



**Owindi & another v Sitalo (Environment & Land Case  
131 of 2000) [2023] KEELC 236 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 236 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 131 OF 2000  
FO NYAGAKA, J  
JANUARY 26, 2023**

**BETWEEN**

**JOSEPH WANDERA OWINDI ..... 1<sup>ST</sup> PLAINTIFF**

**RAILI OWINDI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**WAFULA SITALO ..... DEFENDANT**

**RULING**

1. The Plaintiffs, now Respondents, sued the Defendant, now Applicant, for an order of eviction and vacant possession of part of land parcel No LR No Trans Nzoia/ Makutano/31 which was said to be measuring approximately 2.428 Hectares. At paragraph 4 of their Complaint they averred that the Defendant had encroached 0.528 hectares of their land without their consent. They then prayed for his eviction. The Defendant denied the allegations through a Defence dated December 19, 2000. In his defence he stated that he bought a portion of land measuring 2 acres from one Jimmy Onguka. He made other averments, not directly relevant to the issues in the instant Application, which I therefore do not have to reproduce here now.
2. The suit proceeded to full hearing. At the end thereof, the Judge delivered a judgment on 3/11/2004. In it the Court stated that it was satisfied with the reliefs sought by the Plaintiffs and granted them the reliefs sought in the Complaint. It was the said Judgment that this Court believes it was moved through the instant Application to review. I am of that belief because prayer 3 which is the substantive one in this Application refers to a judgment dated 3/11/2021, which does not exist in this file. But let me proceed on the premises that the date referred to was a typographical error hence I do not dismiss the Application on a technicality.



3. The Notice of Motion before me is dated August 10, 2022. It is brought under Order 45 Rule 1 and 2 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3 and 3A of the Civil Procedure Act. It sought the following orders:
  1. ...spent
  2. ...spent
  3. That this honourable Court be pleased to vary/review and or set aside the judgment of dated November 3, 2021 (sic) and decree dated December 8, 2004, hiving off the Defendant's land measuring 0.528 Ha. from land parcel No Trans Nzoia/Makutano/47 instead order that the Plaintiff/Respondent surrender 0.528 Ha. from land parcel No Trans Nzoia/Makutano/31 to the Defendant/Applicant.
  4. That the County Land Surveyor be ordered to resurvey and plant boundary between land parcels No Trans Nzoia/Makutano/31 and Trans Nzoia/Makutano/47 reflecting the measurement on the title deeds of the land parcels.
  5. That costs of this application be provided for.
4. The Application was based on a number of grounds whose summary I will give hereinafter and supported by the Affidavit of Meshack Wafula Shitalo sworn on August 10, 2022. The grounds were that Judgment in this matter was delivered on 3/11/2004 and a decree issued on 8/12/2004 declaring that 0.528 hectares be hived off from land parcel No Trans Nzoia/Makutano/47 and given to parcel No Trans Nzoia/Makutano/31; that by so doing the Defendant would lose 0.528 hectares of his land vis-à-vis the registered size in the title; the judgment is erroneous since the surveyor's report indicates that it is the Plaintiffs/Respondents who had encroached the Defendant's land; the decree be rectified to fit the registered measurements; that parcel number Trans Nzoia/Makutano/31 measures 2.660 hectares instead of 2.428 hectares which are registered on the title; that parcel No Trans Nzoia/Makutano/47 measures 0.309 hectares instead of 0.090 hectares which is registered on the title; if the decree is implemented as drawn the Defendant would lose his parcel of land as per the surveyor's report; the interest of justice demand that the orders sought be granted; and the application has been brought without delay after the ruling of July 28, 2022.
5. The depositions in the Supporting Affidavit repeated the contents of the ground summarized above save that it had annexures attached thereto, and a few facts. Some of the facts were misleading. For instance, that the decree was issued on December 8, 2022 while it is clear that that was done on 08/12/2004. The judgment and decree impugned were annexed as MWS 1(a) and (b). A Surveyor's Report dated 16/08/2016 prepared by the Trans Nzoia County Surveyor, one Protus Muindi, was annexed and marked as MWS 2. Another Report prepared by another County Surveyor, one BA Onduso, dated November 11, 2021 was annexed as MWS 3. The Applicant stated that if the Surveyors were to plant boundaries based on their reports, it shows clearly that it was the Plaintiff who had encroached onto land parcel No Trans Nzoia/Makutano/47 on a triangular portion thereof hence the Reports support the facts that the Applicant would lose 0.528 hectares of his land to the Respondents if the decree is implemented. Further, the Applicant then annexed as MWS 4 a copy of the Ruling of this Court dated July 28, 2022 which finds that the Reports were not in tandem. He prayed for another resurvey of the land to put the proper boundaries. He prayed that his Application be allowed.
6. The Respondents opposed the Application through a Replying Affidavit sworn by one Raili Owindi, the 2<sup>nd</sup> Defendant. He stated that the Application had been brought after a long unexplained delay and it was bad in law, an abuse of the Court process, misconceived, frivolous, vexatious and scandalous. He deponed between paragraphs 5 and 12 on the history of the proceedings herein culminating the



