Awori v Attorney General & 2 others (Constitutional Petition 6 of 2013) [2023] KEELC 16975 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16975 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

CONSTITUTIONAL PETITION 6 OF 2013

E ASATI, J

APRIL 27, 2023

IN THE MATTER OF ARTICLES 22 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27,40,48 AND 50 AS READY WITH ARITICLES 19,20,21,22,23 & 24 AND SECTION 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA

BETWEEN

ARTHUR ATHANASIUS MOODY AWORI ..... PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

COUNTY DIRECTOR OF HOUSING, KISUMU ..... 2ND RESPONDENT

PERMANENT SECRETARY, MINISTRY OF HOUSING ..... 3RD RESPONDENT

RULING

Background

1. The petitioner/applicant herein, Arthur Athanasius Moody Awori, filed the petition dated April 3, 2013 seeking for the following relief against the Hon Attorney General, the County Director of Housing, Kisumu and the Permanent Secretary, Ministry of Housing.

a. A declaration that the vacation notice issued by the respondent are inconsistent with article 40, 48, and 50 of the *Constitution* of the Republic of Kenya in that the petitioner herein is the registered leasehold owner of the property Kisumu Municipality/block 11/136 and the vacation notice was issued arbitrary and without due regard to the process of the law and the petitioner's right to access to justice.

b. A declaration that the allegations by the respondent and/or their agents and/or servants or employees to the effect that the petitioner's title to the property was illegally and fraudulently acquired is arbitrary, capricious and irregular is unconstitutional and contravenes the petitioner's fundamental rights and freedom as recognized by the *Constitution* of Kenya and is therefore void, illegal, invalid and/or incapable of enforcement and/or no legal effect.

c. Consequently, an order prohibiting the respondents whether by themselves, their officers, agents and/or servants or employees from evicting the petitioner and/or from further interfering with the petitioner's right of ownership and occupation of all that parcel of land known as Kisumu Municipality/block 11/136.

d. An order prohibiting the respondent either by themselves, their officers, agents and/or servants or employees from restricting or otherwise limiting the petitioner's peaceful enjoyment of and access to his property Kisumu Municipality/block 11/136.

e. A declaration that the respondent s are in breach of the provisions of article 40 of the *Constitution* of Kenya by interfering into the petitioner's rightful use of their land.

f. A declaration that the respondents are perpetuating breaches of the law, the *Constitution* of Kenya and carrying out and legalizing impunity contrary to the *Constitution* of Kenya and exhibiting arrogance and ignorance in performance of their public duties contrary to the law.

g. Damages for infringement of rights of the petitioner to be paid by the respondents jointly and severally.

2. The petition was heard by way of written submissions and judgement delivered on June 21, 2017 dismissing the petition with costs. In dismissing the petition, the court found that the letter from the Ministry dated December 10, 2012 which prompted the petition was not a notice to vacate the premises in one month or any other time frame. That the petitioner's constitutional rights had not been infringed because the letter did not indicate that the respondent would forcefully evict the petitioner after the expiry of the one month after failure to give vacant possession of the suit property. And that the letter did not contain information or decision to cancel the petitioner's title to the suit property. The application before court for determination seeks for orders of review of the judgement.

3. The application is the notice of motion dated December 10, 2021 filed in court on behalf of the petitioner on February 4, 2022. It is brought pursuant to the provisions of order 45 rule 1 of the *Civil Procedure Rules 2010* and section 1A and 3A of the *Civil Procedure Act*s cap 21 Laws of Kenya. The application seeks for orders that;

a. The judgement of the June 21, 2017 be reviewed and set aside.

b. The matter be fixed for hearing de novo.

c. The cost of the application be in the cause.

4. The grounds upon which the application is brought as contained in the notice of motion and the petitioner's affidavit in support sworn on December 16, 2021 are that the petitioner has discovered new

and important evidence which after exercise of due diligence on his part was not within his knowledge and could not be produced by him at the time when the decree was passed. That the evidence was within the records of the office of the 3rd respondent which made no attempts to avail the same to the court and instead deliberately withheld the evidence from the court in flagrant breach of the petitioner's constitutional right to affair trial. That as a consequence, the judgement was made without the learned judge having had the benefit of receiving and considering the evidence and was therefore per incuriam. That the grant of the application is in the interest of justice.

