



REPUBLIC OF KENYA



**Isogol v Ekurut & 3 others; Isogoli (Plaintiff); Ekurut & 2 others (Defendant) (Environment and Land Case 49 of 2018) [2024] KEELC 5244 (KLR) (16 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5244 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT AND LAND CASE 49 OF 2018**

**BN OLAO, J  
JULY 16, 2024**

**BETWEEN**

**SARAFINA OJUMA ISOGOL ..... PLAINTIFF**

**AND**

**JOSEPH OKOCHIL EKURUT ..... 1<sup>ST</sup> DEFENDANT**

**SAVIOR OMULA OPILI ..... 2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR, BUSIA ..... 3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**FIDELIS ISOGOLI ..... PLAINTIFF**

**AND**

**ROPHINA AJUMA EKURUT ..... DEFENDANT**

**FIDELIS AJUMA EKURUT ..... DEFENDANT**

**CHRISTINE KADOGO EKURUT ..... DEFENDANT**

**RULING**

1. The dispute between Safarino Ojuma Isogoli (the Plaintiff) as against Joseph Okochil Ekurut, Saviour Omula Opili, The County Land Registrar Busia and The Attorney General (the 1<sup>st</sup> to 4<sup>th</sup> Defendants respectively) in which the Plaintiff had sought, inter alia, a declaration that he had lawfully acquired the title deed to the land parcel No South Teso/amukura/1964 being a sub-division of the land parcel No South Teso/amukura/1542 was determined by Omollo J vide a judgment delivered on 3<sup>rd</sup> March 2021. The Judge made the following disposal orders in favour of the Plaintiff:



1. An order declaring the Plaintiff's process or procedure in obtaining the title deed for land parcel No South Teso/amukura/1964 was lawful and legal.
  2. An order declaring that the Plaintiff had acquired the land parcel No South Teso/amukura/1964 and/or the portion of land measuring 1.1 hectares out of the land parcel No South Teso/amukura/1542 by adverse possession.
  3. An order directing the 3<sup>rd</sup> Defendant to reinstate the title deed for land parcel No South Teso/amukura/1964 and mutation form that gave rise to the said number and cancel any other number arising out of the land parcel No South Teso/amukura/1542.
  4. The costs of the suit be awarded to the Plaintiff.
2. The implementation of the above judgment ran into some head wind, and the Plaintiff returned to Court vide her application dated 19<sup>th</sup> August 2022 in which she sought the substantive orders that Order No 2 of the said judgment be amended. That application was allowed by Omollo J vide a ruling delivered on 26<sup>th</sup> January 2023.
3. I now have before me for my determination an un-dated application but filed herein by Fidelis Isogoli, Rophina Ajuma Ekurut And Christine Kadogo Ekurut who are acting in person and were described therein as Plaintiff/Interested Party and Applicant at the same time. For purposes of this ruling, I shall refer to them as the 1<sup>st</sup> to 3<sup>rd</sup> Applicants respectively. By that application which is a Notice of Motion not premised under any provision of the law, the Applicants pray for the following orders:
1. Spent.
  2. That the Honourable Court be pleased to grant leave to the Applicants to be enjoined in the place of the 1<sup>st</sup> Defendant who is now deceased.
  3. That the Honourable Court be pleased to review, vary and/or set aside the ruling delivered on 26<sup>th</sup> January 2023 and judgment delivered on 3<sup>rd</sup> March 2021 and all consequential orders arising therefrom pending hearing and determination of this application inter-parties.
  4. That an order be issued enjoining Fidelis Isogoli as the Plaintiff since she is the wife of the Plaintiff who is now deceased.
  5. That upon judgment being set aside, the suit be re-opened afresh and the Applicants be allowed to file responses and the matter be set down for hearing of the same for the interest of the Applicants to be determined pending the hearing and determination of this suit.
  6. That this Honourable Court be pleased to issue a temporary order of injunction to the intended Plaintiff, Respondent, her agents, assigns and/or representatives stopping further implementation of the decree and the ruling of this Honourable Court and if any, all subsequent titles if acquired be returned back to the original number South Teso/amukura/1542 pending hearing and determination of this application.
4. The application is based on the grounds set out therein and supported by the joint affidavit of the Applicants. The Applicants are, as I have already stated above, acting in person and as is common with pro se litigants, it is not always easy to comprehend exactly what they seek. This Court must however do the best it can to decipher their pleadings and make an informed decision.
5. It is the Applicants' case that they are a wife and daughters respectively of one Erukut Opili Emonguluk (deceased) from whom the Plaintiff had purchased one (1) acre of land vide an agreement dated 6<sup>th</sup> July 1985 and are therefore interested in the deceased's Estate although they were not made parties