quest to implement the decree. I do not have to repeat the history. He then deponed on how on April 18, 2006 a Surveyor by name Mr Wanyama implemented the decree by erecting beacons as directed by the Court. He annexed and marked as RO1 and RO2 copies of and Order dated February 28, 2006 and a letter dated May 30, 2006 written by the Surveyor to the Plaintiff's Advocates and copied to Court, indicating that the decree had been executed. He deponed further that the Defendant and his agents removed the fence and beacons put in place. The incident was reported to the Kitale Central Police Station. That the decree of this Court notwithstanding, the Defendant continued to encroach the parcel of land and has thereafter put up there on a house, cattle shed, grain store, a pit latrine and residential compound. Further, that on 2/11/2009, this Court issued an eviction order which was implemented by the District Surveyor on October 27, 2011. He stated that after the implementation of the decree again, less than 0.528 hectares of land was reclaimed back by the Plaintiffs to land parcel No 31. His further deposition was that the Ruling of this Court made on July 28, 2022 was the genesis of the instant application but there was no error apparent on record. He disputed that there was an error apparent on the record and the applicant had not attached no new evidence to warrant the review. He also stated that there was inordinate delay in bringing the application and that it was an afterthought. He swore that no one would be prejudiced if the Application was disallowed and he prayed for its dismissal.

7. The Application was disposed of by way of written submissions. As at the time of making the determination herein, only the Applicant had filed his submissions. But absence of other parties' submissions is not a leeway for this Court not to making findings on the merits or otherwise of the Application since submissions do not constitute either pleadings or evidence of a party: they constitute a voice that is projected by a party in trying to convince the Court to decide the issue before it in favour of the party putting it forth. I refer the parties to [\*Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another\*](#) [2014] eKLR, where the Court of Appeal stated as follows:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

8. The Court is not bound by them since by human nature the party's desire, in an adversarial system is to win his case. What happens in submissions is akin to the what happens in the movie known as Game of Thrones: a struggle to win. It may involve skewing information and legal opinion in order to sway the mind of the judge. It would be seldom and divine to have an adverse party making submissions in favour of the opponent. Often, they will emphasize that which suits their contention and discount that which is against them.
9. With the above observation in mind, the Applicant filed his submissions on October 19, 2022. They were dated October 17, 2022. In them he repeated the prayers in the Application only that he subtly changed the prayer as was in the Application, regarding the date of judgment. As can be noted above, in the Application he prayed the setting aside of judgment delivered on 3/11/2021 while in the submissions he repeated the prayer as relating the judgment delivered on 3/11/2004. He did not in any way want to inform the Court that he made an error and wished to have it amended. He let it slip through the papers, hoping the judge does not notice it. The practice of parties not being candid in what they plead or submit to the Court seems to be rampant nowadays. It would appear, for believers in the Holy Bible, that parties are unconsciously fulfilling what the Jesus predicted that in the last days sin shall increase (Matt 24:12, NIV).



