judgment in 2022. He then visited the Land Registry and it was then that he discovered that the suit land had been transferred to Bundenjiana Abungu Ojiambo on 11th February 1992 following succession proceedings in BUSIA SRM Succession Cause No 56 of 1990 and thereafter to the Defendant on 29th April 2011 vide BUSIA SRM Succession Cause No 26 of 1996. That the Interested Party/Applicant and the family of the late Odhiambo Onyango live on the land parcel No Bunyala/Mudembi/1063 in the homestead left to them and also do farming on the land parcel No Bunyala/Mudembi/1049. He therefore also followed up the details of the two Succession Causes NO 56 of 1990 and 26 of 1996 at the Court's Registry and they were traced from the Archives in Kakamega and brought to Busia.
 6. Upon perusal of the said files, he discovered that Succession Cause NO 26 of 1996 was in respect to the Estate of one Buluma Khanyenya Kefa and one Wellington Wanyama Khanyenya whose Administrator was one Humphreys Onjoro Khanyinya and the property was described as land parcel No Samia/Nambuku/Lugala/393. Therefore, the suit land was not properly and legally transmitted from the original owner Odhiambo Onyango to Bundenjiana Abungu Ojiambo and subsequently to the Defendant. The Court was therefore misguided to deliver a judgment on the basis of Succession Causes which wrongly portrayed the suit land as having been properly transmitted to the Estate of the late



Odhiambo Onyangoon 11th February 1992. That based on that judgment, the Land Registrar had proceeded to rectify the register. That this evidence was discovered after the judgment herein and the Plaintiff has since November 2023 embarked on grazing his livestock on the suit land which feed on the Interested Party/Applicant's crops and has vowed to continue doing so. That has necessitated the filing of this application.

7. The following documents are annexed to the application:

1. Grant of Limited Letters of Administration Ad Litem issued to the Interested Party/Applicant in respect to the Estate of Odhiambo Onyango in Busia Chief Magistrate's Court Succession Cause NoE0214 of 2023 on 17th January 2024.
2. Register for the land parcel No Bunyala/Mudembi/1049.
3. Register for the land parcel No Bunyala/Mudembi/1063.
4. Judgment delivered on 15th April 2020.
5. Decree.
6. Certificate of Death for Gaitano Muga Okotsi.
7. Petition for Letters of Administrator in BusiaSRM Court Succession Cause No56 of 1990 in respect to the Estate of Gaitano Muga Okoth filed by Thomas Ouma Muga.
8. Affidavit in support of Petition by Thomas Ouma Muga.
9. Grant of Letters of Administration Intestate issued to Thomas Ouma Muga for Estate of Gaitano Muga.
10. Certificate of Confirmation of Grant issued to Thomas Ouma Muga in respect of Estate of Gaitano Muga Okoth.
11. Certificate of death for Buluma Khanyenya Kefa.
12. Certificate of death for Wellington Wanyama Khanyenya.
13. Petition for Letters of Administration Intestate issued to Humphreys Onjoro Khanyenyain BusiaSRM Court Succession Cause No26 of 1996 in respect to the Estates of Buluma Khanyenya Kefa and Wellington Wanyama.
14. Affidavit in support of Petition of Humphreys Onjoro Khanyenya.
15. Grant of Letters of Administration issued to Humphreys Onjoro Khanyenyain BusiaSRM Succession Cause No26 of 1996.
16. Certificate of Confirmed Grant issued to Humphreys Onjoro Khanyenyain Busia Srm Court Succession Cause No26 of 1996.

8. The application is opposed and the Plaintiff filed a replying affidavit dated 31st January 2024 in which he deposed, inter alia, that he knows the Interested Party/Applicant well since they lived together in Mombasa since 1986 where the Plaintiff was working. That the Interested Party/Applicant was introduced to him by Bundejiana Abungu Ojiambo and is a grandson of Michael Ojiambo Onyango who had two wives namely Bundejiana Abungu Ojiambo the mother to the Defendant and Khadudu Ojiambo Onyango the mother to Batholomew Esakha who was the father to the Interested Party/Applicant. That the suit land, though registered in the name of Ojiambo Onyango belongs to his wife



Bundejiana Abungu Ojiambo which had been given to him by her classmen. That Ojiambo Onyango had his own family land separate from that of his wife.

