



REPUBLIC OF KENYA



**Kilui & 8 others v Wafula & another (Environment & Land Case
113 of 2002) [2023] KEELC 17072 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17072 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 113 OF 2002**

EC CHERONO, J

APRIL 20, 2023

BETWEEN

JAPHETHER WAMALWA KILUI 1ST PLAINTIFF
JOHN SIBELA MUSEE 2ND PLAINTIFF
JOHNSON WANJALA MAFUTA 3RD PLAINTIFF
TIMOTHY MASINDE SINDANI 4TH PLAINTIFF
MARY WASIKE 5TH PLAINTIFF
FRAGNEL WAWIRE MIRIMO 6TH PLAINTIFF
HENRY MASIBO 7TH PLAINTIFF
NICOLUS MASIKA MAIKUMA 8TH PLAINTIFF
TITUS MUSUYA SAKWA 9TH PLAINTIFF

AND

MATHEW MUNYOLE WAFULA 1ST DEFENDANT
BEN MACHABE WAFULA 2ND DEFENDANT

RULING

1. Vide a Notice of Motion application brought under Certificate of Urgency dated 24th May 2022, the 1st defendant/applicant seeks the following orders;
 1. (Spent)
 2. That the Honourable Court be pleased to review the Orders made on 28/10/2021, be and are hereby vacated plus subsequent orders issued thereafter and return a finding as follows;



- a. The Ruling delivered herein on 11-3-2004 dismissing plaintiff's application dated 24-10-2002 by way of Chamber Summons seeking to reinstate Titles (Kimilili/Kimilili/2438, 2430, & 2435, 2432, 2436, 2431, 2433, 2434, 2495, & 2323) which orders are still subsisting.
 - b. This suit was determined by consent Judgment reached between the parties of consent dated 30-3-2011, filed in Court on 5-4-2021 & adopted by the Honourable Court on 08-04-2011, still subsisting as Judgment of this Honourable Court.
 - c. It was an error for this Court to issue Eviction orders against the applicant/1st defendant a prayer not claimed for in this suit as plaintiff's plaint only claimed for;
 - i). A declaration that the consent Judgment dated 10-01-2001 in Bungoma High Court Civil Case No. 3 of 2001 was fraudulent and in bad faith and that the same should be expunged and the numbers of the titles cancelled thereby be reinstated
 - ii) Costs of this suit
 - iii) Interest on (b) at court rates
 - iv) Any other relief which this Honourable Court may deem fit just to grant
 - d. Further it was an error by this Court signed and issued orders in contradiction of the Ruling delivered on 28-03-2018 but the amendment of the same signed on 11-05-2021 is subsisting.
3. Inter-parties hearing scheduled for-----day of-----2022
 4. Costs of this application be provided for.
2. The application is premised on the supporting affidavit as well as a supplementary affidavit sworn by the applicant on 24/10/2022 and 7/12/2022 respectively. The application is further supported by grounds apparent on the face of the said application.
 3. Only Johnson Wanjala Mafuta, the 3rd plaintiff/respondent swore a replying affidavit on 15-11-2022 and filed in Court on 17/11/2022 in opposition to the said application.

Applicant's Summary Of Facts.

4. The applicant in his sworn affidavit deposed as follows;
 1. That land parcel No. Kimilili/Kimilili/108 forms part of the Estate of Wafula Bukhuni(deceased)
 2. That the suit land referred hereinabove was transferred through transmission after the 2nd defendant succeeded the Estate of the said Wafula Bukhuni but left out the 1st defendant who was by then a minor aged 3 years
 3. That upon the 1st defendant attaining maturity age, he claimed a share of his father's land aforementioned measuring 23.5 acres and the 2nd defendant realizing his mistake in excluding him in the succession cause, transferred a portion measuring 8.5 acres to the 1st defendant and got registered as L.R No. Kimilili/Kimilili/4087.
 4. That this suit was subsequently determined by consent of the parties and the 1st defendant having sold 4.0 acres from his portion remained with 4.5 acres which he has been in occupation



until 15-9-2022 when he was mysteriously evicted due to errors of this court's proceedings, records and orders.