5. The application was opposed *vide* the grounds of opposition dated January 17, 2022 and filed in court on behalf of the respondents on the same date. The grounds raised in opposition of the application are that order 45 rule 1 of the *Civil Procedure Rules 2010* provides for review of orders issued by a court when there is discovery of new evidence that was not within knowledge or could not be produced at the time when such orders were made. That article 50(2) of the *Constitution* of Kenya 2010 provides for fair hearing and gives the respondents the right to challenge the evidence produced thereof.

   Thirdly, that the application dated December 10, 2021 by the petitioner does not introduce any new evidence as alleged by the petitioner. That order 45 rule 3 provides that where the court sees no sufficient ground for the review orders to be granted, the court shall proceed to dismiss the application. That there is no sufficient ground of new evidence, therefore no *prima facie* case with high chance of succeeding that has been established by the petitioner to warrant issuance of the orders sought.

6. The application was by consent of the parties canvassed by way of written submissions. The petitioner/applicant filed written submissions dated March 9, 2023 through the firm of Behan & Okero Advocate. The respondents filed written submissions dated February 27, 2023 through the principal litigation counsel for the Attorney General.

7. From the application, grounds of opposition and rival submissions filed, the issue that emerge for determination is whether or not the applicant has demonstrated the grounds for review of the judgement. The application is brought, *inter alia*, under order 45 of the *Civil Procedure Rules 2010*. Order 45 rule 1 provides: -

   "

   "(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."

   It is clear that the grounds upon which an application for review of a judgement, order or decree can be made are: -

   a) discovery of a new and important matter or evidence

   b) some mistake or error apparent on the face of the record

c) any other sufficient reason

d) the application must be brought without unreasonable delay.

8. The present application is premised on the ground of 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. The applicant averred in the affidavit in support that before the entry of judgement by which his petition was dismissed, he was unable to respond to questions and requests made by the Ministry of Housing dated December 10, 2012 as he could not despite all efforts made retrieve pertinent documents from the Ministry of Lands and Housing which constituted and/or contained the answers to the said questions and requests as he was informed that the relevant files were unavailable. That after the judgement, he directed his son Jeremy to renew efforts to trace from the Ministry of Housing and from the Ministry of Lands, the missing documents on the boarding of the house that is on the suit property and on creation of the lease issued to him in respect thereof with a view of seeking review of the judgement. That the missing files with the relevant documents were found sometime in October, 2021 through persistent efforts by his son Jeremy whom he authorized to present the said documents to court through an affidavit.

9. Jeremy Noel Awori swore an affidavit on December 16, 2021. He stated that he had made countless efforts to the Ministry of Lands and met various officers in the efforts to trace the file for the suit property but was unsuccessful. That after the suit was dismissed, he renewed the efforts to trace the documents at the Ministry of Lands and Ministry of Housing and that the missing file with the relevant documents was traced in October 2021 and requisite documents received by the said Jeremy Noel Awori on October 16, 2021.

10. The applicant contended that there is a sound basis for review of the judgement given that the relevant documents were not available for consideration by the court owing to the fact that the files in which the documents were kept had been missing and unavailable to the applicant for many years.

11. It was submitted on behalf of the applicant that the documents annexed to the affidavit of Jeremy Noel Awori and marked JNA-1 and JNA-2 are the new and important evidence that were not available to the petitioner at the time of the filing and hearing of the petition. That those were documents that were uncovered after a nine-year search through two ministries of government. That had these documents been availed to the petitioner in the pendency of the petition, he could have been able to provide the answers to the queries posed by the respondent *vide* the letter of December 10, 2012. That the finding against the petitioner that he was unable to prove the boarding for sale of the suit property wherefore he acquired it illegally was a finding per incuriam and must be set aside.

    Counsel further submitted that the procedural omissions to sign the petition is something that would have been easily cured by an amendment facilitating the signing by counsel of the petition under article 159(2) of the *Constitution* of Kenya 2010.

12. The respondent submitted that order 45 rule 1 and 3 of the *Civil Procedure Rules 2010* provides for review of judgements. Counsel relied on the case of *Hosea Nyandika Misagwe & 2 others v County Government of Nyamira* (2022)eKLR and *Tokesi Imbuka Mambili & 2 others v Simon Litsanga* [2004]eKLR and the provisions of order 45(2) to submit that there has been no discovery of new and important matter of evidence which was not within the knowledge of the applicant and that could not be produced at the time when the orders or such judgement was passed.