9. Therefore, the Interested Party/Applicant has no say over the suit land. The Plaintiff was not involved in the transmission of the suit land and he only sued the Defendant after discovering that she was registered as the personal representative of the owner. That he filed this Originating Summons claiming the suit land by way of adverse possession as he has been and is still in occupation thereof for over 30 years.
10. In June 2022, he discovered that the Defendant had purported to transfer the suit land to one Leonard Rangala Larifollowing orders in Busia Chief Magistrate's Court Succession Cause NoE193 of 2021. The Plaintiff however moved to Court and had the grant revoked and he believes it is the said Leonard Rangala Lariwhom he had chased from the suit land who is behind this application. That this application is an afterthought and the Interested Party/Applicant should have applied to be enjoined in this suit at the right time.
11. The Plaintiff annexed the following documents to his replying affidavit:
 1. Certificate of Official Search for the land parcel No Bunyala/Mudembi/1049.
 2. Order issued in BusiaChief Magistrate's Court Succession Cause NoE193 of 2021 on 27th June 2023.

In response to that replying affidavit, the Interested party/Applicant filed a supplementary affidavit dated 29th February 2024 in which he deposed, inter alia, that his grandfather is called Odhiambo Onyango while the person referred to by the Plaintiff as Michael Ojiambo Onyango is a stranger to him and it is not true that the Plaintiff was living with him in Mombasa. That he was born in 1976 and schooled at Namalo Primary School from 1982 upto 1990 when he completed class 8 after which he joined Budalangi High School but dropped out in 1992 due to lack of fees. That he is the legal representative to the Estate of the late Odhiambo Onyango who owned the suit land which forms part of the ancestral land of the family. That the Plaintiff had for the first time attempted to move into the suit land in 2016 but was ejected therefrom and therefore his claim in adverse possession was premature and incompetent. That this case and the fake Succession Causes being nos 56 of 1990 and 26 of 1996 demonstrate the Plaintiff's efforts to have the names of Bundejiana and Ursula irregularly entered in the register to the suit land so as to take it away yet it belongs to Odhiambo Onyango. That the Defendant lives in her matrimonial home in Siaya County where she has been married for decades and it is the Interested Party/Applicant and his brother who are in actual occupation of the suit land and also the land parcel No Bunyala/Mudembi/1063.

12. The Defendant did not participate in this application and it is not clear whether infact she was served as directed on 8th February 2024.
13. When the application was placed before me for directions on 8th February 2024, I issued orders that it be canvassed by way of written submissions. Those submissions were subsequently filed both by Mr Wanyama instructed by the firm of Wanyama & Company Advocates for the Interested Party/Applicant and by MR J. V. Juma instructed by the firm of J. V. Juma & Company Advocates for the Plaintiff.
14. I have considered the application, the rival affidavits and annextures thereto as well as the submissions by counsel.



15. The Interested Party/Applicant seeks the substantive orders that the judgment delivered herein on 15th April 2020 be reviewed and set aside and that the Plaintiff's case be heard de novo with the participation of the Interested Party/Applicant or that the said case be struck out with costs. Thereafter, all the entries made on the register with respect to the suit land be cancelled.
16. To begin with, although the Interested Party/Applicant has moved to this Court describing himself as an Interested Party, he did not seek to be so enjoined as an Interested Party as provided under the provisions of Order 1 Rule 10 of the Civil Procedure Rules. Ideally, that ought to have been his first port of call. I will however excuse that lapse guided by the fact that going by the averments contained in his supporting affidavit, he may have been a necessary party in the suit.
17. Having said so, however, the Interested Party/Applicant has invoked the provisions of Order 45 Rule 1 of the Civil Procedure Rules which reads:

45 (1) 1: "Any person considering himself aggrieved-

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (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." Emphasis mine.

