



REPUBLIC OF KENYA



Mutuku & 3 others (Suing for and on behalf of the Estate of Mutuku Katumbu (Deceased)) v Mutuku & 6 others (Environment & Land Case E040 of 2021) [2023] KEELC 15759 (KLR) (15 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15759 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E040 OF 2021
A NYUKURI, J
FEBRUARY 15, 2023

BETWEEN

ELIZABETH NGINA MUTUKU 1ST APPLICANT
MONICA MWIKALI MUSAU 2ND APPLICANT
JOSPHAT KIOKO MUTUKU 3RD APPLICANT
WINFRED MUTINDA MUTUKU 4TH APPLICANT
SUING FOR AND ON BEHALF OF THE ESTATE OF MUTUKU KATUMBU
(DECEASED)

AND

EDWARD MUSAU MUTUKU 1ST RESPONDENT
JONES NDONYE MUTUKU 2ND RESPONDENT
JOSEPH MUTUKU MATINGI 3RD RESPONDENT
GEORGE WAMBUA MUIA 4TH RESPONDENT
REGISTRAR -MACHAKOS 5TH RESPONDENT
THEOPHILUS MUTHENGI 6TH RESPONDENT
JETI GENERAL CONTRACTORS 7TH RESPONDENT



RULING

Introduction

1. Before court are two applications; both dated February 16, 2022 and filed by the Plaintiffs. One application seeks for orders to amend the plaint while the other application seeks for review of the orders of this court made on December 1, 2021, dismissing the application for injunction.

Application for Amendment of Plaint

2. In the application dated February 16, 2022, the Plaintiff sought the following prayers;
 - a. That the draft amended plaint annexed hereto be treated as the Plaintiffs' Amended Plaint and that the same be deemed as having been duly filed and served.
 - b. That the Defendant be at liberty to amend its defence/file a response to the amended plaint within 14 days thereafter if they so wish.
 - c. That costs of this application be costs in the cause.
3. The application is premised on the supporting affidavit sworn by Webster Kimathi Advocate for the Plaintiffs/Applicants. The Applicants' case is that they have obtained vital information and documents in support of their case which will affect the outcome thereof as the information was not available to them during pretrial. Further, that the interests of justice require that the Applicants be granted leave to amend their plaint.
4. The application was not opposed. Parties were directed to file submissions in respect to the same and on record are the Applicants' submissions dated April 22, 2022 and the 6th and 7th Respondents' submissions dated July 4, 2022 which the court has considered.

Application for Review**

5. In the application dated 16th February 2022, the Plaintiffs sought the following orders;
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to review its ruling delivered on 1st December 2021 to the extent that it grants the Applicant an order of temporary injunction barring the 6th and 7th Respondents whether by themselves, their servants, and/or agents from entering into, continuing to stay, excavating or carrying on any works, parting with possession, alienating, disposing and/or in any manner whatsoever dealing with or interfering with Land Parcel Machakos/Nguluni/800 pending the hearing and determination of the suit.
 - d. That this Honourable Court be pleased to grant such other directions as it may deem fit and necessary.
 - e. That the costs of the Application be provided for.
6. The Application is anchored on the supporting affidavit sworn on February 16, 2022 by Elizabeth Ngina Mutuku, the 1st Plaintiff in this matter. The Applicants' case is that on December 1, 2021, this court delivered a ruling which dismissed the Plaintiffs' application for injunction against the 6th and



- 7th Defendants in respect of Parcel Machakos/Nguluni/800 (suit property). The reasons for the prayer for review were that the late Mutuku Katumbu acquired the suit property in 1939 by way of purchase and that the acquisition was formalized during the adjudication and settlement process as there was no objection or dispute over the suit property. The Applicant further stated that the deceased's family had lived on the suit property for over 80 years and it is only in 2019 that the Plaintiffs realized that the suit property was registered in the name of the 1st Defendant and that the Plaintiffs have also discovered that the 1st Defendant sold part of the suit property to the 6th and 7th Defendants.
7. The Applicants further averred that on January 26, 2021, the Plaintiffs reported the 1st Defendant's fraud to the DCI at KCB Police Station and in early January 2021, the 6th and 7th Defendants started to construct a crusher site on the basis that they purchased the suit property from the 1st Defendant. They argued that the acts of the 6th and 7th Defendants continue to degrade the value of the suit property. They further stated that they stood to suffer irreparably and may be rendered homeless or be disinherited if the orders sought are not granted.
 8. The application was opposed. Titus Kyalo Musyoka, a director of the 7th Defendant filed a replying affidavit sworn on 15th March 2022. His position was that he purchased 5 acres from the suit property from the 1st Respondent who owned a total of 94.65 acres being the acreage of the suit property which was registered in his name. He stated that subdivision of the suit property was done to yield title No. 5621. He further stated that the Plaintiff will not suffer any prejudice if he is allowed to use his lawfully purchased property as they have not been using it.
 9. His position was that the matters raised by the Applicants ought to have been raised in an appeal and not by way of review application. He stated that the 7th Defendant suffered loss estimated at Kshs. 107,651,114/- when the court issued interim orders that lasted between July 29, 2021 to December 1, 2021 when the same were vacated. He maintained that the Applicant had not given any sufficient reasons to warrant orders of review.
 10. In a rejoinder, the Applicants stated that the subdivision and survey of the suit property were irregular as they were done before consent to subdivide was issued. They further stated that the surveyor never visited the suit property as no beacons were laid thereon. They held the view that the sale by the 1st Defendant to the 7th Defendant was done fraudulently as the suit land does not appear in Registry Map Sheet No. 16. Their position was that the suit property was ancestral land and that the 7th Defendant should blame themselves for purchasing it without due diligence.
 11. Parties filed submissions in respect to the said application. On record are the submissions filed by the Applicant dated April 22, 2022, 6th and 7th Respondents' submissions dated July 4, 2022 and the 1st – 4th Defendants' submissions dated October 3, 2022. The court has considered all the submissions above.

