



**Nathoo v Musyoka & another (Environment & Land Case
161 of 2017) [2023] KEELC 16463 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16463 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 161 OF 2017
SM KIBUNJA, J
MARCH 22, 2023**

BETWEEN

KARIM NATHOO PLAINTIFF

AND

JOSEPHINE MARTHA MUSYOKA 1ST DEFENDANT

THE LAND REGISTRAR, KWALE 2ND DEFENDANT

RULING

[NOTICE OF MOTION DATED 16TH NOVEMBER 2022]

1. The plaintiff filed the application dated November 16, 2022 seeking for orders: “3. That this honourable court be pleased to set aside and or review and rectify its orders of judgement delivered on July 21, 2022, that:
 - a. There was never any registration of transfer in the name of the plaintiff/applicant;
 - b. There was no actual registration of the transfer;
 - c. The plaintiff cannot be considered the rightful proprietor of the suit property without demonstrating a proper sale and a proper transfer.
 - d. The register will remain reflecting the name of the deceased proprietor and;
 - e. The original certificate of lease in the name of the plaintiff/applicant will be retained in the court record and will not be released so that it cannot be used to transact over the suit property.
4. That this honourable court issue an order of declaration that there was proper sale and transfer Kwale/Diani Beach Block/1060, suit property and that the plaintiff/applicant is the rightful proprietor of the suit property.



5. That the cost of this application be in the cause.”

The application is premised on twenty (20) grounds on its face, and supported by the affidavits of Karim Nathoo, K.M Karimbhai and Abdulhamid Aboo sworn on the November 16, 2022. It is the plaintiff’s case that he commenced suit through the plaint filed on the May 10, 2017 over the suit property. That he had sought for declaration that he was the bona fide and rightful owner of the said property; that an order be issued directing the Land Registrar to rectify the register to reflect him as the owner of the land; injunctive orders be issued against 1st respondent; general damages for trespass and costs. That the plaintiff’s efforts to contact the advocates who had transacted the sale of the suit land for evidence of the purchase to be used during the trial did not succeed as the advocates were always out on business and his searches at the court registry and archives for the required records were unsuccessful; that the suit was heard and determined on the July 21, 2022 and he was declared not to be the rightful owner of the suit property; that he instructed his advocates to file a notice of appeal dated the July 29, 2022, which however does not amount to an appeal, but signifies the intention to file one; that the documents relating to the sale transaction only became available after the judgement had been delivered, and therefore this application should be allowed.

2. The application is opposed by the 1st defendant through the five (5) grounds of opposition dated the December 5, 2022 that the plaintiff is guilty of laches; there has been unexplained and inexcusable delay; application has not met the threshold of Order 45 of the *Civil Procedure Rules* and is contrary to the overriding objectives as litigation must come to an end.
3. The learned counsel for the plaintiff and 1st defendant filed the submissions dated the January 19, 2023 and February 13, 2023 respectively, which the court has carefully considered.
4. The following are the issues for the determinations by the court;
 - a. Whether the plaintiff has met the threshold required for the judgement delivered in this suit to be reviewed in the manner proposed.
 - b. Whether the evidence the plaintiff refers to could have been obtained and availed during the trial, or rather, whether the evidence is new and important and could not have been obtained and tendered during the trial.
 - c. Who pays the costs of the application.
5. The court has considered the grounds on the application, grounds of opposition, the affidavit evidence, the submissions by both learned counsel, the superior courts decisions cited thereon and come to the following findings;
 - a. The power of court to review its own decree or order is derived from section 80 of the *Civil Procedure Act* chapter 21 of Laws of Kenya which provides that;

“ 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.”