to the suit. That the Plaintiff is also now deceased and it is imperative that his wife Fidelis Isogoli be enjoined in the proceedings that Fidelis Isogoli has now issued a notice dated 23<sup>rd</sup> August 2023 from the Busia County Surveyor's office intending to comply with the decree of this Court which will be prejudicial to the Applicants who were left out of the succession proceedings in Nairobi High Court Succession Cause No 153 of 2007 and are apprehensive that their late husband and father only sold one (1) acre but the deceased Plaintiff's wife wants to take three (3) acres after misleading the Court thus leading to the judgment herein. The said judgment is detrimental to the Applicants and there is an error on the record since the deceased Plaintiff obtained a title issued on 9<sup>th</sup> July 2008 and which does not tally with the agreement and therefore their deceased father and husband will be defrauded. That the County Surveyor will proceed with the implementation of the judgment hence this application for review to enable the Applicants challenge the judgment which Fidelis Isogol wants to implement before substitution. No prejudice will be caused to the Plaintiff and the Applicants believe they have a prima facie case to warrant the orders sought.

6. The following documents are annexed to the Notice of Motion:
  1. Copy of letter dated 23<sup>rd</sup> August 2023 from the County Surveyor Busia addressed to the parties herein informing them that he will visit the land in dispute on 14<sup>th</sup> September 2023 to implement the Court order.
  2. Land sale agreement dated 6<sup>th</sup> July 1985 between Ekurut Opili Emonguluk And Sarafina Ojuma.
  3. Letter from Department of Lands addressed to Sarafina Ojuma but which is illegible.
  4. Letter dated 7<sup>th</sup> September 2023 addressed to the County Surveyor by Josephat Okiria requesting that the survey exercise scheduled for 14<sup>th</sup> September 2023 be postponed for two (2) months.
  5. Copy of title deed to the land parcel No South Teso/amukura/1964 in the name of Sarafino Ojuma Isogol dated 9<sup>th</sup> July 2008.
  6. Copy of ruling dated 26<sup>th</sup> January 2023.
  7. Copy of Judgment dated 3<sup>rd</sup> March 2021.
  8. Burial permit for one Joseph Okochile dated 10<sup>th</sup> January 2024.
7. When the application was placed before me on 17<sup>th</sup> January 2024, I directed that it be served upon the Plaintiff and the Defendant who are the Respondents and that it be canvassed by way of written submissions.
8. The application appears to have been responded to by only Vidalis Ojuma who is not even a party. She has deposed in her replying affidavit dated 6<sup>th</sup> February 2024 that she is not the Administratrix of the deceased Plaintiff's Estate and therefore lacks the capacity to be sued or to answer any allegations herein. That the judgment and decree herein were awaiting implementation when the Plaintiff died and that the Applicants have come to Court with unclean hands and misrepresentation since the succession proceedings in Nairobi High Court P&A No 153 of 2007 with respect to the Estate of Emorut Opili were filed by the 2<sup>nd</sup> Applicant. That if the Applicants are aggrieved by the judgment herein, the recourse is to appeal. That he has no interest to be enjoined in these proceedings and neither have the Applicants demonstrated what interest they have in this case and this Court is functus officio and has no jurisdiction to adjudicate over succession issues in which the Plaintiff was not a party.



