



**Nyamunga v Ndeda & 3 others (Environment & Land Case  
E030 of 2022) [2023] KEELC 16967 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16967 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE E030 OF 2022**

**E ASATI, J**

**APRIL 27, 2023**

**BETWEEN**

**ENGINEER ERIC NYAMUNGA ..... PLAINTIFF**

**AND**

**JOEL MIDIGO NDEDA ..... 1<sup>ST</sup> DEFENDANT**

**SHEM OCHIENG T/A PLINTH HECTARES ..... 2<sup>ND</sup> DEFENDANT**

**COUNTY LAND REGISTRAR KISUMU ..... 3<sup>RD</sup> DEFENDANT**

**ARTTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application before court for determination is the Notice of Motion dated February 1, 2023 brought by the Plaintiff pursuant to the provisions of section 80 *Civil Procedure Act* and Orders 45 Rule 1 and 51 Rule 1 *Civil Procedure Rules 2010*. The application seeks for an order that pending the hearing and determination of the suit, the court be pleased to review or vary its order dated January 26, 2023 and reinstate the initial order of 23<sup>rd</sup> November 22 restraining the Respondents from disposing of, sub-dividing or transferring the suit land. The application was supported by the contents of the Supporting Affidavit and Further Affidavit sworn by the applicant on February 1, 2023 and February 27, 2023 respectively.
2. The 1<sup>st</sup> Respondent opposed the application vide the contents of his Replying Affidavit sworn on February 8, 2023. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not respond to the application.
3. The application was canvassed by way of written submissions. Both the Applicant and the 1<sup>st</sup> Respondent filed written submissions dated February 27, 2023.
4. The application is brought under the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules 2010*.



Order 45 Rule 1 (1) *Civil Procedure Rules* under which the application is brought provides

“ 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 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 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 judgement 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 an order can be made are: -

- a) discovery of a new and important matter or evidence or
  - b) some mistake or error apparent on the face of the record or
  - c) any other sufficient reason.
  - d) the application must be brought without unreasonable delay.
6. I have carefully considered the application and the contents of the Affidavits in support thereof, the Replying Affidavit and the submissions made. The ground upon which the application is premised is 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 new and important matter or evidence, according to the applicant, is that the National Identification Card Number 13683450 shown in the land sale agreement in the possession of the 1<sup>st</sup> Respondent as belonging to one Martin Otieno Ogindo actually belongs to one Joseph Ochieng Odhiambo and that the National Identification Card Number for MArtin Otieno Ogindo is different and hence the evidence presented by the 1<sup>st</sup> Respondent in support of the application that lead to the order sought to be reviewed was forgeries, impersonation and possible fraud.
  7. The applicant claims that the new and important evidence was not within his knowledge and could not be produced at the time when the ruling was delivered. He claims that he discovered the information vide the 1<sup>st</sup> Respondent’s Replying Affidavit to the application for injunction on November 21, 2022 and that he commenced investigations immediately.
  8. The 1<sup>st</sup> Respondent, on his part, contends that the application is an afterthought and an abuse of the court process. That the request to the registrar of persons was done after the ruling sought to be reviewed had been delivered. That the applicant has so far not challenged the 1<sup>st</sup> Respondent’s title to the suit land.
  9. To the Supporting Affidavit was attached a letter dated January 26, 2022 by Counsel for the applicant requesting for information from the Director, National Registration bureau Nairobi in respect of the identification card No 13683450. If the date on the letter is correct, then it means the applicant was aware of the existence of the National Identification Number 13683450 prior to the filing of the suit. But if the correct date of the letter ought to be 26th January 2023 as stated in paragraph 8 of the Supporting Affidavit and in the submissions, then there is no explanation as to why the letter was not written immediately the applicant learnt of the existence of the Identification Number 13683450 on



November 21, 2022. The applicant had the opportunity to access the new evidence before the ruling was made.

10. In the case of *Evan Bwire v Andrew Aginda* Civil appeal No. 147 of 2006 as cited in *Stephen Githua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR the Court of Appeal 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. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”

And in *D.J.Lowe & Company Ltd v Bangue Indosuez* (1998)eKLR the Court of Appeal held that

“where such a review application is based fact of discovery of fresh evidence, the court must exercise greatest of care as it is easy for a party who lost, to see the weak part of his case and the temptation to lay evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was remissness on his part in adducing all possible evidence at the hearing.”

6. I am not satisfied that the National Identification Number, its owner or the alleged forgeries are matters that the applicant could not access before the ruling delivered on January 26, 2023. I am also not convinced that due diligence was exercised as required by Order 45 *Civil Procedure Rules 2010*. Mere discovery of a new or important matter or evidence is not sufficient ground for review. The applicant must demonstrate the efforts made to retrieve the evidence before the decision sought to be reviewed was made.
7. The justice of this case will, in my view, be served by expeditious hearing and disposal of the main suit so as to adjudicate and determine the rights of the parties conclusively.
8. The court finds that the application lacks merit. The application is dismissed with costs to the 1<sup>st</sup> Respondent.

It is so ordered.

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

**E. ASATI,**

**JUDGE.**

**In the presence of:**

Maureen - Court Assistant.

for the Plaintiff/Applicant.

for the 1<sup>st</sup> Defendant Respondent.