    That the evidence alleged not to have been within the knowledge of the petitioner is the same evidence that was annexed to the petition dated April 3, 2013 at its inception. To demonstrate this counsel submitted that the letter of allotment Ref No 30973/LXIX/14 dated July 1, 1998 marked JNA –

3 was attached to the affidavit in support of the notice of motion dated April 3, 2013 and marked "AAMA-3". That annexture JNA-4 was annexture "AAMA-5" in the notice of motion dated April 3, 2013, JNA-6 was "aama-5 in the supporting affidavit. JNA-6 was annexed in the notice of motion dated April 3, 2013 and the accompanying supporting affidavit, JNA-7 was AAMA-3 to the notice of motion, JNA-8 was "AAMA-3" in the notice of motion dated April 30, 2013 and accompanying supporting affidavit. JNA-9 which was annexed to the notice of motion of April 3, 2013 and marked AAMA-1. JNA-10 was AAMA-2 in the same notice of motion.

13. Counsel submitted further that under order 45 rule 3, the court may reject an application for review where it appears to the court that there are no sufficient grounds to review. Counsel further relied on the Court of Appeal decision in *Stephen Githua Kimari v Nancy Wanjira Waruingi, T/a Providence Auctioneers* (2016)eKLR where it was held that;

> " an application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh."

Counsel submitted that the applicant has not met the threshold for grant of the orders of review as prayed.

14. In the affidavit in support of the application, the applicant averred that it was unable to answer questions and queries from the Ministries of Lands and Housing dated December 10, 2012 because could only be found in documents that were not availed to him. He stated that the documents were availed to his son Jeremy after the judgement sought to be reviewed. In his affidavit jeremy listed the documents that were availed to him in paragraph 6 the affidavit of Jeremy Noel Awori and marked them as exhibit JNA-1 to Exhibit JNA-10 that were given to Jeremy Noel Awori on October 16, 2021 on behalf of the petitioner. However, in the submissions, the applicant narrows these down to only exhibit JNA 1 and JNA-2 only as the documents that were received after the judgement dismissing the petition had been delivered.

15. I have perused the documents marked exhibits JNA-1. It is a letter dated May 22, 1998 by the Commissioner of Lands to the District Commissioner requesting the District Commissioner to arrange for boarding of the government house on land parcel No Kisumu/block 11/136. The letter was copied to the District Land Officer who was requested to value the structures on the plot. I have also perused exhibit JNA-2. It is report of the board of surveyors on stores (unserviceable and surplus to requirements). I find no information on these documents to show that they were retrieved on a date after the judgement or were given to Jeremy Noel Awori on behalf of the applicant on October 16, 2021. It is important, where a party relies on discovery of new and important matter or evidence as the ground to seek review, to prove not only the discovery of the new and important matter or evidence but also that indeed the discovery happened after the decision sought to be reviewed. This has not been proved. Annextures JNA-1 and JNA-2 do not bear date of certification by the source where they were supplied from or date of receipt by Jeremy.

16. In the case of *Rose Kaiza v Angelo Mpanju* [2009]eKLR, the Court of Appeal considered an application for review on the ground of new evidence and quoting *Mulla Commentary on Indian Civil Procedure* observed that:-

> " applications on this ground must be treated with great caution and as required by r 4(2) (b) the court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his

knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

17. As to whether the judgement was per incuriam, my reading of the judgement shows that the court considered the facts, documents and submissions presented before it in depth vis-a-vis the applicable law before making the decision. A judgement is said to be per incuriam when it is rendered in ignorance of a constitutional or statutory prescription or of a binding precedent (see *Senate & 2 others v Counsel of County Governors & 2 others* (Petition 25 of 2019) [2019] KESC 7 (KLR) Constitutional and Human Rights (17th February 2022) Judgement

18. And lastly, though the court noted that the petition was not signed, the petition was not struck out or dismissed on the basis that it was not signed. The court proceeded to consider the petition on merit, the procedural omission notwithstanding and concluded that;

> " the court finds that the petitioner has failed to prove any infringement and/or violation of his constitutional rights by the respondents and the petition is hereby dismissed with costs".

19. In conclusion, I find that the grounds for review of the judgement have not been demonstrated. The application dated December 10, 2021 is 77 hereby dismissed. Each party to bear own costs.

20 It is so ordered.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 27TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen- Court Assistant.

Orege Advocate for the Petitioner/Applicant.

No appearance for the Respondent.