9. He deposed further that he has not issued any notice to the Applicants and the notice was issued by the Lands Office. That the Applicants have not met the requirements for review of judgment and what they seek can only be done through an appeal. That this application is an abuse of the Court process and should be dismissed with costs.

10. Annexed to the application are the following documents.

1. Copy of confirmed Grant issued in Nairobi High Court Succession Cause No 153 of 2007.
2. Letter dated 6<sup>th</sup> January 2022 by the County Land Registrar Busia addressed to the Defendants.

The Applicants filed a supplementary affidavit and further affidavit dated 19<sup>th</sup> February 2024 and 7<sup>th</sup> March 2024. The gist of those affidavits is that the Applicants affirm their interest in the subject of this suit. That the said Vidalis Ojuma is colluding with the County Surveyor to implement judgment and decree herein yet the Plaintiff and 1<sup>st</sup> Defendant are deceased. That the Applicants have met the threshold for re-opening the case and this application is made in good faith, is meritorious and should be allowed in the interest of justice.

11. The application has been canvassed by way of written submission. These have been filed by Vidalis Juma and the Applicants.

12. I have considered the application, the rival affidavits and annexures thereto as well as the submissions.

13. As I stated at the beginning of this ruling, the Applicants are acting in person. I have however tried my best to identify what they seek from this Court and I find that what calls for my determination are the following:

1. Whether the Applicants should be enjoined in these proceedings.
2. Whether Fidelis Isogoli should be enjoined in these proceedings as a Plaintiff since she is the wife of the deceased Plaintiff.
3. Whether the ruling delivered on 26<sup>th</sup> January 2023 and the judgment delivered on 3<sup>rd</sup> March 2021 should be reviewed and set aside and the Applicants to file their responses for the suit be heard afresh.
4. Whether this Court should issue an order of temporary injunction stopping any further implementation of the judgment and decree.
5. Who bears the costs of the application?

#### **A. Whether The Applicants Should Be Enjoined In These Proceedings As Interested Parties:**

14. It is not clear to this Court why in prayer No (2) the Applicants seek they be enjoined in these proceedings while in prayer No (4) they also seek that Fidelis Isogoli be enjoined yet the said Fidelis Isogoli is infact named as the 1<sup>st</sup> of the three (3) Applicants. However, as I said earlier, the Applicants are acting in person and such are the challenges which the Court must contend with in their drafting. An Interested Party is defined in *Black's Law Dictionary* 10<sup>th</sup> Edition as:

“A party who has a recognizable stake (and therefore standing) in a matter.”



In the case of *Trusted Society Of Human Rights Alliance -v- Mumo Matemu & 5 Others* Supreme Court Petition No 12 of 2013 [2015 eKLR], the Supreme Court defined an Interested Party at paragraph 18 thus:

“Consequently, an Interested Party is one who has a stake in the proceedings though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause.”

That definition was approved by the same Court in the case of *Muruatetu & Another -v- R, Kenya National Commission On Human Rights & Others (Interested Parties)* Supreme Court Petitions No 15 and 16 of 2015 [2016 KESE 12 KLR].

15. What then is the Applicants interest in these proceedings? It is clear from the ground NO 1 upon which the application is based that the Applicants are family members of one Erukut Opili Emongoluk, now deceased, who is alleged to have sold the land in dispute to the deceased Plaintiff. This is how the Applicants have pleaded in that ground:

“That the Interested Party/Applicant wife and daughters to the deceased one Erukut Opili Emong’oluk to whom Saraphina Ojuma purchased from him 1 acre vide an agreement dated 6<sup>th</sup> day of July 1985.”

And in paragraph 6 of their joint supporting affidavit, the Applicants have deposed as follows:

- 6: “That it is within our knowledge and understanding that the Plaintiff obtained the title deed issued on 9<sup>th</sup> July 2008 which does not tally with the agreement and which prompted County Land Registrar Busia to recall the title issued vide notice dated 13<sup>th</sup> June 2009 which acts shows malicious intent of the deceased Plaintiff and Interested Party to defraud our father who is deceased the rightful share. (See annexure marked fare – 4 being copy of letter dated 13<sup>th</sup> June 2009 and agreement).”

