



Mburu v Theuri; Kachili (Interested Party) (Environment & Land Case 564 of 2017) [2023] KEELC 16898 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16898 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 564 OF 2017**

JG KEMEI, J

APRIL 20, 2023

BETWEEN

EUNICE WAMBUI MBURU PLAINTIFF

AND

JAMES WAGURA THEURI DEFENDANT

AND

ALLEN NGUTA KACHILI INTERESTED PARTY

RULING

1. The Defendant filed the instant Notice of Motion dated June 20, 2022 pursuant to Section 3A & 80 *Civil Procedure Act*, Order 45 rule 1 & Order 51 *Civil Procedure Rules* seeking Orders that;
 - a. Spent.
 - b. The Court has inherent powers to review its judgement to meet the ends of justice.
 - c. This Honorable Court be pleased to review the judgement of the Court delivered on May 5, 2022 dismissing the Defendant/Applicant's counterclaim and allow the same as prayed.
 - d. The costs of this application be in the cause.
2. The Application is based on the grounds on the face of it which are reiterated in the Supporting Affidavit of even date sworn by James Wagura Theuri, the Defendant. He averred that this Hon. Court delivered its Judgment herein on May 5, 2022 dismissing the Plaintiff's suit alongside the Defendant's counterclaim with no orders as to costs. That the counterclaim was primarily dismissed because Equity Bank enjoyed a superior title over the suit property by way of charge and allowing the counterclaim would cause hardship to the bank in the event it wished to exercise its statutory power of sale over the suit land. That the Defendant has now discovered that the suit land is no longer charged to Equity Bank



and no hardship would be occasioned to the Plaintiff or the bank should the counterclaim be allowed. That this information despite exercising due diligence was not within the Defendant's knowledge at the time the Judgment was delivered hence the Application. Copies of the Judgment and green card search (sic) were annexed as JWT1 and JWT3 respectively.

3. Despite service as evidenced by Affidavit of Service sworn by John Evans Omondi on July 7, 2022, the Plaintiff and the Interested Party (Plaintiff's husband) did not oppose the Motion. It would be recalled that Equity Bank was not enjoined in the trial proceedings and it is partly for that reason it could not be condemned unheard.
4. Be that as it may, the Court directed that the Application be prosecuted on its merits by way of written submissions.
5. The Defendant through the firm of Mukiri Global Advocates LLP filed submissions dated October 13, 2022 and drew a singular issue for determination; whether this Court should review the Judgment delivered on May 5, 2022. The issue was answered in the affirmative with the Defendant making reference to Section 80 *Civil Procedure Act* and Order 45 rule 1 *Civil Procedure Rules*. That the main consideration to bear in mind is that the discovery of the new and important evidence was not within the Defendant's knowledge at the time the Judgment was entered. That it is now evident that the suit land is no longer charged to Equity bank or any other financial institution hence no hardship would be occasioned if the Application is granted. The Defendant further submitted that the costs follow the event and to this end urged the Court to allow his counterclaim as prayed.
6. The main issue for determination is whether the Plaintiff has established case for the Court to Review its Judgment.
7. The underpinning legal provision for seeking Review is found in Section 80 *Civil Procedure Act* that;

“ 80. Review
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.”
8. The above provision is further augmented by Order 45 rule 1 *Civil Procedure Rules* that;

“ Application for review of decree or order [Order 45, rule 1.]
(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.”

9. Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath Vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608. had this to say:-

“The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”.

10. In the Court of Appeal case of *Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) Vs Kariuki Marega & Another* (2018) eKLR stated categorically that where an Applicant in an application for review sought to rely on the ground that there was discovery of new and important evidence, one had to strictly prove the same. The Court of Appeal stated as follows:-

“We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.”

11. In *Republic Vs Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR the Court culled out the following principles from a number of authorities-

- a. A Court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- b. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- c. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- d. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- e. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior Court.
- f. While considering an application for review, the Court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- g. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the Court/tribunal earlier.



