



**Korir v Langat (Guardian ad litem of Susan Cherono Chumo -legal representative of the Estate of the Late Chepkwony Arap Chumo) (Environment & Land Case 75 of 2018) [2024] KEELC 13642 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13642 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 75 OF 2018  
LA OMOLLO, J  
DECEMBER 5, 2024**

**BETWEEN**

**JULIUS CHELOGOI A KORIR ..... PLAINTIFF**

**AND**

**WESLEY KIPYEGON LANGAT (GUARDIAN AD LITEM OF SUSAN  
CHERONO CHUMO -LEGAL REPRESENTATIVE OF THE ESTATE OF THE  
LATE CHEPKWONY ARAP CHUMO) ..... DEFENDANT**

**RULING**

**Introduction.**

1. This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 26<sup>th</sup> March, 2024. The application is expressed to be brought under Sections 1A, 1B, 63(e) & 80 of the [Civil Procedure Act](#), Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules.
2. The Plaintiff/Applicant seeks the following orders;
  - a. Spent
  - b. That the Honourable Court be pleased to set aside and or review the judgement delivered on 22<sup>nd</sup> February, 2024.
  - c. That the Honourable Court be pleased to set aside and or review its judgement dated 22<sup>nd</sup> February 2024, to the effect that it renders a fresh judgement while taking into consideration the new material evidence.
  - d. That the costs of the application be provided for.



3. The application is based on the grounds on its face and the supporting affidavit of one Kiprotich Joseah Koech sworn on 26<sup>th</sup> March, 2024.

### **Factual Background.**

4. The Plaintiff/Applicant commenced this suit by way of the Plaint dated 3<sup>rd</sup> September, 2018. He sought the following prayers;
  - a. An order declaring that the records in the lands registry in respect to the suit property be rectified and a title be issued in the name of the Plaintiff.
  - b. Costs of the suit.
5. The Defendant/Respondent filed his Statement of Defence on 24<sup>th</sup> April, 2019 wherein he denied the averments in the Plaint and sought that the Plaintiff/Applicant's suit be dismissed with costs.
6. On 22<sup>nd</sup> February, 2024 the Court delivered its judgement and dismissed the Plaintiff/Applicant's suit with no order as to costs.
7. The application under consideration first came up for directions on 8<sup>th</sup> May, 2024 when the Court directed that the application be heard by way of written submissions.
8. The application was mentioned severally to confirm whether parties had filed their submissions. It was finally reserved for ruling on 24<sup>th</sup> September, 2024.

### **The Plaintiff/Applicant's Contention.**

9. The supporting affidavit is sworn by Kiprotich Joseah Koech the donee of specific power of attorney No. 5223591 from the Plaintiff/Applicant.
10. He contends that the Plaintiff/Applicant was a member of Lesirwa Farm Estate and upon payment of the requisite fees was allocated the suit property.
11. He also contends that after the Plaintiff/Applicant paid the requisite fees, he was entered into the register of members as the proprietor of the suit property.
12. He further contends that in the year 1986, members of Lesirwa Farm including the Plaintiff/Applicant were shown their respective parcels of land. He adds that beacons were placed to mark the boundary of each parcel of land.
13. It is his contention that the late Chepkwony Arap Chumo fraudulently caused his name to be entered in the register of members jointly with the name of the Plaintiff/Applicant. He states that the late Chepkwony Arap Chumo was added as one of the proprietors of the suit property and yet he was not a member of the Lesirwa Farm Estate.
14. It is also his contention that the addition of the late Chepkwony Arap Chumo in the register was meant to deny the Plaintiff/Applicant his rightful entitlement to the subject property.
15. It is further his contention that Lesirwa Farm was acquired by members of the Lesirwa Farm Estates and therefore the allocation of land was restricted to those members who had fully paid their membership dues and loan obligations. Upon payment of the said sums, their names were be entered in the official register. He adds that the register was then presented to the Land Registry for formal registration.