The title deed being referred to above is the title deed to the land parcel No South Teso/amukura/1964 issued to Sarafina Ojuma Isogoli the deceased Plaintiff herein on 9<sup>th</sup> July 2008. As the wife and daughters of the said Sarafina Ojuma Isogoli therefore, there can be no doubt that they have an interest in the suit land which their deceased husband and father is alleged to have sold to the deceased Plaintiff. I think that those prayers are for allowing.

16. As to whether or not the other prayers are available to the Applicants, that will be the subject of the next segment of this ruling.
17. Having enjoined the Applicants as Interested Parties in these proceedings, I shall now consider the other prayers sought in their Notices of Motion to determine whether or not they are available to them.

#### **B. Whether Fidelis Isogoli Should Be Enjoined As A Plaintiff Since She Is The Wife Of The Deceased Plaintiff:**

18. The short answer to that prayer is that a party cannot be enjoined in proceedings as a Plaintiff without his consent. In the case of *Civicon Ltd -v- Kivuwatt Limited & 2 Others* C.a. Civil Appeal No 45 of 2014 (2015 eKLR) the Court cited with approval O’hare & Hills Civil Litigation 7<sup>th</sup> Edition (1996) at page 101 that one cannot be added as a Plaintiff unless one gives one’s consent in writing. However any one can be joined as a Defendant even against his wish.



19. In the circumstances of this case, even if Fidelis Isogoli is the wife to the deceased Plaintiff, it is clear from the above precedent that she cannot be enjoined as a Plaintiff without her consent.
20. That prayer is declined.

**C. Whether The Ruling Dated 20<sup>Th</sup> January 2023 And The Judgment Dated 3<sup>Rd</sup> March 2021 Should Be Reviewed And/or Set Aside And Applicants To File Their Responses:**

21. The law on review of judgments and orders is found in Section 80 of the [Civil Procedure Act](#). It states that:

80: “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.”

The procedure for review of a judgment or order is provided for in Order 45 Rule 1 of the [Civil Procedure Rules](#) as follows:

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(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 the judgment to the Court which passed the decree or made the order without unreasonable delay.” Emphasis mine.

It is clear from the above rule that a party seeking to review a decree or order must satisfy the following requirements:

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

In the case of [Francis Origo & Another -v- Jacob Kimali Mungala](#) C.a Civil Appeal No 149 of 2001 [eKLR 2 KLR 307]; the Court of Appeal reiterated the above by saying:

“In an application for review, and applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most



importantly, the applicant must make the application for review without unreasonable delay.”

I have not been shown any new and important matter or evidence or any error apparent on the face of the record nor any other sufficient reason to warrant the order of review of the judgment and decree herein. What is clear from the application is that the Applicants are basically seeking a re-hearing of this dispute by challenging the ruling and judgment delivered by Omollo J. For instance, in paragraph 4 of the joint supporting affidavit, the Applicants have deposed thus;

4: “That the agreement dated 6<sup>th</sup> day of July 1985 placed in Court is questionable upon perusing through the Court’s proceedings the Plaintiff indicated he purchased three acres of land which is contrary to our agreement which clearly provides one acre in which same one acre the Plaintiff never completed payment. (See annexure marked FAE-2 being a copy of the agreement).”

22. The Applicants proceed to add in paragraphs 8 and 11 of the same supporting affidavit as follows:

8: “That it is within our knowledge and understanding that leave ought to be granted to enable us challenge the judgment herein and the suit be set down for hearing.”

11: “That it is not in doubt that the agreement which was placed in Court doctored on acreage hence misleading the Court in delivery of it’s own judgment hence warranting a review.”

If the Court was misled into accepting doctored evidence, that is really an issue to be pursued on appeal. It is not a matter for review. As was held by the Court of Appeal in case of Pancras T. Swai -v- Kenya Breweries Ltd 2014 eKLR citing with approval the holding of Bennett J 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 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 appeal but not a ground for an application 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 Courts in which they were made under the guise of review when such Courts are *functus officio* and have no appellate jurisdiction.”