- h. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detailed examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- i. Section 80 of the *Civil Procedure Act* provides for a substantive power of review by a civil Court and consequently by the appellate Courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Act* does not prescribe any limitation on the power of the Court, but such limitations have been provided for in Order 45 Rule 1.
- j. The power of a civil Court to review its judgment/decision is traceable in Section 80 *Civil Procedure Act*. The grounds on which review can be sought are enumerated in Order 45 Rule 1. [Emphasis added]
12. The Defendant’s case is that he has discovered new and important information after exercising due diligence, was not within his knowledge at the time of entry of the impugned Judgment. That the suit property is no longer charged to Equity bank which was the basis for dismissing his counterclaim. A copy of the green card in support of this contention is annexed as JWT3. JWT3 describes the subject property as Ruiru Kiu Block 2/7349 measuring approx. 0.054 Ha. The important information alluded to is found at page 3, entry no.2 dated January 18, 2019 confirming the discharge of charge to Equity Bank to secure a sum of Kshs 1.7M. That charge was registered on March 9, 2015.
13. The question that arises is whether indeed that information could not be obtained at the time of hearing the suit upon conducting due diligence. The answer to this is contained in the same annexure at page 1 entry No 7 in particular is a restriction against the title of the suit land registered on August 12, 2019 *vide* a letter from Mukiri Global Advocates dated May 12, 2017. This entry was later removed by entry No 9 which was a result of entry no 8 being temporary injunctive orders issued by the Court registered on April 10, 2019. Going by the Defendant’s own registration of the restriction, it is evident that the discharge was registered 7 months earlier on January 18, 2019. This information in my view was available to the Defendant had he exercised due diligence and long before the hearing of his counter claim on November 8, 2021.
14. However, the circumstances of this case are unique calling for the Court’s inherent powers to ensure substantive justice. The Applicant’s counterclaim was disallowed on account of Equity bank’s charge over the land. See para. 27 of the impugned Judgment where I held that;
- “To this end, it is clear that while specific performance is not an adequate remedy in light of the circumstances of his case and granting it would cause hardship and injustice to the Bank who despite enjoying a superior title by way of security/mortgage was not enjoined in the Counter claim and or heard on merit. The Defendant entered into the agreement of sale knowing that the property was charged to the bank”
15. According to Part C of the copy of green card signed on May 26, 2022 the charge on the suit land was discharged on January 18, 2019 way before entry of Judgment herein. As already mentioned, the Applicant’s counterclaim was not opposed neither at the hearing nor by way of defence to counter claim. His evidence then just as in the instant Application remains unrefuted. The findings of this Court at paras. 23 and 24 of the Judgement were;
- “23. As discussed above, the Defendant has demonstrated that he entered into a valid contract. Absent any evidence to the contrary, the contract is binding



on the parties thereto. Reliance is placed on the Court of Appeal decision in *National Bank of Kenya v Pipeplastic Samkolit (K) Ltd* [2001] eKLR that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.

24. DW1 went ahead and substantially performed his contractual obligation by paying a total of Kshs 3.7M out of the agreed Kshs 4M as at February 25, 2017. He expressed willingness and readiness to pay the balance of Kshs 300,000/=. The Plaintiff has not contradicted the firm and consistent evidence of the Defendant.”
16. The Applicant relied on Section 3A of the *Civil Procedure Act* which provides for inherent powers of this Court that nothing shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. I am also guided by Articles 48 and 159 Constitution of Kenya on access to justice and the quest to bring litigation to an end.
17. In *Shanzu Investments Limited v Commissioner for Lands* [1993] eKLR the Court of Appeal held that:-
- “Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by section 80 of the *civil procedure act*: and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”
18. That position was reiterated by the same Court in *Official Receiver And Liquidator V Freight Forwarders Kenya Limited* [2000] eKLR where the Learned Judges allowed an appeal against the trial Court finding that sufficient reason (as a third ground for Review) had to be ejusdem generis with the first two grounds set out in Order 44 rule 1(1) or analogous to them.
19. Flowing from the above reasons and binding pronouncements of the superior Court, and the fact of removal of the impediment of the charge on the suit land, I am satisfied that this an appropriate case for this Court to review its Judgement on the ground of sufficient reason to ensure the ends of justice are met.
20. In the end the Application for Review succeeds and the Applicant’s counter claim is allowed in terms of prayers a and c of as follows;
- a. Specific performance be and is hereby granted directing the Plaintiff to transfer the suit premises free from any and all encumbrances to the 1st Defendant subject to payment of the sum of Kshs 300,000/- to the Plaintiff within 30 days.
 - b. In default the Hon. Deputy Registrar of this Honourable Court is mandated to sign such documents as are necessary to effectuate these orders.
 - c. General damages for breach of contract is denied.
 - d. Costs of the counter claim shall be in favour of the Applicant / 1st Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF APRIL, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI



JUDGE

Delivered online in the presence of;

Plaintiff – Absent

Aiyeko HB Mukiri for Defendant

Interested Party - Absent

Court Assistants – Kevin/Lilian