10. The Applicant then cited Order 1 Rule 1(a) of the [Civil Procedure Rules](#), 2010 but reproduced the content of a totally different provision, dealing with review. He proceeded to apply the facts onto it. He summed it that the decree made on December 8, 2004 was based on misleading information the mutations drawn by the two surveyors who visited the ground showed that there was a discrepancy on the mutation and shape of the affected parcels of land. He referred to reports filed by the surveyors on August 16, 2016 and November 11, 2021. He then contended that he (Applicant) never encroached on the Plaintiffs' land but rather the Plaintiff did by way of land parcel No Trans Nzoia/Makutano/31 encroaching onto parcel No Trans Nzoia/Makutano/47 by approximately 0.03 Ha. He stated that this was new evidence which formed the basis of the application for review.
11. He then submitted that the Judge had earlier made an order that in order for the decree to be implemented a survey had to be done and a report be filed in Court. He stated further that if the decree was implemented as above he would lose 0.529 Hectares of his land. His submission was that the Plaintiff misled the Court with wrong evidence hence the decree called for a review. He relied on the decision of Nairobi Misc Civil Application No 317 of 2018 between [Republic v Advocates Disciplinary Tribunal Ex-parte Apollo Mboya](#) [2019] eKLR

### Issues, Analysis & Determination

12. I have considered the Application before me. I have taken into account the law cited, the facts of the application, the submissions and case law relied on. I am of the view that the following issues fall for determination before me:
  - a. Whether the Application is merited.
  - b. Final disposition and who to bear costs.
13. The prayers sought are directed against a judgment delivered on 3/11/2004. At paragraph 1, I summarized the prayers in the Plaint and the Defence on whose basis the judgment was made and delivered. It would appear that the decree from the judgment is being executed for years. There is no dispute that the Defendant never appealed from the judgment. But approximately eighteen (18) years after the judgment, the Applicant has moved this Court in the instant Application for orders of review and setting aside the judgment.
14. He relied on Order 45 Rules 1 and 2 of the [Civil Procedure Rules](#), 2010, and Section 1A, 1B and 3 of the [Civil Procedure Act](#). Be that as it may, and Application for review may be brought also under Section 80 of the [Civil Procedure Act](#).
  - (a) Whether the Application for review is merited
15. In the instant suit, the claim against the Defendant was for the reliefs of an order of eviction and vacant possession of part of land parcel No LR No Trans Nzoia/ Makutano/31 which was said to be belonging to the Plaintiff. It is worth repeating that after hearing the matter on merits, the judge found for the Plaintiffs and entered judgment accordingly on November 3, 2004.
16. The Applicant now contends that the judgment was erroneous since the reports by the surveyor conclude that it is the Plaintiff who encroached onto the Applicant's land by 0.528 acres. His plea is that the decree be rectified to fit the registered title measurements. He does not contend whether his Applicant is brought under a specific limb of Order 45 Rule 1 of the [Civil procedure Rules](#), 2010 or Section 80 of the [Civil Procedure Act](#). This turns me to first discussing the relevant law in an application of this nature.



17. Section 80 of the Act provides as follows:

“any person who considers 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 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.

18. The above provision is broadened through the procedural enunciation of Order 45 Rule 1(1) of the [Civil Procedure Rules](#), 2010. It provides in the same manner as Section 80 (1) and (2) save that Sub-rule (b) adds the following phrase detailing the reasons the basis of which an application may be made. The Sub-rule is to the effect that any person “..... who from the discovery of a 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 judgement to the court which passed the decree or made the order without unreasonable delay.”