That is what the applicants are attempting to pursue in this application and which is not acceptable as is clear from the above precedents.

23. Secondly and most fundamentally, the Applicants were required to move to the Court without unreasonable delay. The judgment sought to be reviewed was delivered on 3<sup>rd</sup> March 2021 some 3 years and 4 months away. No explanation has been proffered for that delay which is clearly unreasonable.

24. The same applies to the prayer for review of the ruling dated 26<sup>th</sup> January 2023. It has not been demonstrated what new matter or evidence, mistake or error apparent on the face of the record nor any other sufficient reason warrants the review or setting aside of the said ruling. The application has



also not been filed without unreasonable delay. The ruling sought to be reviewed was delivered on 26<sup>th</sup> January 2023 and this application was filed a year later on 17<sup>th</sup> January 2024. That delay is equally unreasonable and has not been explained.

25. With regard to the setting aside of the judgment herein, it is clear from the record that it was not a default judgment. Rather, it was a judgment arrived at after all the parties who were then involved in the suit had been heard. Such a judgment can only be challenged on appeal – *Kenya Power & Lighting Company Ltd -v- Benzene Holdings T/a Wyco Paints* C.a. Civil Appeal No 132 & 133 of 2014 [2016 eKLR]. In that case, the Court of Appeal held thus;

“Apart from the provisions of Order 10 Rule 11, Order 12 Rule 7 and Order 36 Rule 10 of the *Civil Procedure Rules* dealing with the setting aside of default judgments, the *Civil Procedure Rules* does not have a provision for setting aside of the final judgment. A party aggrieved by a final judgment can either move the Court under Order 45 for a review of the resultant decree or by lodging an appeal in terms of Order 42.”

The route for a review, as is now clear from the preceding paragraphs of this ruling, are not available to the Applicants. Similarly, as is clear from the above precedent, the judgment cannot be set aside since it was not a default judgment. The only option open to the Applicants is to approach the Court of Appeal.

26. It follows therefore that since this Court cannot review or set aside the judgment delivered on 3<sup>rd</sup> March 2021 or the ruling delivered on 26<sup>th</sup> January 2023, there can be no basis to grant the prayer for the Applicant to file their responses to the suit. This Court is now functus officio in so far as the dispute over the suit land is concerned.

#### **D. Whether The Court Should Issue A Temporary Injunction Stopping Any Implementation Of The Judgment And Decree Herein:**

27. The purpose of an order of temporary injunction is to preserve the property in dispute pending the determination of the case. Order 40 Rule 1 of the *Civil Procedure Rules* provides that:

“Where in any suit it is proved by affidavit or otherwise-

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.” Emphasis mine.

This suit was heard and a final judgment delivered on 3<sup>rd</sup> March 2021. No appeal appears to have been filed against the said judgment and if any was filed, the Court has not been informed. There is no suit pending “disposal” and therefore, there can be no basis upon which any order of temporary injunction can be granted. That prayer is similarly declined.



28. With regard to costs, the Defendants did not file any responses to the application. Only one Vidalis Ojuma who was not even a party in these proceedings filed a replying affidavit dated 6<sup>th</sup> February 2024. The order that commends itself to me on costs in the circumstances is that the Applicants should bear their own costs.
29. The up-shot of all the above is that having considered the un-dated Notice of Motion filed on 17<sup>th</sup> January 2024, this Court makes the following disposal orders:
1. Prayer No 2 is granted.
  2. Prayers No 3, 4, 5 and 6 are declined.
  3. The Applicants shall bear their own costs.

**BOAZ N. OLAO**

**JUDGE**

**16<sup>TH</sup> JULY 2024**

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 16<sup>TH</sup> DAY OF JULY 2024  
AS WAS ADVISED TO THE PARTIES ON 12<sup>TH</sup> MARCH 2024.**

Plaintiff – Present in person

2<sup>nd</sup> Defendant – Present in person

Mr. Otieno for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants Present

**BOAZ N. OLAO**

**JUDGE**

**16<sup>TH</sup> JULY 2024**

