



**Nginyuri v Kamumo & 6 others (Constitutional Petition E002 of 2023)
[2024] KEELC 14067 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14067 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
CONSTITUTIONAL PETITION E002 OF 2023**

CK YANO, J

DECEMBER 18, 2024

BETWEEN

KIARAGO NGINYURI PETITIONER

AND

**JOSECK NJAGI KAMUMO & 6 OTHERS & 6 OTHERS & 6 OTHERS & 6
OTHERS RESPONDENT**

RULING

1. By a Notice of Motion dated 24th May, 2024 brought pursuant to Articles 40 and 50 of *the Constitution* of Kenya, 2010, Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules and any other enabling provisions of the Law, the 1st and 2nd respondents/applicants seek for orders: -
 - i. Spent
 - ii. That this case be re-opened.
 - iii. That the judgment dated 29th February, 2024 and decree dated 19th April, 2024 be set aside.
 - iv. That this Honourable court be pleased to review its own judgment dated 29th February, 2024 and decree on the Judgment dated 19th April, 2024.
 - v. That this Honourable court do admit the new evidence that has been discovered.
 - vi. Costs of this application be awarded to the applicants
2. The application is supported by the affidavit of Joseck Njagi Kamumo sworn on 24th march, 2024 in which it was contended that on 29th Febraury2024, this court delivered a judgment in this case in favour of the Petitioner/respondent and a decree dated 19th April, 2024 was issued thereafter. Copies of the judgment and decree marked JNK-1 and JNK-2 have been annexed. That the applicants have discovered new and important matter or evidence which after the exercise of due diligence, was not



within their knowledge or could not be produced by them at the time when the suit was filed and the judgment delivered. That there is a new evidence to the effect that the suit parcel of land emanated from parcel number 606 as indicted on the remarks column of the copy of land adjudication records annexed and marked “JNK -3”.

3. The applicants contended that there is new evidence to the effect that the Appeal to the minister No. 196 of 2019 with regard to parcel No.1051 Kamwimbi “A” Adjudication Section was filed on 2nd November, 2016 and within the 60 days statutory period as evidenced by receipt No.C9514983, of which a duplicate copy has been annexed and marked

“JNK -4”. It was further contended by the applicants that the adjudication record at the county land adjudication and settlement officer confirmed to them that the Appeal to the minister Case No. 196 of 2019 was filed on time within the 60 days’ statutory period. A copy of the Appeal to the minister records serial No 414 has been annexed and marked “JNK-5”.

4. The applicants contended that at the time the suit was filed and judgment delivered, they did not have access to such information/evidence since the file could not be found at the county land Adjudication office and at the Director of Land Adjudication Offices in Nairobi. That as a result of the missing file, the Land Adjudication Officers embarked on tracing the file which was found much later after judgment had been delivered. That it was the absence of the above-mentioned pieces of evidence that this Honourable court decided the case in their favour of the Petitioner.
5. The applicants averred that they face a real and immediate threat of eviction/prosecution and other misadventure for being in physical possession and occupation of land Parcel No. 1051 Kamwimbi Adjudication Section. That the Petitioner/respondent herein through his advocates have commenced taxation proceedings against the applicants herein arising from the judgment and decree of this court and the applicants are apprehensive that further misadventure will befall them if this honourable court does not immediately rise in the defence of their constitutional rights. The applicants averred that they are in actual physical possession and occupation of the land where they have been living and farming for decades. It was on the basis of the above averments that the applicants urged the court to grant the orders sought herein.
6. In a replying affidavit sworn on 17th July, 2024 Kiarago Nginyuri, the Petitioner/respondent opposed the application and deposed that the same is designed to thwart his attempts to enjoy the fruits of the judgment of this court. Further, that a keen perusal of the evidentiary material presented with the application herein raises an inevitable suspicion that some of the documents have been fraudulently tailor-made solely for purposes of convincing the court to review its decision. Firstly, Petitioner pointed out that the relevant section of the document marked annexure “JNK -3” in the applicant’s affidavit relating to the remarks column seems to bear an alteration regarding the entry therein. Secondly, that annexure “JNK-5” reveals something quite interesting but not as obvious or mundane. That payment by the same person on the same date regarding different parcels of land are entered in the same receipt save for the payment made by Joseck Njagi Kamumo, the 1st applicant where two receipts seem to have been issued i.e. numbers C9514981 and C9514983 and there is a clear omission of receipt number C9514982 in the entry in a system where the receipt numbers are clearly supposed to follow chronologically. The respondent also contended that it is not lost on a keen eye that entry number 414 that is pertinent to these proceedings is conveniently placed on the last row at the foot of the page making the suspicion of a fraudulent addition not a remote idea.
7. The foregoing notwithstanding, the respondents contended that the applicants have not satisfied the threshold for a grant of the relief sought. The respondent stated that he raised the issue of



limitation early enough but the 1st applicant did not attempt to provide any evidence that indeed the appeal was filed within time instead chose to shift the burden of proof to the petitioner. That it is unreasonable for the applicants to expect the court to believe that they were not aware of the existence of the payment receipt in respect of the appeal since the payment was made by the 1st applicant. The respondent contended that in any case, this court found as a matter of fact that any valid appeal to the minister ought to have been filed by 20/10/2016 whereas the applicants “recently discovered documents” demonstrating that the appeal was filed on 02/11/2016. The respondents contended that even assuming that the discovered documents were genuinely out of reach of the applicants, they are still of no value to their course as the appeal would still have been filed out of time by 16 days and without leave. It is therefore the respondent’s contention that the application is without merit and the court should proceed to dismiss the same with costs.