19. It beyond peradventure that in accordance with Order 45 Rule 1, the conditions for the grant of orders of review are:

- a. discovery of new and important matter or evidence,
- b. some mistake or error apparent on the face of the record or,
- c. any other sufficient reason

20. At the tail end of the Rule is imposed a further and fourth condition which interplays with the three above. It is that the application must be made without unreasonable delay. It means that if an applicant wishes to move the Court based on one or more of the three conditions above, he should move the Court without unreasonable delay. It goes without saying that if an application for review is brought with unreasonable delay, even if the reasons above are merited, it can be defeated. In any event the prayer for review and setting aside is discretionary: it stems from equity, and one of the important principles of equity is that delay defeats equity. The old maxim *Vigilantibus non dormientibus aequitas subvenit* is still applicable to this day as it was when it was invented. It simply means that Equity assists the vigilant and not those who sleep on their rights.

21. This maxim seems to find support in and its way indirectly into our legislation today. Our legislators may not have found the proper language to coat it as it was coined by the Latin people. But a closer analysis of three provisions renders the meaning of the legal provisions as such. Here I lay them down. One, of fair hearing, Article 50(2)(e) provides that, “Every accused person has the right to a fair trial, which includes the right- (e) to have the trial begin and conclude without unreasonable delay.” This right has been interpreted by the Court to extend to civil cases. For this view, refer to the Supreme Court decisions of [Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others](#), Sc Pet 18 of 2014, [2014] eKLR; and [Christopher Odhiambo Karan v David Ouma Ochieng & 2 Others](#) [2018] eKLR; the High Court in [Pinnacle Projects Limited vs Presbyterian Church of East Africa, Ngong Parish & Another](#) [2018] eKLR; [SM v HGE](#) [2019] eKLR; and the European Court of Human Rights in [Steel and Morris v United Kingdom](#), [2005] ECHR 103, at paragraph 59.



22. Other legal provisions which import the idea of fast conclusion of matters hence the need for parties not to sleep on the rights that accrue to them through causes of action or issues they bring to court are those that call for, two, expeditious determination or adjudication of disputes as stipulated in, Section 3 of the *Environment and Land Court Act* (in respect of environment and land matters), Section 1A of the *Civil Procedure Act*, and Order 11 Rule 3 of the *Civil Procedure Rules*, 2010. Thus, a party cannot afford to lose any moment in bringing before the Court or adjudicating body any right that is due to him, which with due diligence he either has knowledge thereof or can know it. Short of immediate action he will be guilty of laches and puts itself/themselves on the path of failure to successfully urge for the exercise of the discretion of the Court.
23. There are two attendant limbs to consideration of unreasonable delay. The first is the discernment of what constitutes it. The meaning of unreasonable delay is a matter of fact which should be looked at from the circumstances of each case. The second one is the explanation as to why the delay occurred. Hence, even then besides it not being unreasonable, the Applicant must satisfactorily explain the delay. It does not matter how short the period is. The applicant should give reasons cogent and convincing reasons thereof.
24. In the Supreme Court decision of *Wachira Karani v Bildad Wachira* (2016) eKLR the Court explained that sufficient cause (or reason) is a question of fact. The Court emphasized the need to consider the cause on a case by case basis. The Court of Appeal in *Muyodi v Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243 and the High Court in the cases of *re Estate of Japhet Avugwi Luseno (Deceased)* [2020] eKLR and *Francis Njoroge Vs Stephen Maina Kamore* (2018) eKLR emphasize the need to proof the four conditions before an order of review is granted.
25. Moreover, it is important to point out that applications for review are not meant to substitute the remedy of appeal. This was stated in the case of Avugwi Luseno cause (above). Therefore, a party cannot squander his right of appeal and then resort to an Application for review.
26. In the instant case, the applicants contend that the decree was erroneous. They do not contend that there is an error apparent on the record. All he argues is that the judgment was arrived at by virtue of presenting evidence which was, to him, misleading. I do not agree with the Applicant on that account. At the hearing the Plaintiffs contended that the Defendant had encroached their parcel of land to the extent of 0.538 Hectares. They tendered evidence to that effect, and the Court found in their favour and then issued an order of eviction, upon implementation of the finding. In my view there was and is no error in the judgment to warrant its review. The Court listened to the parties herein, it weighed the evidence they tendered and was satisfied that the Plaintiff had proved his case to the required standard. In essence the Court was satisfied that the Plaintiffs were the owners of the portion of 0.528 Hectares of land that the Defendant had been found to have encroached. My humble view is that there in nothing new which the Applicant, with due diligence, could not have raised at the time of filing and conducting his Defence. He knew the extent and proprietorship of his land then, and surveyors existed then who could have written reports to show the extent of the parcel of land. The Defendant had ample opportunity then, to avail evidence that the portion of land in issue was his. He should have availed the evidence of proprietorship thereof and availed a survey report to the effect that his parcel of land stretched to cover the portion the Plaintiffs' claimed. Once the Plaintiff proved that they Defendant had encroached his land, it was incumbent upon him to dislodge or discredit that evidence as to make the judge find that the Plaintiffs had failed to prove their case to the required standard of proof in civil cases.
27. Moreover, if it is true as the Applicant contends, that the Respondents misled then Court by way of the evidence he wishes to discredit by way of the Application for review he ought to have stepped in