16. He contends that upon the Plaintiff/Applicant realizing the fraudulent registration in the Lesirwa Farm register and upon recognizing that this would be mirrored in the official records, he applied for a certificate of official search from the Land Registry.
17. He also contends that unfortunately this request was not processed and so he sought the assistance of the Deputy County Commissioner Kipkelion Sub County but the said efforts were futile.
18. He further contends that since he was unable to get any remedy, he opted to seek recourse from the Courts. He goes on to state that the Court in its judgement delivered on 22<sup>nd</sup> February, 2024 noted that the Plaintiff/Applicant failed to supply documents in relation to the land which documents would have shown who the registered proprietor was and the acreage of the land.
19. It is his contention that he has since discovered the existence of very important and material evidence which with due diligence was not available at the time of the hearing of the suit which shows that the late Chepkwony Arap Chumo was illegally and fraudulently registered as a joint proprietor of land parcel No. Kericho/Kipchorian/Lesirwa Block/92.
20. It is also his contention that he has obtained a certificate of official search and a green card that shows that the suit property was registered jointly in the names of Julius Chelogoi A. Korir and Chepkwony A. Chumo. He adds that this registration reflects the illegal and fraudulent entries in the register of Lesirwa Farm Members.
21. It is further his contention that from the Certificate of Official Search and the Green Card, the said registration was done on 26<sup>th</sup> February, 2024 after judgement in this matter had been delivered. This shows that the said documents were not available at the time of the hearing of the suit.
22. He contends that owing to the nature of the evidence that he had obtained, he prays that the judgement delivered on 22<sup>nd</sup> February, 2024 be reviewed.
23. He also contends that pursuant to the provisions of Sections 1A, 1B, 63(e) and 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the Civil Procedure Rules, this Court has the powers to review its orders and/or judgement where sufficient cause has been shown.
24. He ends his deposition by stating that unless the orders sought are granted, he will be prejudiced and will therefore suffer loss and damage.

#### **The Defendant/Respondent's Response.**

25. The Defendant/Respondent filed a Replying Affidavit sworn on 8<sup>th</sup> July, 2024.
26. He deposes that he is the guardian ad litem of Susan Cherotich Chumo who is his mother and who is also the administrator of the estate of Chepkwony Arap Chumo (Deceased). He adds that the late Chepkwony Arap Chumo was his father.
27. He also deposes that his deceased father was a brother to Julius Chelogoi A. Korir the Plaintiff/Applicant herein.
28. He further deposes that the Court analyzed and addressed all the issues that had been raised by both parties in its judgement that was delivered on 22<sup>nd</sup> February, 2024.
29. It is his deposition that the issues that have been raised by the Plaintiff/Applicant at paragraphs 2, 3, 4, 5, 6 and 7 of his Supporting Affidavit had been addressed in the said judgement. He adds that the Plaintiff/Applicant is impliedly raising Grounds of Appeal in the Trial Court instead of lodging an appeal in the Court of Appeal.



30. It is also his deposition that during the trial, both the Plaintiff/Applicant and the Defendant/Respondent relied on the extract register of Lesirwa farm Estate whereby the Plaintiff/Applicant and the late Chepkwony Arap Chumo were co-registered as owners of land parcel No. Kericho/Kipchorian/Lesirwa Block 1/92.
31. It is further his deposition that it is not true that he fraudulently registered an abstract in the names of the Plaintiff/Applicant and the deceased on the suit land.
32. He deposes that he and his mother do not have authority to process the abstract of the disputed land before the Kericho Land Registrar because they do not have a certificate of Confirmation of Grant in respect of the half share of Chepkwony A. Chumo.
33. He also deposes that the Plaintiff/Applicant may have processed the said abstract of the suit property since he is the surviving joint registered owner of the land. He adds that the Plaintiff/Applicant would have done so and misrepresented it to the Court in order to raise a dubious ground of discovery of new evidence in an attempt to set aside the judgement of the Court under Order 45 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*.
34. He further deposes that the Plaintiff/Applicant intentionally failed to annex the documents from the lands office as the Court would have known that he had processed the said abstract of the suit property.
35. It is his deposition that what is contained in the abstract and the Official search is a replica of the names stated in the Register Book of Lesirwa Farm Estate and under the custody of the Kericho Lands Registry and therefore the abstract is not new evidence which may tilt the decision of this Court through an application for review of the judgement.
36. It is also his deposition that on 2<sup>nd</sup> July, 2024, his advocates on record wrote to the Land Registrar a letter inquiring on who had processed the said abstract and/or green card of the suit property. In response, the Land Registrar stated that he is empowered under the *Land Registration Act* to open green cards in accordance with the members register especially if a member is deceased in order to assist in the completion of the succession cause.
37. It is further his deposition that based on the information contained in the Land Registrar's response, there is no discovery of new evidence which will lead to the review of the judgement of this Court.
38. He ends his deposition by stating that the application under consideration does not have any merit and it should therefore be dismissed with costs.

#### **Issues for Determination.**

39. The Plaintiff/Applicant filed his submissions on 5<sup>th</sup> June, 2024 while the Defendant/Respondent filed his submissions on 8<sup>th</sup> July, 2024.
40. The Plaintiff/Applicant submits on whether the judgement delivered by this Court on 22<sup>nd</sup> February, 2024 should be reviewed.
41. The Plaintiff/Applicant relies on Order 45 Rule 1(b) of the Civil Procedure Rules, Section 80 of the *Civil Procedure Act*, the judicial decisions of *Dock Workers Union & 2 Others v Attorney General & another Kenya Ports Authority & 4 Others (Interested Party)* [2019] eKLR, *Benjoh Amalgamated Limited & anor vs Kenya Commercial Bank Limited* [2014] eKLR and submits that a party who has been aggrieved by a judgement of a Court can apply for review where an appeal is allowed but from which no appeal has been preferred.



