Thuo & another v Gikera & another (Environment & Land Case 72 of 2017) [2024] KEELC 5851 (KLR) (26 August 2024) (Ruling)

Neutral citation: [2024] KEELC 5851 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE 72 OF 2017

LN GACHERU, J

AUGUST 26, 2024

BETWEEN

MILKA NJERI THUO ..... 1ST PLAINTIFF

SIMON MAINA NGA'NGA ..... 2ND PLAINTIFF

AND

PAULINE WANGARI GIKERA ..... 1ST DEFENDANT

GIKERA MWANGI ..... 2ND DEFENDANT

RULING

1. Defendants/Applicants brought this Notice of Motion Application dated 12th October 2023, and sought for the following orders:

    i. That this court be pleased to review the orders issued on the 28th September 2023, dismissing the Application dated 21st March 2023, and that the prayers or orders sought in the said Application be allowed.

    ii. That the costs of the Application be in the cause.

2. This Notice of Motion is premised on the following grounds:

    a. That this court delivered a ruling on 28th October 2023, wherein it made a finding that it was not clear whether there exist a distinction between land parcels No Loc 2/ Kinyona/ 4192, and Loc2/ Kinyona/ 94;

    b. That for clarity land parcel no Loc 2/ Kinyona/ 94, was subdivided into two being Loc 2/ Kinyona/ 4191 & Loc 2? Kinyona/ 4192, where the 1st Defendant /Applicant got Loc2/ Kinyona/ 4192, and the 2nd Defendant/Applicant who is the son to the 1st Defendant got Loc 2/ Kinyona/ 4191, after a consent from the Land control Board of 2014;

c. That there was inevitable oversight to clarify the subdivision of land parcel No. Loc 2/ Kinyona/ 94, because the relevant document had not been made available timeously;

d. That it is in the interest of justice that the court grants the orders sought and review its ruling as no prejudice will be occasioned to the respondents herein.

3. The application is also supported by the Affidavit of Pauline Wangari Gikera, the 1st Defendant/ Applicant herein, who averred that this court delivered a ruling on 28th September 2023, wherein the court indicated that it was not clear whether there exists a distinction between the parcel of land No. Loc 2/ Kinyona/ 4192 and Loc 2/ Kinyona/ 94. Further that the court held that unless there was clarity in identification, it could not issue orders of eviction.

4. She averred that for clarity, land parcel No. Loc2/ Kinyona/ 94, was subdivided into two parcels namely Loc 2/ Kinyona/ 4191, and Loc 2/ Kinyona/ 4192, after consent was granted by the Land Control Board in 2014, as is evident PWG/2, which is a copy of the letter of consent.

5. That after consent, the land was surveyed and subdivided as per annexture PWG/2, which is a copy of Mutation form. That thereafter, the title deeds were issued on 9th August 2016.

6. It was her averments that she got her title deed for Loc 2/ Kinyona/ 4192, while her son who is the 2nd Defendant / Applicant was issued Loc 2/ Kinyona/ 4191, which is evident from annextures PWG/4(a) (b) and (c), which are copies of title deeds for Loc 2/ Kinyona/ 94, 4191 and 4192.

7. The deponent reiterated that it is in the interest of justice that this court do review its ruling of 28th September 2023, and proceeds to grant the orders sought in the instant Notice of Motion Application dated 21st March 2023. She contended that no prejudice will be occasioned upon the Plaintiffs/ Respondents herein.

8. The Application is opposed by the Plaintiffs through the Replying Affidavit of Milka Njeri Thuo, the 1st Plaintiff/ Respondent herein, who averred that she has the consent of the 2nd Plaintiff to swear the Affidavit on his behalf.

9. She contended that the court dismissed the Application dated 28th March 2023, on the grounds that the Applicants had failed to clarify whether there exists a distinction between the parcels of land Loc 2/ Kinyona/ 4192 and Loc 2/ Kinyona/ 94.

10. She contended that the Applicants seeks for review of the court's ruling by citing that subdivision of Loc 2/ Kinyona/94, was carried out in 2014, resulting in Loc 2/ Kinyona/ 4191 and Loc 2/ Kinyona/ 4192, and therefore the Applicants seek to re-argue the Application that was already dismissed, on the guise of review.

11. It was her contention that the instant Application fails to meet the criteria for review, as it introduces novel evidence that was evidently in existence and was within the Applicants reach at the time of filing, but was purposely omitted for the court's consideration.

12. She also contended that even if the newly presented evidence is expected, it inadvertently weakens the Applicants' position.

13. That the letter of consent reveals that the Application for consent to subdivide the property in question between Pauline Wangari Gikera and Mwangi Gikera, was made on 8th December 2014, and the consent was obtained on 9th December 2024.