immediately to avail evidence to the contrary. He has taken about eighteen (18) years to raise such an issue. He argues that the finding of the surveyor, by his Report dated November 11, 2021 prompted him to discover new evidence of encroachment to his land. It means that all along, since the delivery of the judgment, the Applicant was convinced that the judgment was correct, and he awaited its implementation. That is why he never appealed against it. If that inaction or action of the Applicant for all the period after judgment is anything to go by, then it is clear to my mind that the Applicant was convinced all those years since the judgment of the Court impugned that indeed he had encroached the Plaintiffs' parcel of land as the Court found. The fact that the implementation of the decree will lead to him losing his parcel of land, as he argues, is not a ground for review of the judgment. It is not among the reasons the law provides for review of judgments, decrees, rulings or orders. It is not a reason to deliberately obstruct the implementation of this Court's decree. In an adversarial system such as ours, where the dispute is over a singular subject, unless the parties agree on sharing thereof and record a consent as much, one must lose and that is, he/she who fails to prove or against who prove is made. It is worth repeating that by the Court's finding in the judgment, the Plaintiffs proved their case against the Applicant herein. The Application is wholly unmeritorious and therefore lost.

b) Final disposition and who to bear costs

28. There comes a time when litigation must come to an end. There is a time to pick weapons of war and a time to lay them down. For the Defendant, the time is now. My understanding of the judgment is this, the Court found that the Defendant had encroached 0.528 Hectares which was part of land parcel No LR No Trans Nzoia/ Makutano/31 which was said to be measuring approximately 2.428 Hectares. The Defendant was ordered to vacate or be evicted from the said portion and that the same be given to the possession and ownership of the Plaintiffs. It should be so. Therefore, the said portion of land measuring 0.528 Hectares which purportedly forms part of land parcel LR No Trans Nzoia/ Makutano/47 should be hived off from the said parcel and added to land parcel No Trans Nzoia/Makutano/31 and the Land Registrar should correct the register accordingly. The National Government Surveyor in charge of Trans Nzoia is hereby directed to resurvey forthwith, at the cost of the parties herein, the two parcels of land and effect the demarcations by erecting beacons thereon as found and directed by the Court, and report to this Court within two months. Meanwhile, the Applicant is directed to vacate the said portion of land measuring 0.528 Hectares or thereabout forthwith but in any event strictly not later than thirty (30) days of this Ruling, otherwise he should be forcefully evicted therefrom at his own cost, and he be cited in contempt of this Court.
29. I have found that the application before me is unmeritorious. Costs follow the event. Therefore, the Applicant will bear the costs of the Application.
30. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 26TH DAY OF JANUARY, 2023.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE**