42. The Plaintiff/Applicant reiterates his averments in his Supporting Affidavit and while relying on Article 40(6) of *the Constitution* of Kenya, the judicial decision of Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others [2015] eKLR as was cited in Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another ELC Case No. 609B of 2012, Munyu Maina v Hiram Gathiha Maina [2013] eKLR submits that without any records that the late Chepkwony Arap Chumo was a member of Lesirwa farm, his registration as a joint proprietor of the suit property was illegal and/or fraudulent.
43. The Plaintiff/Applicant relies on judicial decision of Dina Management Limited *v County Government of Mombasa & 5 Others (Petition No. 8 (E010 of 2021))* and submits that if the judgement delivered on 22<sup>nd</sup> February, 2024 is left to stand, the Court will be sanctioning an illegality and therefore a review of the judgement is necessary to ensure justice is served and to protect the integrity of the legal system.
44. The Plaintiff/Applicant therefore seeks that his application be allowed as prayed.
45. The Defendant/Respondent in his submissions reiterates the averments in his replying affidavit and submits that the Plaintiff/Applicant has not demonstrated any new evidence which the Court can act upon to review and/or set aside its judgment.
46. The Defendant/Respondent relies on the judicial decisions of Nasibwa Wakenya Moses vs University of Nairobi & another [2019]eKLR, Tokesi Mambili and Others vs Simion Litsanga (citation not given), Sadar Mohammed versus Charan Signgh & another (citation not given) and submits that a review is only permissible upon discovery of new and important evidence which after exercise of due diligence was not within an Applicant's knowledge.
47. The Defendant/Respondent submits that this provision of the law is not meant to enable the Court to write a second judgement or give a second inning to a party who lost his case because of his negligence.
48. The Defendant/Respondent seeks that the Plaintiff/Applicant's application be dismissed with costs.

#### **Analysis and Determination.**

49. I have considered the application, the response thereto and the submissions filed by the parties. Taking them into consideration, the only issue that arises for determination is whether this Court should review its judgement delivered on 22<sup>nd</sup> February, 2024.
50. Section 80 of the *Civil Procedure Act* provides as follows;
  - “ 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.”
51. Order 45 Rule 1 of the Civil Procedure Rules provides as follows;
  - “(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.”

52. In the judicial decision of Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR the Court held as follows;

“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.”

53. As was held in Republic v Public Procurement Administrative Review Board & 2 others (supra) cited above, the Court can only review its orders upon discovery of new and important evidence which after the exercise of due diligence could not be adduced at the time the decree was issued, on account of mistake or error apparent on the face of the record and any other sufficient reason.
54. In the present matter, the Plaintiff/Applicant is seeking that the Court reviews its judgement delivered on 22<sup>nd</sup> February, 2024 on the ground that he has discovered new and important evidence which with upon exercise of due diligence was not available at the time judgement was delivered.
55. The Plaintiff/Applicant contends that the Court in its judgement observed that he had failed to supply documents that show that the late Chepkwony Arap Chumo was one of the registered owners of the suit property.
56. The Plaintiff/Applicant also contends that after delivery of judgement on 22<sup>nd</sup> February, 2024, he realized that he together with the late Chepkwony Arap Chumo had been registered as joint owners of the suit property on 26<sup>th</sup> February, 2024.
57. It is on this account that the Plaintiff/Applicant is seeking that the judgement of the Court be reviewed.
58. The Defendant/Respondent in response admits that at the time of the hearing of the suit, neither of the parties produced any certificate of search or abstract which showed that the Plaintiff/Applicant and the late Chepkwony Arap Chumo were jointly registered as owners of the suit property.
59. The Defendant/Respondent also contends that it is the Plaintiff/Applicant who decided to register the suit property in both his name and the name of the late Chepkwony Arap Chumo after judgement had been delivered and then claim that he had discovered new and important evidence.



60. The Court of Appeal in *Rose Kaiza –vs- Angelo Mpanjuiza* [2009] eKLR while considering an application for review on the ground of discovery of new evidence held as follows;

“An application for review under Order 44 r 1 must be clear and specific on the basis upon which it is made. The motion before the superior Court was based on the discovery of new facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed. In the words of the rule itself, it is

“.....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.....”

