



**Nyangwara v Nyamboga & 2 others (Environment and Land Appeal
6 of 2021) [2023] KEELC 15737 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15737 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL 6 OF 2021**

M SILA, J

FEBRUARY 21, 2023

BETWEEN

JAMES NYANGWARA APPELLANT

AND

LUKAS NYAMBOGA 1ST RESPONDENT

ZACHARY NYAMBEGA MANYISA 2ND RESPONDENT

MOIGE NYAMBEGA 3RD RESPONDENT

RULING

1. The application before me is that dated 19 August 2022 filed by the respondents to this appeal. The application seeks the following orders: -
 - i. Spent (certification of urgency)
 - ii. Spent (interim orders pending hearing of the application)
 - iii. That this Honourable Court be pleased to review and set aside its judgment given on 17 July 2022 and all consequential orders arising therefrom.
 - iv. That this Honourable Court be pleased to take the Land Registrar's evidence afresh.
 - v. That this Honourable Court be pleased to grant any other relief that may deem fit and just in the circumstances; and
 - vi. That the costs of this application be provided for.The application is opposed.
2. The background is that the appellant commenced suit against the applicants through a plaint filed on 29 October 2019 in the Chief Magistrate's Court at Kisii. The appellant claimed to be the registered



owner of the land parcel Central Kitutu/Mwamosioma/3262 (the suit land). He complained that the applicants had trespassed into his land. In the suit, he asked for an order to be declared the owner of the suit land, a permanent injunction to restrain the applicants from the suit land, costs and interest. The applicants entered appearance and filed a joint defence. They admitted that the appellant was the registered proprietor of the suit land but claimed that he obtained registration illegally from one James Maobe Manyinsa (deceased) who was said to have been holding the suit land in trust for the defendants, respectively as uncle, brother and brother-in-law. They also filed a counterclaim against the appellant and two other persons, being Kefa Mayianda Maobe and Denis Nyabicha Maobe, who are administrators of the estate of the late James Maobe Manyinsa. They reiterated that the deceased held the land in trust for them as this was ancestral land and they sought an order that his title be cancelled and the same be transferred to them.

3. The evidence of the appellant (as plaintiff) was that he properly purchased the suit land in the year 2014 from the deceased who was the registered proprietor. The sale was in presence of his two sons, Kefa and Denis (the other two defendants in the counterclaim). What he purchased was a portion of the parcel No. 1954 and his portion became registered as parcel No. 3262 (the suit land). With that evidence, the appellant closed his case.
4. The applicants first witness was Mr. Stephen Mokaya, the Kisii County Land Registrar. His evidence was that originally the suit land was comprised in a parcel No. 369 which was registered in 1967 in name of Maturiti Neko who died in 1974. He was of opinion that any transaction after 1974 is null and void and the numbers that emanated from the parcel No. 369 should be expunged and the land to revert back to the name of Maturiti Neko for succession purposes. The other evidence of the applicants was that the seller of the land (James Manyinsa deceased) was brother to Zachary Manyinsa, the 2nd applicant.
5. The 1st applicant is son to Zachary whereas the 3rd applicant is his wife. There was evidence led of two equal portions of land, one for the deceased (James) and the other for Zachary. In a judgment delivered on 26 May 2021, the trial Magistrate largely relied on the evidence of the Land Registrar to determine the dispute. He found that the original land was parcel No. 369 and that there was no succession for the land to be subdivided. He thus found the subdivision of the parent title to the suit land and transfer of the suit land to the plaintiff/appellant to be null and void for want of succession. He thus dismissed the case of the plaintiff/appellant. He further ordered that the land reverts back to Maturiti Neko, the first registered owner until such time that succession would be done.
6. Aggrieved, the plaintiff/appellant filed this appeal. Part of the grounds of appeal was that the trial Magistrate erred in bringing in a new parcel of land, parcel No. 369, which was not in issue in the suit and finding that the suit land resulted from a subdivision of the parcel No. 369. The appeal was heard by my predecessor, Onyango J, who delivered judgment on 27 July 2022. The Judge agreed with the appellant and found that it was erroneous for the trial Magistrate to solely rely on the evidence of the Land Registrar. She also found that the Magistrate fell into error in believing that the suit land originated from parcel No. 369 without any evidence. She indeed found that the evidence demonstrated that the suit land originated from a parcel No. 1954 which was registered in the name of the vendor and not from the parcel No. 369.
7. From the official search, she found that parcel No. 1954 resulted from a subdivision of parcel No. 1804 whose relationship with parcel No. 369 was never established. The Judge allowed the appeal and set aside the judgment of the subordinate court and substituted it with an order allowing the suit of the appellant as pleaded in the plaint.



