



**Mwei & another v Chumba (Environment & Land Case 53 of 2019)
[2024] KEELC 6257 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6257 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 53 OF 2019
EO OBAGA, J
SEPTEMBER 25, 2024**

BETWEEN

FLORENTINA MWEI 1ST PLAINTIFF

PHILIP MWEI METTO 2ND PLAINTIFF

AND

JAMES MOSONIK CHUMBA DEFENDANT

RULING

1. This is a ruling in respect of a Notice of motion dated 30.5.2024. Defendant Judgment Debtor/ Applicant seeks the following orders: -
 1. Spent
 2. Spent
 3. That the honorable court be pleased to review the judgment and its consequential decree dated 31st May, 2023.
 4. That the Honourable court be pleased to rectify the error on record that did not consider the finding of in ELC 51 of 2012, the respondent's total acreage had been determined at 187.436 acres.
 5. That there is discovery of new and important material evidence that were not available to the applicant at the time the matter was heard and which the applicant prays to the Honourable court to look at and consider thus desires to have a review of the Honourable court's judgment and subsequent decree and afford an opportunity for the matter to be heard on merit.
 6. That costs of the application be provided for.



2. The Applicant wants to have the judgement delivered on 31.5.2023 reviewed and set aside on the ground that the court did not consider the decision in ELC No. 51 of 2012 thus reaching an erroneous conclusion; that there is discovery of new and important evidence which the Applicant could not present at the time of hearing and that there is an error on the face of the record.
3. The Applicant argues that had the court considered the judgement in ELC 51 of 2012, it would have noticed that the Deceased Joseph Kiplagat Arap Mwei was entitled to 187.436 acres and not 191 acres. He further argued that the court's finding that plot 70 belonged to the Deceased was erroneous in that that plot belonged to St. Brigids Catholic Church Sambul.
4. The Applicant further contends that the court's finding that Thomas Chepkunur Lagat's plot was not adjacent to the Deceased's plot was erroneous as the said Thomas Lagat had sold plot 62, 64 and 69 to three people including himself and remained with plot 53.
5. On discovery of new and important evidence, the Applicant states that he came to discover that Thomas Chepkunur Lagat had purchased 10 acres from the Deceased, when he stumbled on a certificate of confirmation in respect of the Estate of the Deceased. That Thomas Chepkunur Lagat sold the land to other people including him who purchased one acre being plot 69, thus becoming the immediate neighbour of the Deceased.
6. The Plaintiffs Decree Holders/Respondents opposed the Applicant's application based on a replying affidavit sworn on 12.6.2024. The Respondents contend that the Applicants application is frivolous and an abuse of the process of court. The Respondent state that this application has been brought after a year and no explanation has been given.
7. The Respondents further state that what the Applicant calls discovery of new evidence were document which were part of his documents filed in court and therefore there is nothing new he has discovered. The Respondents state that the issues which the Applicant raises in his application are matters which ought to have been raised before the Court of Appeal.
8. The Respondents also take issue with the fact that the Applicant's new Advocates came on record without seeking leave of the court.
9. The Applicant submitted that he had instructed his new Advocates who filed a notice of appointment which clearly indicated that they were acting alongside the Advocates who were already on record. He therefore submitted that his new Advocates are properly on record.
10. The Applicant submitted that his application is premised on order 45(1)(a) (b) of the Civil Procedure Rules which states as follows: -
 - “ 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”.
11. The Applicant relied on the case of Republic –vs- Public Procurement Administrative Review Board & 2 others (2018) eKLR where it was held as follows: -

“Section 80 gives the power to review and order 45 sets out the rules. The rules restrict the grounds for review. The rules lays 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 record, or for any other sufficient reason and whatever ground there is a requirement that the application has to be made without delay.”

12. The Applicant submitted that he came by the certificate of confirmation on or about 26.5.2024 and that had he presented it in court, the court would not have arrived at the judgement of 31.5.2023.
13. On the issue of error apparent on the record, the Applicant submitted that the acreage of the land of the Deceased was found to be 187.2 acres but that he occupies 191 acres on the ground. The other error is that the court erroneously found that plot 70 belonged to the Deceased when indeed it belonged to the Catholic church as confirmed from the certificate of confirmation.
14. The Respondents submitted that there is no discovery of new and important evidence as all the documents were known to the Applicant and had been made part of the bundle of his documents. The Respondents further submitted that the issue of acreage was not in issue in this case and in any case if there was such issue, it should have been raised as a ground of appeal in ELC 51 of 2012.
15. The Respondents further submitted that the court had considered ELC 51 of 2012 in the background in the judgement which was the basis of filing the present suit. They submitted that the Applicant cannot be heard to argue that the court did not consider the case.
16. The Respondents submitted that the Applicant did not demonstrate that there was error apparent on the case of the record or that there was discovery of new and important evidence and that in any case, the application was brought after one year which delay has not been explained. On the issue of the application being brought without unreasonable delay, the Respondents relied on the case of Otieno Ragot & Company Advocates –vs- National Bank Limited (2020) eKLR where the Court of Appeal stated as follows: -

“The main grounds for review are therefore discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay”.
17. I have carefully considered the Applicant’s application, the opposition to the same by the Respondents as well as the submissions by the parties. The issues which emerge for determination are firstly whether there is an error on the face of the record. Secondly, whether there is discovery of new and important evidence which would not have been obtained if due diligence had been exercised. Thirdly, whether the Applicant’s application has been brought without unreasonable delay.
18. I will start with the third issue. The impugned judgement was delivered on 31.5.2023. This application was filed in June 2024. This was a period of over one year. The Applicant tried to argue that he instructed his initial Advocate to file a review in time and that when he went to his office to see the progress, he found out that the Advocate had not filed an application for review. He instructed his new Advocate and another law firm which joined the new Advocate. This explanation does not make sense because the Applicant claim to have come across the certificate of conformation on or about 26.5.2024. This was a period of over one year. The delay is therefore unexplained and the Applicant is not being truthful.
19. On the first issue, the Applicant claims that the court did not consider the decision in ELC 51 of 2012 which showed that the true acreage of the Deceased entitlement was 187.2 acres and not the 191 acres he was occupying. The issue of acreage was not an issue in this case. What was in issue is hiving of plot



69 from the Estate of the Deceased's land. This issue should have been the subject of appeal in LEC 51 of 2012 and cannot be a ground for review of this judgement.

20. The other alleged error is that this court made an erroneous finding that plot 70 belonged to the estate of the deceased and that plot 69 was not adjacent to the Deceased's land. An erroneous finding is not a ground for review. It can only form a good ground for appeal.
21. On the second issue, the Applicant states that he stumbled on the certificate of confirmation on or around 26.5.2024 and that had he placed this before the court, the court would not have reached the decision reached on 31.5.2023. There is nothing new which the Applicant has brought forth in this application. The judgement in ELC 51 of 2012 was part of the documents he relied on in his case.
22. The certificate of confirmation was issued on 20.1.2020. This certificate of confirmation was known to the Applicant because the Applicant was aware of it and his Advocate tried to argue that as the same had been issued to the Deceased, the Respondents had no locus standi to bring this suit. This court addressed this issue in the judgement of 31.5.2023. The Applicant cannot therefore claim that he discovered the existence of the certificate of confirmation on 26.5.2024.
23. From the above analysis, it is clear that the Applicant's application is devoid of merit. The same is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 25TH DAY OF SEPTEMBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Murgor for Applicant.

M/s Salim for Respondent.

Court Assistant –Laban

E. O. OBAGA

JUDGE

25th September, 2024