5. That the plaintiffs filed this suit but in their prayers never claimed for eviction which by error this court granted them eviction orders and was not part of the terms of the decree.
6. That the plaintiffs filed the plaint simultaneously with a Chamber Summons seeking to reinstate title numbers Kimilili/Kimilili/2438, 2430 & 2435, 2432,2436, 2431, 2433, 2434, 2495, & 2323 which was dismissed.
7. That the Ruling delivered by this Court on 28-3-2018 never issued orders to cancel and to destroy title Numbers Kimilili/Kimilili/4086 & 4087 as quoted by the judge in the Ruling of 26-10-2021.
8. That an error by this court occurred when it signed and issued wrongly extracted order of 28-3-2018 but it was then Amended a proper one issued in conformity of the ruling thereof
9. That the plaintiffs using the wrong order erroneously issued by this Court have proceeded and evicted the 1st defendant demolishing his houses, destroying trees, crops and households of value Kshs 4,000,000/= rendering him landless.
10. That from foregoing the decree of this Honourable Court is subsisting and therefore the plaintiffs had no legal basis to evict the 1st defendant.
11. That it is important this Honourable Court review the orders granted on 28-10-2021 granted mistakenly that there was an order issued in the Ruling of 28-3-2018 to reinstate titles or evict the 1st defendant.
12. That the 1st defendant was punished by this Honourable Court after he failed to implement the decree on his part and he paid a fine of Kshs. 50,000/
13. That the imprisonment and/or fine by this Court to 1st defendant was over execution of the decree herein and subject titles of land thereon were Kimilili/Kimilili/4086 & 4087 and therefore there is urgent need the orders issued contains errors be reviewed and vacated plus subsequent orders therein.
14. That I am legally advised and verily believe it to be true information that the plaintiffs were to move the Court for this Court's Deputy Registrar to sign transfer documents than going against the decree of this Honourable Court.
15. That the eviction of the 1st defendant was irregular and unlawful the lay down procedure was not followed, provincial administrations not conducted, no existence of boundaries and it is very bad in eyes of the public.
16. That it is important this Honourable Court scrutinize its records properly and correct the errors than subjecting the innocent party-the 1st defendant to hardships and landless
17. That the 1st defendant has continuously stayed on this parcel of land since his childhood, buried his mother, his first wife and (2) children on his portion of the land and has no alternative place to stay.
18. That unless urgently the errors from the original records of this Honourable Court are corrected and reviewed then the 1st defendant shall be snatched his share of land being gift from his father's estate.



19. That any delay in bringing up this application was due to my financial constraints, he is jobless and has no proper source of income as he was looking for alternative shelter but has brought this application in good faith.
20. That granting of the orders herein shall not prejudice the plaintiffs in any way in form of loss as they still have chances to execute the decree subsisting in Court despite he is willing to sign and transfer documents pertaining his land title No. Kimilili/Kimilili/4087
21. That this Honourable Court under the law has discretionary mandate to correct its mistake or errors than the appeal.

3rd Defendant's Summary of Facts

5. The 3rd defendant in his replying affidavit sworn on 15-11-2022 deposed as follows;
 1. That this Notice of Motion should not be entertained at all. In my view all the matters raised in it are res judicata.
 2. The Ruling of 11-3-2004 is being quoted out of context. Land titles No. Kimilili/Kimilili/2433, 2430, & 2435, 2432, 2436, 2431, 2434, 2495 & 2323 have been litigated upon since 2004 and were finally reinstated when the applicant and his brother failed to honour order made in respect thereof.
 3. That having failed to honour relevant consent orders affecting the same the applicant was finally evicted from the suit lands on 16th September, 2022.
 4. That the eviction of the applicant was the final result of his failure to satisfy the court that he and his family members were innocent in the whole creation of land titles from the original land title No. Kimilili/Kimilili/108.
 5. That paragraph 18 of the affidavit in support of this application is a lie. In a 1999 affidavit on Ben Wafula Machabe, a brother of the applicant clearly states that the applicant sold all his land and migrated to Naitiri from where he came to start endless cases.
 6. That to entertain this application would amount to starting this suit de novo which will be a waste of time.
 7. That the Court should also know that the defendant/applicant has filed an appeal in the Court of Appeal-Eldoret .C.A 231 of 2021 in which he has applied for similar orders as he is seeking in this application. To entertain this application will amount to subjecting the same subject matter to arbitration by this Court and the Court of Appeal. This application should not be entertained when the matter is also the subject matter of a subsisting appeal in a higher Court.

