



REPUBLIC OF KENYA



KENYA LAW
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**Zumzum Investments Limited v Ndoro & 835 others (Environment & Land
Case 242 of 2017) [2023] KEELC 16382 (KLR) (21 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16382 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 242 OF 2017
NA MATHEKA, J
MARCH 21, 2023**

BETWEEN

ZUMZUM INVESTMENTS LIMITED PLAINTIFF

AND

NDEGWA NDORO 1ST DEFENDANT
JOSPEH KITSAO SHIDA 2ND DEFENDANT
FRANCIS KANJA 3RD DEFENDANT
KITHI KALU 4TH DEFENDANT
KATANA KIBWANA 5TH DEFENDANT
HASHIM LOWA MAKAZI 6TH DEFENDANT
JUMA RUWA 7TH DEFENDANT
FREDRICK CHARO 8TH DEFENDANT
KAZUNGU KAINGU 9TH DEFENDANT
JEFWA BAYA 10TH DEFENDANT
NGAWA NDORO 11TH DEFENDANT
CHIDZAYA NDEGWA ALIFAN 12TH DEFENDANT
CHARO MUMBA MASHA 13TH DEFENDANT
FLORENCE KALAMA 14TH DEFENDANT
WILSON NGALA KASSIM & 821 OTHERS 15TH DEFENDANT



RULING

- 1 The application is dated November 4, 2022 and is brought under Section IA, 1B and 3A of the Civil Procedure Act, Order 45 rule 1 (a) and 2 of the Civil Procedure Act seeking the following orders;
 1. That this Honourable Court reviews and sets aside the judgment dated September 27, 2022.
 2. That upon setting aside the judgment this Court allows the 9th Defendant to file a defence and counterclaim as against the Plaintiff.
 3. The costs of this application be in the cause.
- 2 It is based on the grounds that a judgment was delivered in this suit on September 27, 2022. That the 9th Defendant/Applicant herein has recently become aware that the suit was heard and determined. That upon inquiry from his former counsel on record, the 9th Defendant found out that his Counsel withdrew from acting for him in this suit in 2019. That as a consequence the 9th Defendant case proceeded undefended and in the absence of his then Advocate. That the said mistake of the previous advocate should not be visited upon the 9th Defendant.
- 3 The Plaintiff/Respondent submitted that pursuant to a Court order issued on September 12, 2022, leave was granted to the Plaintiff to effect service of Summons to Enter Appearance upon all the Defendants herein including the 9th Defendant, by substituted means by placing an advertisement in either the Daily Nation or Standard Newspaper (Annexed and marked "ASM — I" is a copy of the said Court order). That on September 20, 2017, the Plaintiff effected Summons to Enter Appearance together with the Plaint and the attendant pleadings thereto upon all the Defendants herein by advertising in the Daily Nation Newspaper and a return of service was filed to demonstrate proper service upon all Defendants. (Annexed and marked "ASM-2" is a copy of the complete Affidavit of Service dated November 8, 2017). That as a result of the said service, the firm of Mwaniki Gitahi & Partners entered appearance for the 1st to 11th Defendants on November 16, 2017. (Annexed and marked "ASM-3" is a copy of the said Memorandum of Appearance). That the firm of Mwaniki Gitahi and Partners continued being on record for the 1st to 11th Defendants and to this end all the process herein were throughout the subsistence of this matter served upon the said firm for and on behalf of the 1st to 11th Defendants. (Annexed and marked "ASM 4" is a bundle of affidavits of service showing that the 9th Defendant was served with all the process herein throughout the subsistence of this matter. That the said application to cease from acting was never prosecuted and no orders were ever issued to the firm of Mwaniki Gitahi & Partners to cease acting for the 1st to the 11th Defendants herein. Consequently, the firm of Mwaniki Gitahi & Partners was throughout the subsistence of this suit properly on record for the 1st to the 11th Defendants.
- 4 That even if the said firm of Mwaniki Gitahi and Partners had indeed properly ceased from acting for the 9th Defendant in 2019 as alleged, the 9th Defendant has not tendered any reasons before this Court to explain the three years delay in bringing this present application. Consequently, the delay herein is inordinate and inexcusable. That since the 9th Defendant did not comply with the above provisions of Order 9 Rule 9 his application as brought by the firm of Richard Ngari & Co Advocates is not properly on record and consequently, the same ought to be struck out with costs for being an abuse of the court process.



5 This Court has considered the application and the submissions therein. In the case of *Kwame Kariuki & Another vs. Mohamed Hassan Ali & 4 Others* (2014) eKLR, the Court observed that;

"It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal."

6 In the case of *Mwiboko Housing Company Limited vs Equity Building Society* (2007) 2 KLR 171 it was held, that;

"A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of *Rose Kaiza Vs Angelo Mpanju Kaiza* 2009, the Court was categorical that;

"An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made..."

7 Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section 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.

(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."



8 The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya which states 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."

9 Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. The 9th Defendant/ Applicant herein has recently become aware that the suit was heard and determined. That upon inquiry from his former counsel on record, the 9th Defendant found out that his Counsel withdrew from acting for him in this suit in 2019. I have perused the court file and find that firm of Mwaniki Gitahi & Partners entered appearance for the 1st to 11th Defendants on November 16, 2017. (Annexed and marked "ASM-3" is a copy of the said Memorandum of Appearance). They never withdrew from acting. Secondly no reason was given as to why the Applicant never followed up his matter since 2017 until he recently learnt of the judgement. This delay is inexcusable. I also find his current Advocates are not properly on record for failure to comply with Order 9 Rule 9 of the Civil Procedure Rules. In Court of Appeal, Civil Appeal No 2111 of 1996, National Bank of Kenya vs Ndungu Njau the Court of Appeal held that;

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law".

10 From the above provisions of the law, authorities cited and facts of this case I find that the Applicant has failed to show any mistake or error apparent on the face of record and/or any sufficient reason to enable this court set aside its decision. His recourse if dissatisfied was to file an appeal. I find the application dated November 4, 2022 is not merited and I dismissed it with costs.

11 It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF MARCH 2023.

N.A. MATHEKA

JUDGE