8. It is subsequent to the said judgment that this application was filed. It will be seen that it seeks two principal prayers, the first is for review of the judgment and the second is that the court be pleased to take the Land Registrar's evidence afresh. The supporting affidavit is sworn by Lukas A. Nyamboga the 1st applicant. He deposes that the outcome of the judgment does not address the root cause of the dispute between the parties, which he avers is still subsisting, as the same was predicated on errors and mistakes committed by the Land Registrar during his evidence before the subordinate court. He deposes that since the judgment of this court highlighted the said mistakes and errors on the part of the Land Registrar, it will only be just and fair to review and set aside the judgment by analyzing fresh and accurate evidence from the Land Registrar.
9. He has deposed further that the suit property does not result from the parcel No. 369 and they have no known kinship with Matureti Neko (deceased). He has then gone to lengths to try and demonstrate that the Land Registrar gave evidence based on the wrong title and what he considers to be the correct history of the land that the Land Registrar ought to have given.
10. The appellant filed a replying affidavit to oppose the motion. He deposed inter alia that the applicants have all along been supporting the claim that the suit land arose from subdivision of the parcel No. 369 as can be seen in their submissions before the lower court and before this court at the hearing of the appeal. He has further deposed that it is the applicants who brought the Land Registrar as their witness and they have not demonstrated that the new evidence was not within the powers of the Land Registrar to avail it when he testified. He has added that this application is an appeal in disguise.
11. I have taken note of the submissions filed by M/s Mochiemo Gichana & Company Advocates for the applicant, and M/s J.M Nyagwencha & Company Advocates for the appellants. What is before me is an application for review and an application to have a witness recalled to testify afresh.
12. Starting with the application for review, such applications are addressed in order 45 of the Civil Procedure Rules, and rule 1 (1) thereof provides the grounds for review. It states that:-
 - (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.
13. From the above, it will be discerned that one can apply for review on the following three grounds:-
 - i. That there is discovery of new and important matter or evidence which could not be produced despite exercise of due diligence at the time the decree was passed or order made.
 - ii. That there is a mistake or error apparent on the face of the record.
 - iii. That there is other sufficient reason.
14. I have gone through the submissions of counsel for the applicant and it is explicit that the applicants seek review on the basis of discovery of new evidence which was not in their possession during delivery



of the judgment of this court on 27 July 2022. Counsel has submitted that the applicants only came to discover the new evidence after performing due diligence. He has continued to submit that the new evidence is attached to the supporting affidavit. Mr. Nyagwencha's response was that the said due diligence was performed after the court allowed the appeal and that the evidence was readily available. Mr. Nyagwencha also pointed out that in his submissions before the lower court and during the appeal, counsel for the applicant insisted on the credibility of the Land Registrar.