Analysis And Decision

6. I have considered the Notice of Motion application dated 24th October 2022, the supporting affidavit as well as the supplementary affidavit sworn on 24-10-2022 and 7-12-2022 respectively. I have also considered the replying affidavit sworn by Johnson Wanjala Mafuta, the 3rd defendant herein and the applicable law. The applicant is seeking a substantive order for review under order 45 rule1(1), 2(2) [CPR](#) as read with section 80 CPA. Order 45 [CPR](#) provides as follows;

“45(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,
7. 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, desire 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----

In the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR, the court discussed the scope and jurisdiction of review as follows;

“That the rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;

- a. 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; or
 - c. For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”
8. Looking at the application dated 24-10-2022, the supporting affidavit and the annexures thereto as well as the replying affidavit, it appears that this suit which commenced in the year 2002 has protracted with numerous applications and Rulings with some of the Orders annexed to the supporting affidavit. From those orders, the one which has aggrieved the applicant and also the subject of this application is a ruling issued by this Honourable Court on 28-10-2021. That ruling arise from two applications. The first application by the plaintiffs dated 6/5/2021 and filed on 20/5/2021 and the second application is a Notice of Motion by the 1st defendant dated 25/5/2021. In the opening remarks of his Ruling, my predecessor Justice Olao observed as follows;

“Mathew Munyole Wafula and Ben Machabe Wafula (the 1st and 2nd defendants respectively) must now be told in no un-certain terms that their shenanigans in this matter have arrived at a cul-de-sac and have to be brought to an end---”

At page 10 of his Ruling, the learned Judge continued as follows;

“At the commencement of this ruling, I referred to what are clearly shenanigans on the part of ‘ the defendants in this matter and in his submissions, Mr J. Khakhula has also alluded to the same. It is clear from the 1st defendant’s own replying affidavit in response to the plaintiffs’ Notice of Motion dated 6th May 2021 that the said application is infact conceded.



And even in his own application dated 25th May 2021, the 1st defendant is asking this Court to compel the 1st, 4th and 8th plaintiffs to avail themselves to enable the implementation of this Court's judgment. It is obvious therefore that whereas the 1st defendant purports to be seeking orders by his application dated 25th May 2021, he is infact basically conceding the plaintiffs' Notice of Motion dated 6th May 2021. Obviously that was only done in an attempt to forestall whatever ruling this Court would arrive at. There is nothing to show that the plaintiffs have in any way impeded the implementation of the consent judgment herein. There is therefore no basis upon which this Court can compel the 1st, 4th and 8th plaintiffs to avail themselves for any exercise in that regard. And as the plaintiffs have averred through the replying affidavit of the 1st plaintiff, the 1st defendant is fully aware that the 4th and 8th plaintiffs are deceased. It is not clear how the 1st defendant expect this Court to compel deceased persons to avail themselves for any exercise with regard to the execution of the consent judgment herein..."

9. I have given the proper perspective in which the learned Judge arrived at his decision arising from the two applications which is the subject of the present application for review.
10. As stated in the case of *Republic v Public Procurement Administrative Review Board*(supra), a party seeking the review of a decree or an order of a court or Tribunal must show to the satisfaction of the court that there is a discovery of a new and important matter or evidence which was not within his knowledge or could not be produced at the time when the decree was passed or the order was made. Where the application for review is based on a mistake or error apparent on the face of the record or for any other sufficient reason, the applicant is required to show or demonstrate the existence of a prima facie visible mistake or error which does not require any elaborate argument or detail examination. It must be one that is self-evident.
11. In the present application, the applicant has not shown to the satisfaction of this Court that there has been a discovery of a new and important matter or evidence which was not within his knowledge. He has not also shown the existence of any mistake or error apparent on the face of the record to warrant the grant of the orders sought. The applicant has not also given any other sufficient reasons to warrant this honourable Court review its ruling/order made on 28-10-2021
12. Suffice to add that having elected to prefer an appeal against the ruling of this Honourable Court made on 28/10/2021 to the Court of Appeal at Eldoret being C.A No. E231 of 2021, the applicant cannot also apply for judicial review. Order 5 rule 1(2) *CPR*, prohibits a party who is appealing from a decree or order from applying for a review. Having duly exercised his right of appeal in respect of the ruling made on 28/10/2021, an order for review is not available to the applicant.
13. The other issue that arise for consideration is whether the application for review has been brought without undue delay. The applicant in his supporting affidavit has confirmed that the impugned ruling /order which he now seeks this Honourable Court to review was made on 28/10/2021. The present application was filed on 24/10/2022. It took the applicant one year to bring the application. A delay for one year without reasonable explanation is inordinate and inexcusable.
14. The upshot of the foregoing is that the Notice of Motion application dated 24/10/2022 is devoid of merit and the same is hereby dismissed with costs.

Orders accordingly.

READ, SIGNED AND DELIVERED VIRTUALLY/IN THE OPEN COURT THIS 20TH APRIL, 2023



HON E.C. CHERONO

ELC JUDGE

In the presence of;

1. Applicant-present

2. Joy C/A

3. Respondents-absent