It is clear from the above that one does not need to have been a party in the earlier proceedings to file an application for review under Order 45 Rule 1 (1) of the Civil Procedure Rules. However, the Interested Party/Applicant was required to satisfy the following conditions:

- 1: Show that there has been a discovery of a new and important matter or evidence; or
- 2: Demonstrate some misstate or error or apparent on the face of the record; or
- 3: Provide any other sufficient, and
- 4: Approach the Court without unreasonable delay.

18. The thrust of the Interested Party/Applicant's case is that the suit land which belonged to his late grandfather Odhiambo Onyangohad been transferred to Bundenjiana Abungu Ojiambo whose Estate the Defendant represents, and thereafter to the Defendant through a fraudulent succession process. This is how he has deposed in paragraphs 7 and 13 of his supporting affidavit:

7: "That at the Lands Office, I discovered that land parcel No Bunyala/Mudembi/1049 which was owned by Odhiambo Onyangohad been transferred to Bundenjiana Abungu Ojiambo on 11/2/1992 through BUSIA SRM Succession Cause No56 of 1990 and thereafter, it was further transferred to Ursula Nabwire Odhiambo on 29/4/2011 through BusiaSRM Succession Cause No26 of 1996."

13: "That the details of BusiaSRM Succession Cause No56 of 1990 shows that the deceased person therein is named as Gaitano Muga Okutsi and his administrator was named Thomas Ouma Mugawhile the land that was succeeded therein was land parcel No Marach/Elukhari/132 which was located at Elukhari Sub Location in Butula Sub County within Busia County. Annexed and marked DE – 6, 7, 8, 9 & 10 copies of death certificate, Petition, Affidavit the Grant and the Certificate of Confirmation of Grant."



The Interested party/Applicant's case therefore is that the judgment sought to be reviewed was as a result of fraudulent succession proceedings in the two succession causes listed above. That may or may not be so. However that cannot be described as an error, apparent on the face of the record. The fact that the Succession Cause NO 56 of 1990 was in respect to another Estate and not the Estate subject of these proceedings cannot be described as an error apparent on the face of the record because it never featured in the proceedings before the trial Court. In any event, those succession proceedings were matters which, with due diligence, the Interested Party/Applicant should have been able to place before the Court during the trial.

19. Secondly, the Interested Party/Applicant is clearly trying to prosecute this suit again through this application. If, as he claims, the transmission of the suit land to Bundejiana Abungu Ojiamboand thereafter to the Defendant was through a fraudulent succession process, then what the Interested Party/Applicant should pursue is an appeal to the superior Court. That cannot be a matter for review. As was held by the Court of Appeal in the case of Pancras T. Swai v Kenya Breweries Ltd^{2014 eKLR} citing with approval the holding of BennettJ in *Belinda v Fredrick Kangwamu*^{1963 E.A. 557};

“... a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal.”

The same Court went on to add at paragraph 29 that:

“It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly, faulted the decision on a point of law. That was a good ground for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law either because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which Court decisions that ought to be examined on appeal would be exposed to attacks in the Court in which they were made under the guise of review when such Courts are functus officio and have no appellate jurisdiction.”

The remedies being sought by the Interested Party/Applicant herein including the striking out of the Plaintiff's case and the restoration of the suit land in the names of the late Odhiambo Onyangoare not orders that can be pursued in such an application.

20. Finally, the Interested Party/applicant was required to file this application without unreasonable delay. The judgment sought to be reviewed was delivered on 15th April 2020 and this application was filed on 23rd January 2024 almost 4 years later. No explanation for that delay, which I consider to be unreasonable, has been proffered. And even if the Interested Party/Applicant was searching for the records of the Succession Causes, he has not told us when he subsequently found them.
21. Ultimately therefore and having considered all the matters herein, I make the following disposal orders:
- 1: The Notice of Motion dated 19th January 2024 and filed on 23rd January 2024 is devoid of merits.
 - 2: It is accordingly dismissed with costs to the Plaintiff.

BOAZ N. OLAO

JUDGE

25TH JULY 2024

RULING DATED, SIGNED AND DELIVERED ON THIS 25TH DAY OF JULY 2024 BY WAY OF ELECTRONIC MAIL.



BOAZ N. OLAO
JUDGE
25TH JULY 2024