14. It was her further contention that Kigera Mwangi, the previous owner of the suit land passed on 29th August 2014, which was three months before the subdivision occurred. That this raised the questions

about the legitimacy of subdivision, particularly given that the succession of his estate had not and could not have been formally conducted.

15. That after the demise of Kigera Mwangi, caution was placed on the suit property by Nganga Mwangi, a beneficiary. However, the property was still subdivided and transferred to Pauline Wangari Gikera and Mwangi Gikera.

16. It was her allegations that the sole reason an individual might refrain from presenting available evidence that would favour their case, is if they seek to conceal their misconduct from the court, which is evident in this case. Therefore, the Applicants have approached the court with unclean hands, and the court should not condone the same nor support an illegality.

17. She alleged that there was a clear collusion between the Applicants and unscrupulous individuals at the land's registry, to unlawful subdivide and transfer the suit property by passing the right procedure, which action was apparent. Therefore, the Applicants are untruthful land grabbers, who are attempting to waste valuable court's time. They urged the court to dismiss the instant Application with costs.

18. This Application was canvassed by brief written submissions. The Defendants/Applicants filed their written submissions dated 6th December 2023, through the Law Firm of Gori, Ombongi & Company Advocates, and submitted that this court by its ruling found and held that it was not clear to the court whether or not there exists a distinction between land parcel Loc 2/ Kinyona/ 94 and Loc 2/ Kinyona/ 4192.

19. It was their submissions that Land parcel No. Loc 2/ Kinyona/ 94, was subdivided into two parcels being Loc 2/ kinyona/ 4191 and Loc2/ Kinyona/ 4192, where the Applicants who are mother and son got their shares with the 1st applicant getting Loc 2/ Kinyona/ 4192, and the 2nd Applicant got Loc 2/ Kinyona/ 4191. That all the requisite legal procedures were adhered to.

20. They also submitted that they have now attached the pertinent documents which was an oversight in their earlier application. Therefore, it was their submissions that they have demonstrated amply to this court sufficient reasons for it to exercise its discretion and review its ruling as provided in the law and the *Civil Procedure Act* and *Rules*.

21. The Plaintiffs/Respondents filed their submissions on 17th January 2024, through the Law Firm of Chege Kibathi & Co Advocates LLP, and raised two issues for determination; being whether the current application meets the criteria for review: who bears costs of this Application.

22. On whether the current Application meets the criteria for review, the Respondents relied on Order 45 Rule 1, of the *Civil Procedure Rules*, which states;

> "(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."

23. The Respondents submitted that the instant Application falls short of meeting the threshold for review. That the Applicants needed to prove 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.

24. It was their submissions that the letter of consent and title deeds produced by the Applicants had been in the Applicants possession in since 2014, and 2016, respectively and therefore does not qualify as new and crucial evidence since the applicants were aware of it, and were in possession of the said documents. That the Applicants had intentionally withheld the said documents, which was an attempt to conceal material facts from the court.

25. Further, they submitted that this application is an attempt to re-argue the dismissed Application by relying on documents that were consistently within the Applicants possession, but were deliberately withheld from the court's attention.

26. The Respondents further submitted that the Applicants relied on improperly obtained documents, and for the court to rely on them would be an illegality. That the subdivision and transfer purportedly conducted after the death of the previous owner, occurred without proper succession proceedings of the estate.

27. It was the Respondents further submissions that the purported new evidence was consistently accessible to the Applicants, yet they chose not to present it, and therefore, the threshold for review has not been met.

28. On who should bear the costs of the Application, it was submitted that Applicants should meet the costs of this Application, since it is unmerited.

29. The court has carefully considered the instant Application for review, the annextures thereto, the response to the same, rival written submissions, relevant provisions of law, and the entire court records, and finds the single issue for determination is; whether the instant Application is merited.

30. The Application herein is brought under Section 80 of the *Civil Procedure Act*, and Order 45 Rule 1(1) 0f *Civil Procedure Rules* which sections of law deal with the issue of review. Further, Order 51 Rule 1 of the said *Rules* grants the court power to issue orders that are necessary. The Applicant has also invited the court to use any other enabling provisions of law in determination of this Application.

31. Section 80 of the *Civil Procedure Act*, provides;

> " Review Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (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."

32. Further, Order 45 Rule 1 of the *Civil Procedure Rules* provides;

> " (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."

33. Under the above provisions of law, the court has discretion to review its own judgement or orders, wherein an Appeal has not been preferred and upon 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 where there is a mistake or an error apparent on the face of record ,or for any other sufficient reasons.

34. Further the Application for review must be made without unreasonable delay. In this instance, the ruling sought to be reviewed was delivered on 28th September 2023, and the instant Application for review was filed on 16th October 2023, which is a period of less than 30 days. Though there is no definition of what amounts to unreasonable delay, this court finds that there was no delay in bringing this Application for review.

