



Ogolla & 3 others v Atieno & another (Environment & Land Case 862 of 2017) [2024] KEELC 14200 (KLR) (19 November 2024) (Ruling)

Neutral citation: [2024] KEELC 14200 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 862 OF 2017
GMA ONGONDO, J
NOVEMBER 19, 2024**

BETWEEN

SYLVESTER O OGOLLA 1ST APPLICANT

JONATHAN ADAGI MAHIJA & 2 OTHERS 2ND APPLICANT

AND

SALOME ATIENO 1ST RESPONDENT

RAPHAEL OTIENO OTIENO 2ND RESPONDENT

RULING

1. In a Notice of motion application dated 15th February 2024, defendants /applicant through Odondi Awino and Company Advocates, are seeking the orders infra;
 - a. That this Honourable Court be pleased to review and/or vary its findings regarding the acreage on account that there is a mistake in the acreages adversely affected.
 - b. That the intended survey schedule on 21/2/2024 for subdivision by the National Government County Surveyor Migori be stayed until this application is heard and determined.
 - c. That the cost of this application be provided.
2. Briefly, the applicant asserted that on 7/10/2020 when the matter was slated for hearing, the defendants/applicants failed to appear in court despite being served with a hearing notice as per the affidavit of service marked 'SOO-1' annexed to the supporting affidavit. That the matter was heard and finalised on the 11th November 2020 in favour of the applicants. That equity aids the vigilant and not the indolent. That a litigant should always be vigilant in pursuit of prosecuting or defending his case. That subdivision of the suit land reference number Suna East/Wasweta 1/7624 should be allowed to satisfy the decree and help in Migori High Court Succession Cause No. 5 of 2016 when the grant will be confirmed and the respondents/applicants do not stand to be prejudiced.



3. By the replying affidavit sworn on 1st March 2024, the respondents opposed the application. They averred in part that there is in existence Migori High Court Succession Cause No. 5 OF 2016 (The succession cause herein) related to this matter.
4. The application was heard by way of written submissions pursuant to the court's directions of 15th July 2024.
5. By the applicants failed to file submissions as discerned in the Case Tracking System (CTS) herein.
6. Learned counsel for the respondents filed submissions dated 27th August 2024 providing the background of the matter namely the application and the replying affidavit as well as delineated the sought in the application as the three issues for determination. In discussing the issues against the applicants, counsel submitted that the application is timelessly barred and has not met the threshold to enable the court grant the same and that the applicants aim at estopping the respondents from reaping the fruits of their judgment. Reliance was made on sections 1A and 1B of the Civil Procedure Act Chapter 21 Laws of Kenya, Order 45 and Order 22 rule 22 (1) of the Civil Procedure Rules 2010 as well as Stephen Somek Takwenyi & another-vs-David Mbutia Githare & 2 others Nairobi (Milimani) HCC No. 363 of 2009, to reinforce the submissions.
7. In that regard, have the applicants established their case to entitle them to the orders sought in the application?
8. The instant suit was heard and determined ex parte as shown in the judgment. The applicants who were duly served, claimed that the decree was issued error on acreage under adverse possession hence sought review of the same as well as an order for stay of the intended survey exercise (R005) herein. This court takes cognizance of the decree and a copy of grant in the succession cause.
9. The decree was amended further to the Notice of motion dated 2nd July 2021. The document marked as 'R004' being a surveyor's report annexed to the supporting affidavit, is an enforcement of the amended decree following the Notice of Motion dated 17th October 2023. Also, it is order number 4 sought in the instant application.
10. Indeed, judgment was delivered on 11th November 2020 in favour of the plaintiff while the instant application is dated 15th February 2024. There was a delay of over three years to commence the application.
11. Delay for a day will result to dismissal of an application or matter if not explained as held by the COA in Raphael Musila Mutiso & 3 others-vs-Joseph Ndava Nthuka & another (2019) eKLR. Also, it is settled law that the whole period of delay should be declared and explained satisfactorily to the court; see County Executive of Kisumu-vs-County Government of Kisumu & 8 others (2017) KLR.
12. Time is stipulated under Order 50 of the Civil Procedure Rules 2010. Extension of timelines is an equitable discretionary remedy to a deserving party as I subscribe to decision in the case of Nicholas Kiptoo Arap Korir Salat-vs-Independent Electoral and Boundaries Commission & 7 others (2014) eKLR.
13. The respondents contended that the application is aimed at denying the them the fruits of their judgment in this case. The respondents have a vested right to the judgment which ought to be effectual as held in Shahmad-vs-Shamji Bros and another (1957) EA 438.
14. In view of paragraphs 4 and 6 of the applicants' supporting affidavit and paragraphs 7 of the respondents' replying affidavit, Migori High Court Succession Cause number 5 of 2016 is pending



confirmation of grant of letters of administration. Clearly, the orders sought in the application target to circumvent the succession cause and this court cannot take one more step thereof.

15. A fortiori, the instant application is misconceived, inept and fails. The same is hereby struck out with no orders as to costs.

16. It is so ordered.

DATED AND DELIVERED AT MIGORI THIS 19TH DAY OF NOVEMBER 2024.

G M A ONGONDO

JUDGE

Mr B Singei learned counsel for the respondents

Tom Maurice, court assistant