8. The applicants filed a supplementary affidavit sworn by the 1st applicant on 25th October, 2024 in which they reiterated that there is discovery of new evidence to the effect that their appeal to the Minister was filed within the statutory period as provided under Section 29 of the Land Adjudication Act, Cap 284 Laws of Kenya. They have annexed their application form dated 5th October, 2016 marked as “SJNK -1” that they said was received by the Land Adjudication Officer on the same day. That the law does not provide or envision for receipts as evidence of appeal before the land adjudication and settlement officer.
9. The applicants contend that when their application was received, they were not issued with receipts until 2nd November, 2016 as per the receipt book records, and that the only plausible explanation they received from the Land Adjudication and settlement officer was that they had run out of receipt books way before 5th October, 2016 when the applicants filed their appeal to the minister. The 1st applicant averred that he should not be punished for the government’s administrative procedures that are completely out of his control and jurisdiction. The deponent has also provided a clear copy of the document marked annexures “JNK – 3” since the petitioner disputed the copy previously filed.
10. The 1st applicant deposed that at the time of hearing, he had knowledge of the existence of the documents that he has produced before this court. That his attempts to peruse the file at the land adjudication and settlement within Meru South/Maara Sub-county offices turned futile since the file could not be found. That the directorate at Nairobi managed to secure the file and upon perusal, the applicants discovered new evidence that would be significantly helpful in their case. The applicants contended that it was at that juncture that they learnt that the file had been forwarded to the Chief Land Registrar, Nairobi for implementation of the decision in the Appeal to the minister case which was part of the administrative and legal procedures provided and urged the court to take judicial notice of such procedures. The applicants contended that there is no reasonable way they could have produced such evidence at the time when the suit was filed and judgment delivered since the documents were completely outside their precincts. The 1st applicant averred that he acted in all due diligence within his capacity and argued that there is no way he would have jeopardized his case by failing to produce the relevant evidence at the relevant time. The applicants urged the court to allow the application as prayed.
11. The application was canvassed by way of written submissions. The applicants filed submissions dated 5th December, 2024 through the firm of B. Musili Advocates while the Petitioner filed his dated 19th November, 2024 through the firm of Basilio Gitonga, Muriithi & Associates Advocates.
12. The applicants submitted that they were aggrieved by the decree of this court and that the documents marked JNK – 1, JNK2, JNK-3, JNK-4, JNK- 5, SJNK- 1 and SJNK-2 now produced before this court could not have been produced at the time when the decree was made despite the applicants acting



with all due diligence. Further, that the application was made without unreasonable delay and that the grounds espoused in the applicants' affidavits amount to sufficient reasons to allow the application.