35. There are various decisions made by courts in this country on this issue of Review, under Section 80 of *Civil Procedure Act* and Order 45 of *Civil Procedure Rules*. The said decided cases have set parameters to be considered in deciding whether to allow or not to allow an application for review.

36. In the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR, the Court held:

> " Section 80 gives the power of review, and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

37. Further, In the case of *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR, the Court of Appeal held: -

> " Order 44 rule 1 (now Order 45 rule 1 in the 2010 *Civil Procedure Rules*) gave the trial Court discretionary power to allow review on the three limbs therein stated or "for any sufficient reason....."
>
> In the case of *Sarder Mohamed v Charan Singh Nand Sing and Another* (1959) EA 793, the High Court held that Section 80 of the *Civil Procedure Act*, conferred an unfettered

discretion to the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate."

38. Again in the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR in Judicial Review Division Misc. Application No. 317 of 2018, the court spelt out the following principles that should guide the court in an Application for review:-

    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, which was 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.

39. From the above decided cases, it is apparent that a court can indeed grant an order for review upon "..... 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....."

40. The case here is that the court in its ruling of 28th September 2023, had found and held that it was not clear whether there exists a distinction between land parcel No. Loc 2/ Kinyona/ 4192 and Loc 2/ Kinyona/94. Further that the court held that unless there is clarity on the identification, it could

not issue any such orders of eviction. To support this averments, the Applicants attached documents to support their argument; being the Letter of consent to subdivide Loc 2/ Kinyona/ 94, Mutation Form for Loc 2/ Kinyona/ 94, and two title deeds, which are allegedly resultant subdivisions of Loc 2/ Kinyona/ 94.

41. All the above documents were in possession of the Applicants by the time of filing the earlier Application which was dismissed. The Respondents have alleged that there is no discovery of new evidence, but what the Applicants are doing is to re- argue their Application, which had been dismissed. It was their argument that the current Application fails to meet the criteria for review.

42. Further the Respondents argued that the letter of consent dated 8th December 2014, was obtained illegally as the previous owner of the suit land had passed on 29th August 2014. Thus allowing the Letter would amount to re-opening the case for argument, which cannot be done in an Application for review.

43. As was held in the above case of *R v Advocates Disciplinary case supra*) . 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.

44. The Applicants have not demonstrated that the annextures attached to their Application, were not within their knowledge, and the same could not be produced earlier. Indeed, as stated by the Respondents, the Applicants herein are trying to re- argue their Application

45. The case herein is of negligence by the Applicants to avail the necessary documents and not one of discovery of new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge. All the attached documents were in existence at the time the time of filing the Application dated 21st March 2023, which was dismissed for lack of clarity. The Applicants cannot therefore be heard to lament that they could not avail the said documents, even after applying due diligence. The Applicants are actually trying to re- argue their Application.

46. This court will be guided by the decision In the case of *Evan Bwire v Andrew Aginda* Civil Appeal No. 147 of 2006 cited fin the case of *Stephen Githua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers* (2016) eKLR, where the Court of Appeal held as follows:

> " An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence."

47. The Plaintiffs/Respondents have argued that the subdivision in question and the documents sought to be relied on were procured fraudulently and therefore, the current Application falls under the above category, enumerated in the Bwire's case. The effect of allowing an application for Review would amount to re-opening the case afresh. Litigation must come to an end, and parties must present all the facts, documents and evidence in Court at the appropriate time before the Court retires to write its Ruling/Judgment. It is not in doubt that time and time again Courts have advised litigants that they are bound by their pleadings and that cases should not be prosecuted in piecemeal. What is demonstrated by the Applicants herein is a case of negligence to attach all the necessary exhibits and / or annextures , and not what was envisaged by Section 80 of the *Civil Procedure Act* nor the Rules under Order 45 of the *Civil Procedure Rules.*

48. Finally, the Applicants herein attached the copy of the Ruling sought to be reviewed and not an extract of the Order sought to be reviewed. Is this Application irregularly in Court for failure to have annexed a formal extracted Decree or order in respect of which the review is sought?

49. In the case of *Suleiman Murunga v Nilestar Holdings Limited & Another* (2015) eKLR, the court held as follows:

> " The plain reading of the above provision (referring to Order 45 Rule 1) is that an applicant for review ought to have annexed a formal extracted decree or order in respect of which the review is sought. In essence, judgment or ruling. Thus, where an applicant fails to annex the order sought to be reviewed, an application is defective. In the present application the order that the Defendants sought to be reviewed was not annexed with the result that the Defendant's application was fatally defective. I agree that a formal decree or order is a pre-requisite before an applicant can bring himself/herself within the ambit of Order 45 of the *Civil Procedure Rules* as relates to review of the decree or order"

50. Though the Applicants failed to annex the extract of the order sought to be reviewed, they instead attached a copy of the Ruling, and the court will be guided by Article 159(2) d of the *Constitution* and Order 51 Rule 10 of the *Civil Procedure Rules*, and finds that this Application will not be defeated due to technicalities.