The procedure for review has been provided by Order 45 of the *Civil Procedure Rules*. Rule 1 provides 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.
- 2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

The power of court to review is limited to instances where either of the following three grounds have been established:

- a. The 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,
 - b. on account of some mistake or error apparent on the face of the record,
 - c. for any other sufficient reason.
- b. It is the plaintiff’s case that during the hearing of the suit he could not procure evidence to demonstrate that he had purchased the suit property from Johnson Musyoka Mawia (deceased) husband to 1st defendant, in 1998. That he was unable to secure a meeting with the advocates who acted on his behalf in the said transaction, as the said advocate was always out of the office on official business. The plaintiff maintains that the advocates who acted on his behalf as the purchaser and on behalf of the vendor were only able to trace the original files pertaining the transaction after the delivery of judgement. The applicant argues that the documentary evidence demonstrating the sale transaction amounts to discovery of new and important evidence which after exercise of due diligence was not within his possession, and could not have been produced by him at the time the suit was filed, heard and judgement delivered. He urged court to allow the application as there were sufficient grounds to review the judgement delivered on July 21, 2022. For the court to consider this ground for review, it is imperative to consider Order 45 Rule 3 (2) of the [Civil Procedure Rules](#) which states that,
- “Where the court is of opinion that the application for review should be granted, it shall grant the same:
- Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.”
- c. It is a fact that the plaintiff was all along aware that the advocates who acted for the vendor and himself were in possession of the alleged documents pertaining the sale of Kwale/Diani



Beach Block 1060, even before he filed the suit. The plaintiff has also admitted to being aware of the physical location of the offices of the said advocates, but alleges that he could not secure a meeting with them as they were always out on official business. The plaintiff has revealed that after judgement was delivered, he not only got hold of the said advocates, Mr. Karimbhai and Mr. Abdulhamid Aboo, but also got them to swear affidavits in support. This can only be taken by the court to mean that the plaintiff had all along a means of communicating with the said advocates, which communication may have been through a phone call, email or by physically visiting their respective offices, but did not do so during the filing and hearing of his suit.

- d. In the grounds on the application and the deposition in the supporting affidavit, the plaintiff alleges to have unsuccessfully tried to contact the advocates who had transacted for him the purchase of the suit land so that they could avail to him the relevant documents for use during the trial. Abdulhamid Aboo advocate, has at paragraph 2 of his affidavit confirmed that he acted for the plaintiff in regard to Kwale/Diani/Beach Block/1060. The advocate at paragraph 6 of the said affidavit went on to depose that;

“6. That since the transfer of the property was effected, I never saw or spoke to the applicant [plaintiff] until sometime in August 2022, when the applicant came to my chambers distressed and discouraged, seeking assistance on retrieval of the file.”

- e. In the supporting affidavit of K. M. Kaimbhai sworn on the November 16, 2022, the advocate at paragraph 3 confirmed acting for Johnson Musyoka Mawia, deceased, in the transactions involving the same land in 1998. At paragraphs 5 and 6 of the supporting affidavit, Mr. Karimbhai deposed that since the transaction was completed in 1998, he never saw the plaintiff again until 22 years later in 2022 when he visited his chambers in a desperate search of the documents.
- f. That none of the two advocates has in any way confirmed the plaintiff's claim that he had unsuccessfully tried to get in touch with them during the trial. They did not collaborate the plaintiff's allegations that they were always out of their chambers whenever he visited. They simply said that after completion of the transactions of 1998, they only came to see the plaintiff in August 2022, which was after the judgement he now seeks to be reviewed had been delivered. There is therefore no evidence tendered by the plaintiff to confirm that he had exercised due diligence in sourcing for the documents that he knew of, and that he now claims contains new and important evidence that court should consider.
- g. A reading of Order 45 Rule 1 and 3, leaves no doubts that the court will only consider review on the basis of new and important evidence, where it demonstrated that the applicant could not access the said evidence at the time of the trial even after conducting due diligence. The use of the words 'discovery of new and important evidence' paints a picture of the unknown and undiscovered evidence that has later come to light. In this case, the plaintiff all along knew of the existence of documents that he now seeks to rely upon as new and important evidence. The court is not persuaded that the plaintiff had taken any steps to reach out to Mr. Karimbhai of Karimbhai & Co Advocates or Mr Abdulhamid Aboo of Aboo & Co Advocates as he prepared to file or prosecute the suit he filed in 2017. From their sworn affidavits, both advocates practice in Mombasa and had the plaintiff been diligent enough, he could easily have made contact with them, in the same way he did after the delivery of the judgement, and obtained the evidence in time for the trial.