The construction and application of that Provision has been discussed in many previous decisions but we shall take it from the commentary by Mulla on similar provisions of the Indian Civil Procedure Code, 15<sup>th</sup> Edition at page 2726, thus:

“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the Applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”[Emphasis Mine]

61. As stated in the preceding paragraphs, the Plaintiff/Applicant contends that at the time of the institution of this suit up to and until judgement was delivered, he was unable to obtain a copy of the certificate of search and/or copy of the green card to show that he was jointly registered with the late Chepkwony Arap Chumo as the owners of the suit property.

62. He also contends that it was after the delivery of judgement that he was able to obtain documents that showed that they were registered as joint owners of the suit property and in the circumstances, he has demonstrated that he has discovered new evidence which with exercise of due diligence was not available at the time judgement was delivered.

63. The Plaintiff/Applicant has annexed to his supporting Affidavit a copy of the green card for land parcel No. Kericho/Kipchorian Lesirwa Block 1/92.

64. Entry No. 1 is dated 6<sup>th</sup> February, 1995. The registered owner is the President of the Republic of Kenya. Entry No. 2 is dated 26<sup>th</sup> February, 2024 and it states that Julius Chelogoi A. Korir and Chepkwony A. Chumo were registered as owners of the suit property.

65. The Court in its judgement delivered on 22<sup>nd</sup> February, 2024 held as follows;

“ 128. The standard of proof on the issue of fraud is very clear in law wherein a party pleading the same is expected to go a notch higher than the mere balance of probability threshold as was held in the cases of *Mahendra Shah vs Barclays Bank International Ltd & Another* [1979] e KLR and in the case of *Davy*



vs Garrette [1978] Ch. 473 at pg 468, where it has been held that it was not allowable to leave fraud to be inferred from the facts.

129. Having said that, and in consideration of the case before me, I find that the Plaintiff has not annexed a copy of the title deed, or any other document of title, in relation to the suit parcel of land, as required by law to show who the past or the current registered proprietor is/are. Indeed I have not seen any extract of title and therefore I am sure (sic) of what is contained in the register.”

66. In essence, the Court in its judgement delivered on 22<sup>nd</sup> February, 2024 noted that the Plaintiff/Applicant had failed to prove fraud and had also failed to annex a copy of extract of title to show who were the registered owners of the suit property.

67. The Court of Appeal in *D. J. Lowe & Company Limited Vs Banque Indosuez* [1998] eKLR held as follows;

“Where such a review application is based on fact of the discovery of fresh evidence the Court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

68. From the annexed copy of the green card, it is evident that the Plaintiff/Applicant and the late Chepkwony A. Chumo were registered as owners of the suit property after judgement had been delivered.

69. As was held by the Court of Appeal in *D. J. Lowe & Company Limited Vs Banque Indosuez* (supra) cited above, when a Court is considering an application for review on the ground of discovery of new and important evidence, it should be cautious as it is easy for a party who has lost, to see a weak part of his case and procure evidence that would strengthen that weak part.

70. In my view this is a classic example of a Plaintiff who has lost a case procuring evidence to strengthen it. Unfortunately for him, this new evidence that he has procured does not support his case. For example, in paragraph 7 of the plaint the Plaintiff avers as follows;

“After various attempts to process the title in the lands office in the year 2014, the Plaintiff came to learn that his parcel of land known as Kericho/Lesirwa/Block 1/92 was registered jointly in his name and that of the late Chepkwony Arap Chumo”.

71. The Plaintiff/Applicant’s suit was dismissed for failure to prove fraud and also annex a copy of the title deed, or any other document of title, in relation to the suit parcel of land to show who the past or the current registered proprietor is/are.

72. After the delivery of judgement, the Plaintiff/Applicant has now procured a copy of the green card which shows that the suit property is registered in the joint names of the Plaintiff/Applicant and Chepkwony A. Chumo. This registration was effected after judgement was delivered.

73. Therefore, as at the time of institution of the suit, no such registration had taken place. The purported new evidence that has been brought forward shows that Kericho/Lesirwa/Block 1/92 was registered in the name of the Plaintiff and the late Chepkwony Arap Chumo after Judgement in this suit was delivered.



**Disposition.**

74. Although there is now evidence that that the Plaintiff/Applicant and Chepkwony A. Chumo are registered as owners of the suit property i.e. Kericho/Lesirwa/Block 1/92 this evidence does not constitute discovery of new and important evidence as envisaged under Order 45 Rule 1. Also important is the fact that this evidence does not speak to the question of fraud which was also determined by this court.
75. Consequently, the Plaintiff/Applicant's application dated 26<sup>th</sup> March, 2024 lacks merit and it is hereby dismissed with no orders as to costs.
76. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 5<sup>TH</sup> DAY OF DECEMBER, 2024.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of: -

Mr. Okok for the Plaintiff/Applicant.

Mr. Koske Defendant/Respondent.

Court Assistant; Mr. Joseph Makori.