51. Even if the Application had met the criteria for review, is it merited? In the dismissed Application dated 21st March 2023, the Applicants had sought for an order of eviction of the Plaintiffs/Respondents from the suit land being land parcel No. Loc 2/ Kinyona/ 4192, on allegation that the 1st Defendant / Applicant, Pauline Wangari Gikera, is the registered owner of the suit land.

52. From the history of the suit herein, the claim was over land parcel no. Loc 2/Kinyona/94, wherein the Plaintiffs/ Respondents had alleged that the suit land was initially owned by Wambui Mwangi, but was illegally registered in the name of Kigera Mwangi, and therefore the said Kigera Mwangi was holding the said land in trust for the Plaintiffs/ Respondents.

53. However, the suit herein was dismissed by the court on 28th November 2018, for being res judicata. The term Res judicata is a Latin word which means; - a thing or matter that has been finally juridically decided on its merits and cannot be litigated again between the same parties.

54. Therefore, the court having found that the suit was Res judicata means that the matter is finally decided. The doctrine of Res-judicata is invoked to bar multiplicity of suits and to guarantee finality of litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. See the case of *Lotta v Tanaki* (2003) 2 EA 556.

55. The court having found the suit herein is res judicata, and having dismissed it, that finding and holding was not appealed against, and thus the suit herein stands dismissed. If the suit stands dismissed, what is the effect of the same? The dismissal of the suit for being res judicata, meant the Plaintiffs/ Respondents case could not stand. Though the Plaintiffs/ Respondents suit herein was dismissed, there was no Counter- claim by the Defendants/ Applicants herein. The Court did not make a definite positive order in favour of the Defendants/ Applicants herein.

56. The suit having been dismissed, means the suit herein is a closed matter, and no more litigations on the issues in dispute can be litigated. The only proceedings that can be entertained are execution

proceedings. The court is indeed functus officio. With the matter being dismissed, no further proceedings can be entertained apart from execution proceedings.

57. See the case of *Asige Keverenge and Anyanzwa Advocates v Kenya Revenue Authority & another* [2021] eKLR, where the Court held;

> " The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

58. The Court has perused the court record and has noted that no positive orders were issued in favour of the Defendants/ Applicants herein to warrant them to file further proceedings in a dismissed suit. Filing further proceedings in a dismissed suit amounts to a nullity, and the Defendants/ Applicants herein cannot hinge their claim on a dismissed matter. See the case of *Macfoy v United Africa Co. Ltd* 1961 3 All ER 1169, where the Court held that;

> " if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. it is automatically null and void without more ado, though it is sometimes convenient to have a Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse"

59. The 1st Defendant/ Applicant is alleging that she is the registered owners of Land Parcel No. Loc 2/ Kinyona/ 4192, wherein she had sought for eviction of the Plaintiffs/ Respondents from the said parcel of land. This parcel of land was not the one claimed by the Plaintiffs/ Respondents herein in the dismissed suit. The allegations that the 1st Defendant/ Applicant is the registered owner of Loc 2/ Kinyona/ 4192, is a new cause of action.

60. Further, the Plaintiffs/ Respondents have alleged that the said registration was done fraudulently, as the subdivisions were done after the initial registered owner was long deceased. Therefore, the said allegation and counter allegation raises a new dispute. This court finds that for an eviction order to issue, the court must first issue a definite order or make a concrete finding that the 1st Defendant/ Applicant is the bona fide owner of the said parcel of land.

61. No court has made that finding as the initial dispute was over land parcel no Loc 2/ Kinyona/ 94, which suit was dismissed, on 29th November 2018, and the said dismissal order has not been reviewed and/ or set aside by a court of competent jurisdiction. The dismissal order still stands, and therefore, there is no suit herein existing to warrant the Defendants/ Applicants to file further proceedings to exert their rights.

62. The eviction order as sought by the Defendants/Applicants is a new cause of action as they are claiming rights over a different title and not Loc 2/ Kinyona/94, as claimed by the Defendants/Applicants. Even if the suit land could be the same, the Defendants/Applicants ought to assert their rights in a separate cause of action, but not through a dismissed suit. it is clear that the suit herein does not exist, and this court is functus officio.

63. Litigation must come to an end. For the above reasons, this court finds and holds that this Application as filed by the Defendants/ Applicants is not merited. Consequently, the said Application is dismissed entirely with costs to the Plaintiffs/ Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26TH DAY OF AUGUST, 2024

L. GACHERU

JUDGE

26/8/2024

Delivered online in the presence of

Joel Njonjo - Court Assistant

M/s Mwangi HB for Mr Juma for Plaintiffs/ Respondents

Mr Makura for Defendants/ Applicants.