Analysis and Determination

12. Having considered the two applications filed by the Plaintiffs and dated February 16, 2022, the two issues that emerge for determination are as follows;
 - a. Whether the Plaintiffs deserve orders to amend their plaint.
 - b. Whether the Plaintiffs have met the threshold for review of this court's orders made on December 1, 2021.
13. Order 8 Rule 3 of the *Civil Procedure Rules* grants the court the power to allow any party to amend their pleadings at any stage of the proceedings on such terms as to costs or otherwise as may be just. The right to amend ought not be fettered unless it is shown that the amendment will prejudice the opposite



party to an extent that they may not be compensated sufficiently by way of costs. Amendment enables the parties to present their entire case in the manner they deem best to enable the court to determine the case substantively.

14. In case of *Institute for Social Accountability & Another vs. Parliament of Kenya & 3 others* [2014] eKLR, the court held as follows;

The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings. The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced and no vested interested or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.

15. Having considered the prayer for amendment, there is nothing to suggest that the Defendants shall suffer injustice that cannot be compensated in costs. The Plaintiffs state that they have accessed vital information that will assist them in this case. In the premises, it is my view that the interests of justice demand that the Plaintiffs ought to be given a chance to avail all the facts that will enable the court to determine the real issues in controversy and therefore, the prayer to amend the plaint by the Plaintiffs is merited and allowed.

16. Although the Plaintiffs sought for orders that the draft amended plaint be treated as the Plaintiffs' amended plaint and be deemed as having been filed and served, in my view granting the prayers as sought would be irregular as filing any document is preceded by payment for the same and a receipt stamp of the court being endorsed on the same. A draft document cannot be deemed to have been filed before it is actually filed. For order, what ought to come first is leave to amend, then the amendment is done subsequent to grant of leave. In the premises, I grant leave to the Plaintiffs to amend their plaint in 14 days of this ruling.

17. On the question of the prayer for review, it is on record that the Plaintiffs by their application dated July 14, 2021, sought for orders of injunction against the 6th and 7th Defendants. Upon hearing that application on merit, this court found that the Plaintiffs did not establish a prima facie and therefore the court dismissed the application.

18. The law governing review of court orders is enshrined in Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. 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.

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.
19. Therefore, any person who wishes to have any order of the court reviewed must demonstrate any of three conditions namely;
- a. That they have discovered new and important evidence, which could not be produced by them even with the exercise of due diligence.
 - b. That there is a mistake or error apparent on the face of the record; or
 - c. For any other sufficient cause.
20. In the case of *Ajit Kumar Rath vs. State of Orisa & Others* 9. Supreme Court Cases 596 and Page 608 on review, the Supreme Court of India stated as follows;

The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression any other sufficient reason “....means a reason sufficiently analogous to those specified in the rule”.

21. In the instant application, the Applicant allege that the late Mutuku Katumbu acquired the suit property in 1939 by way of purchase and that his children including the Plaintiffs have been on the land for over 80 years. Further, that the Plaintiffs have done several activities on the land including burying their dead thereon, donating a portion to Mukaa Salvation Army Church and AIC Kikuyuni Church. They further alleged that the adjudication records showed that the deceased was the owner of the suit property and that the 1st Defendant’s registration was done fraudulently. The Applicants attached copies of photographs of churches on the land, photographs of their own houses, a letter from the County Adjudication/Settlement Officer Machakos County, Adjudication Register, a letter from the Senior Assistant Chief Land Registration, burial permits, a search for the suit property, copy of the title deed thereof and notices for intention to remove caution, among other documents.
22. While the Applicants purport to have discovered vital documents in respect of their suit, I am not convinced that the Applicants would not have provided those documents even with the exercise of due diligence. To begin with, their houses, graves for their loved ones, and churches were where they have been even at the time of filing the applying dated July 14, 2021. I do not agree that it is now that they have discovered their houses, graves of their loved ones and churches on the suit property. On the issue of the letters by the Land Adjudication/Settlement Officer, the Applicants have not shown



the diligence they undertook to obtain those letters but failed to get them. In my view, the Applicants having noted that their application for injunction was dismissed for failure to demonstrate fraud on the part of the 1st Defendant, decided to now avail evidence of fraud so as to obtain review. The power of review is not meant to assist a party who fails to exercise due diligence at the first instance to have a second bite at the cherry. The Plaintiffs were relying on fraud as the basis for their application dated July 14, 2021. They ought to have exercised due diligence to obtain all the available evidence pointing to the same at the stage when they were seeking the orders and not seek to have a second bite at the cherry, when they failed at the initial stage to exercise due diligence.

23. In the premises, I am not convinced that the Applicants have met the threshold for grant of review orders. Therefore, the application dated February 16, 2022 for review of the orders of December 1, 2021 is not merited and the same is disallowed.
24. The upshot of the above is that this court makes the following orders;
 - a. Leave be and is hereby granted to the Plaintiffs to file and serve amended plaint in 14 days of today.
 - b. Upon service, the Defendants to file and serve their amended defence/response to the amended plaint in 14 days.
 - c. The application seeking for review is hereby dismissed.
 - d. The Plaintiffs to bear the costs of the two applications.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 15TH DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

In the presence of;

Mr. Kitindio for 6th and 7th Respondents

Ms. Makau holding brief for Mutia for 1st, 2nd, 3rd and 4th Defendants

Mr. Kimathi for the Plaintiffs/Applicants

Josephine – Court Assistant