13. The applicant cited the provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules and relied on the case of Republic Versus Public Procurement Administrative Review Board & 2 others (2018) Eklr, Pancras T. Sivai Versus Kenya Breweries Limited [2014] Eklr Sarder Mohammed Versus Charan Singh Nad Sing & Another (1959) EA 793, Dubai Bank Kenya Limited Versus Kwanza Estates Limited (2015) EKLr, VRM V MRM & Another [2006] Eklr, navodhlo Kenya Limited Versus Loria Michelle Civil Appeal No. 24 OF 1998 (UR) AND Mohammed Dagane Fahir Versus Alfonse Mutuku Muli & Another [2020]Eklr. The applicants also cited Articles 40,47,and 48 of the Constitution of Kenya and urged the court to allow the application with costs.
14. It was submitted on behalf of the Petitioner that the Civil Procedure Rules 2010 do not have a provision for presentation of additional evidence after judgment. That the only provision that comes close is Order 42 Rule 27(1) but which relates to appellate proceedings. The Petitioner's counsel relied on the case of Okiya Omtatah Okoiti Versus Director of Public Prosecutions & 3 Others and Mohammed Abdi Mohamed Versus Ahmed Abdillahi Mohmaed & 3 others [2018] Eklr and submitted that in the instant case the applicants have materially failed to satisfy several principles, to wit, that it has not been demonstrated that the additional evidence could not be procured if reasonable diligence was applied or that it was not within the knowledge of the applicants, that the credibility of the evidence has been doubted by the Petitioner and no strong rebuttal has been advanced, that it has not been shown that the applicants were not aware of the additional evidence, that it is demonstrating clear that the additional evidence is designed to remove lacuna and fill the gaps in the evidence of the applicants, and that the introduction of the additional evidence will inevitably derail the swift conduct of litigation as its introduction would result in the fresh hearing of the petition. It is therefore the petitioner's submissions that the applicants have failed to satisfy the threshold for the grant of the orders sought. The Petitioner's counsel further relied on the case of The Institution of Engineers of Kenya Versus Howard Ashihindu M'mayi [2022] KEHC 3841 (KLR), Emily MKaluma Mbasau Versus Godfrey Fundi Mwanbi & Another and Geoffrey through Waweru versus Keziah Wahu Njuguna [2024] Eklr and urged the court to dismiss the application with costs.
15. I have considered the application the grounds of opposition and the submissions filed. I have also taken into account the authorities relied on by the parties to buttress their rival positions. The issue for determination is whether the court should review and set aside the judgment delivered on 29/2/2024 and re-open the case to enable the applicants adduce new evidence.
16. The Judgment delivered by the court on 29th February, followed the Petition dated 31st May 2023 by the Petitioner/respondent herein in which he sought inter alia declarations that the proceedings conducted by the 4th respondent herein in Appeal to the minister No. 196 of 2019 were null and void as they violated various articles of the constitution and infringed the petitioner's rights. The Petitioner also sought an order for cancellation of any title deed that had been issued pursuant to the decision of the minister in favour of the applicants herein in respect of land parcel number 1051 Kamwimbi Adjudication Section. The main complaint by the petitioner was that the 4th respondent acting on behalf of the minister entertained an appeal that was lodged outside the period limited by statute, specifically Section 29 of the Land Adjudication Act which provides that any person aggrieved by the determination of an objection under Section 26(1) and (2) of that Act may within sixty days after the date of the determination appeal against the determination to the minister. The Petition was opposed by the respondents, including the 1st applicant herein who filed a replying affidavit dated 21st July, 2023. Regarding the issue by the petitioner that the appeal to the minister was filed out of time, the 1st applicant herein submitted that the petitioner had not provided any proof to prove that



- allegations. The 1st applicant maintained that he filed the appeal within time. Upon considering the matter the court found that the proceedings before the minister in Appeal Case No 196 of 2019 were un-procedural, unlawful, illegal, unconstitutional and null and void. Consequently, judgment was entered in favour of the Petitioner herein. In the present application, the applicants want that judgment reviewed and set aside and the case be re-opened for them to be allowed to adduce new evidence. The 1st applicant deposed that the new evidence is that the appeal to the minister No. 196 of 2019 with regard to the suit land was filed on 2nd November, 2016 and within the 60 days provided under the law.
17. Section 80 of the *Civil Procedure Act* gives power of review while order 45 of the civil procedure rules sets out the rules. The rules restrict the grounds for review and 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 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.
18. In the instant case, the application is made principally on the ground that the applicants have discovered new and important evidence which after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time when the suit was filed and the judgment was delivered. Whereas the applicants contended to have exhibited documents to show that their application dated 5/10/2016 was received by the land Adjudication and Settlement Officer on the same date and that they were not issued with a receipt until 2nd, November, 2016, the applicants have not explained why the Appeal Case Number is 196 of 2019. Indeed, this court in its judgment made an inference that the appeal was filed in 2019 and not in 2016 as alluded by the applicants in the application herein. Furthermore, the 1st applicant herein had submitted earlier that the land had an inhibition and thus his failure to file the appeal within the period stipulated by the law. It is notable that the applicants have changed from their earlier argument and are now purporting that there is discovery of new evidence. Considering the position taken by the 1st Applicant herein at the hearing of the petition that led to the judgment delivered on 29th February, 2024 and the different position now taken in this application, I am not persuaded that I should exercise my discretion in favour of the applicants. It is evidently clear from the judgment of 29th February, 2024 that the issues raised in the present application were articulated before this court and the decision of the court now sought to be reviewed. The judgment of the court was informed by the arguments advanced by the parties, including the 1st applicant herein. The alleged new evidence in my view, was within the knowledge of the applicants and they could have produced it during the hearing of the petition. It is clear to me that the application herein seeks to fill up omissions and patch up the weak points in the applicant's case. Even if the court was to hold that there was new and important evidence which of course doubt in the circumstances of this matter, the court could highly not have arrived at a different decision since it is not possible for a case number 196 of 2019 to have been filed in 2016, which is a difference of about three years. Therefore, I am of the view that the applicants have not satisfied the conditions for grant of the orders sought under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.
19. By reason of the foregoing, I find that the notice of motion dated 24th May, 2024 is devoid of merit and the same is dismissed with costs to the Petitioner.
20. It is so ordered.



DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF DECEMBER, 2024.

HON. C. YANO

ELC – JUDGE

Order: This ruling has been delivered via Microsoft teams online platform a signed copy will be availed to each party upon payment of the applicable court fee.