- h. That Order 11 of the Civil Procedure Rules, 2010 requires parties to file and serve the documents they will be relying on in their case with the pleadings. It was therefore at the stage of filing the suit, or soon thereafter that the plaintiff needed to visit the chambers of the advocates who had transacted in the sale/purchase of the suit land and acquire the evidence he needed in support of this case, so as to discharge his duty under section 107 and 108 of the Evidence Act chapter 80 of Laws of Kenya. To put it differently, the plaintiff had the duty of ensuring that by the time of filing the suit, he had brought all the relevant evidence that he wished to rely upon, and not to wait until after the judgement delivered does not go his way to start looking for the evidence that he knew all along existed and that he could easily have obtained and presented to the court in good time.
- i. The deposition by the plaintiff at paragraph 16 of his supporting affidavit that “..there is discovery of new and important evidence which, after the exercise of due diligence, was not within the applicant’s [plaintiff’s] possession and could not be produced by him at the time when the suit was filed and judgement delivered,” cannot therefore be true in view of the above findings. The existence of the evidence that the plaintiff seeks to rely on was within his knowledge. He has not demonstrated to the court the efforts he took in securing audience with the advocates who had the documents, as his casual mention that he did not get them due to their busy schedule do not appear to be true. The two advocates have in their affidavits deposed that they never saw or heard from the plaintiff since they completed the transaction in 1998, until August 2022. It is the view and finding of this court that the plaintiff had failed to conduct due diligence before commencing his suit, and even thereafter to secure the filing and admission of important documents that he knew all along existed and in whose custody they were.
- j. That what the plaintiff appear to be doing through the application is to try to fill up for the weaknesses of his case with evidence that ought to have been adduced at the trial stage, after delivery of judgement. The plaintiff/applicant knew of the existence of the documents and did not tender them before court. He has therefore failed to prove that the said documents could not have been discovered after the exercise of due diligence or were not within his knowledge or could not be produced at the time of filing suit or hearing and before the judgement was delivered.
- k. The jurisdiction of court to review cannot be used to support the applicant’s case where it has been shown that he lacked diligence. It is quite clear that after the applicant herein read the judgement or had it explained to him by his advocate on record as to why the said judgement was entered against him, he then decided to go back to the drawing board and fish for evidence that would boost his case and give him the last shot into victory. However, it’s a little too late and the evidence he now wishes to be adduced does not fall in the category of new and important evidence that he did not know about before, and could not have with due diligence produced during the trial. To allow that evidence to be adduced now, the court would in essence be reopening the case afresh. Litigation must come to an end and parties must be diligent in ensuring that they present all facts, documents and evidence before court retires to undertake its judicial duty of judgement writing and delivery. The court will not allow parties to use the route of review as their saving grace after losing a case. Consequently, I find no merit in the plaintiff’s application dated November 16, 2022.
- l. That as the 1st defendant has successfully defended or opposed the application, the plaintiff should pay their costs in accordance with section 27 of Civil Procedure Act chapter 21 of Laws of Kenya.



6. In view of the foregoing, the court finds and orders as follows;
- a. That the plaintiff's application dated the November 16, 2022 is unmeritorious and is therefore dismissed.
 - b. The plaintiff to pay the 1st defendant's costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 22nd DAY OF MARCH 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of;

Plaintiff : Absent

Defendants : Absent

Counsel Mr Mathare for Matheka for Plaintiff, M/s Nduku & Mrs. Waswa for 1st & end Defendants respectively.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

ELC NO. 161 OF 2017 – RULING Page 3 of 3