15. I have to agree with the submissions of Mr. Nyagwencha. In as much as the law permits one to seek review on the ground of discovery of new matter or evidence, the applicant needs to demonstrate that such evidence could not be availed or produced despite the exercise of due diligence. I am not persuaded that in the circumstances herein, the evidence now being sought to be introduced was not available to the applicants when the suit was heard.
16. First, you would expect that since it was the position of the applicants that the suit land was held in trust, then they would have solid knowledge of its history. If not, then on what basis were they making the pleading that the suit land was ancestral land held in trust for them? In any case, if they did not, at the time the suit was being filed, have knowledge of the history of the land and of the land parcels that preceded the suit land, this was evidence that they could have readily collected from the Land registry. It cannot be said that it was evidence that was not and could not be availed when the case was heard. Secondly, it was the applicants who called the Land Registrar as their witness. He was in fact their star witness. The Land Registrar was led by counsel for the applicants in presenting his evidence in chief. It means that whatever evidence the Land Registrar presented was endorsed by the applicants and their counsel.
17. At no point during the trial of the suit did the applicants protest that the Land Registrar has presented the wrong evidence on the history of the land. In any event, if at all they were not comfortable with whatever the Land Registrar presented as his evidence, there was opportunity to subsequently undertake due diligence and confirm whether or not the evidence presented by their witness was factual. When hearing the appeal, the learned Judge did not need to look at any new evidence. All she did was assess the evidence and documents adduced by the Land Registrar, and from the same, she came to the inevitable conclusion that the Land Registrar demonstrated no nexus between the parcels of land that he was mentioning and the suit property.
18. If the Judge could discern that, it means that any person, including the applicants and their counsel, if they were diligent enough, could have discovered this evidence at the time the suit was proceeding for hearing and even before judgment. The Land Registrar indeed mentioned that the original land parcel was under the name of Matureti Neko. Surely, the applicants cannot now assert that it is only at this moment in time that they have discovered that Matureti Neko is not of their lineage. If they were claiming that the land was ancestral land, then they must have known who this ancestor who originally held the land was. They knew, or must have known, whether the evidence of the Land Registrar was factually correct at the time that he testified. Nothing stopped the applicants and/or their counsel from asking that the Land Registrar be stood down, or be recalled to explain his evidence. In fact, the applicants and their counsel were seemingly very happy with the evidence of the Land Registrar in so far as it purported to claim that the title of the appellant was improperly acquired. Counsel did not even deem it fit to re-examine him.
19. In his submissions before the subordinate court, counsel did submit that his clients, the applicants, are beneficiaries of the estate of the late Matureti Neko, and that the 2nd defendant, Nyambega Manyisa, is a beneficiary of Matureti Neko by virtue of being his son. The same submissions were repeated when this appeal was argued. If it is not that the court allowed the appeal, I can bet that the applicants would have been more than happy to have the allegation that the land was previously owned by Matureti



Neko to stand. The applicants were not interested in the truth, they were only interested in winning the case, at whatever cost, and they have clearly not come before this court with clean hands. They did not mind if any wrong evidence was produced so long as it seemed to be in their favour. It is only after their appeal has been dismissed, and it has dawned on them that the evidence that they thought was in their favour is the same evidence that has fried them, that they now want a second bite at the cherry. That is not the purpose for review. All this evidence that the applicants now allege to be new evidence was there when the suit was being heard. It is only that applicants did not deem it fit to present the same because the circumstances suited them.

20. I am afraid that they cannot now be allowed to present it merely because the court allowed the appeal. The purpose for review is not to allow a party who has lost, to now say, that he has some good evidence which would have helped his case. A party must appreciate that the opportunity to have a case heard is only given once, and it is the duty of such party to fully adduce all the evidence in his possession which he believes will help his case. Review will only be permissible where there is demonstration that such evidence could not be discovered or be made available at the time of the hearing which is clearly not the case here. One should not be permitted to now patch up his weak case by unleashing some evidence hidden in the drawer, but was all along available, because he has lost a case.
21. I am not by any stretch persuaded that this is a fit case for review and the prayer for review is dismissed. This court is not persuaded to set aside or review the judgment.
22. The other prayer is to recall the Land Registrar to testify. I am at a loss as to the place of this prayer. The suit was heard before the Magistrate. There was no application to recall the Land Registrar. The matter proceeded for hearing on appeal. Despite there being avenue to apply within section 78 of the Civil Procedure Act, for additional evidence to be taken before the Appeal could be heard, no such application was made. On what basis would the court ask for the Land Registrar's evidence to be taken when it has already heard the appeal and delivered its judgment? This court is functus officio in so far as the suit and the appeal are concerned. I really see no need of saying more on that. There is absolutely no basis upon which this court can grant such a prayer.
23. From the foregoing, it will be seen that I see no merit in this application and it is hereby dismissed with costs.
24. Orders accordingly.

DATED AND DELIVERED THIS 21 DAY OF FEBRUARY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

