



**Mwalambe & another v Freedom Limited (Environment & Land Case
132 of 2018) [2023] KEELC 17872 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17872 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 132 OF 2018**

**EK MAKORI, J
MAY 31, 2023**

BETWEEN

CHAI LWAMBI MWALAMBE 1ST PLAINTIFF

THOMAS LWAMBI MWALAMBE 2ND PLAINTIFF

AND

FREEDOM LIMITED DEFENDANT

RULING

1. Notice of motion dated December 1, 2022 seeks orders as follows:
 - a. Spent
 - b. The court does grant leave to the firm of Manguro Onyango & Co advocates to come on record on behalf of the plaintiff/applicants.
 - c. The court be pleased to review/vary set aside the orders made on November 10, 2022 upholding the consent judgment filed in court on January 21, 2022.
 - d. Costs be provided.
2. The application is opposed. The court directed parties to file written submissions on the matter. They complied.
3. The applicant asserts that section 80 of the *Civil Procedure Act* confers wide discretion in the court to make such orders as it deems fit on review.
4. The main contention in the applicant's application is that the court ought to have considered the reasons put across why the consent order in this matter is irregular - that it is because an advocate representing the applicant without instructions and guidance from the parties themselves made it. Counsel for the applicant in support of the motion quotes several authorities. For example in *Pancras*



- T. Swai v Kenya Breweries Limited* [2014] eKLR the Court of Appeal held that the court has discretionary powers to issue an order of review as disclosed in order 45 *Civil Procedure Rules*, or for any sufficient reasons.
5. That in the Ugandan Case - Misc cause No 109 of 2017 *Robert Migadde v Musoke Tadeo, and Seruwu Nalubowa*, Namundi J. set aside a consent judgment since it was entered in the absence of a party with only advocates endorsing the same. The court relied on the case of *Hirani v Kassam* [1952] 19 EACA 131. The court noted that while the consent entered by an advocate on behalf of his client is binding, however an exception to this rule is that the principles that appertain to setting aside consent orders are well established in a line of cases including *Brooke Bond Liebig v Mallya* [1975] EA 266 where Mustafa Ag. VP held that it is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on grounds of fraud or collusion, that there was no consensus between the parties, public policy, or for such reasons as would enable a court to set aside or rescind a contract. In this case, the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement.
 6. In this case, the applicant submitted that the court declined to review the consent order for reasons that the plaintiff delayed approaching the court and sought orders late. It is the plaintiff's case that the delay was occasioned by the coronavirus pandemic, which was a worldwide contagion; the court should also have taken note that the plaintiff was not on good terms with his former advocate. It is the case of the plaintiff that the fact that he was not on good terms with his advocate; greatly influenced the outcome of the case, as his advocate entered into a contract (read consent) without his knowledge. This is a sufficient reason why the orders in place ought to be reviewed.
 7. Secondly, it is the plaintiff's submission that the consent was entered into because the acreage of the land that is the suit property was not fully determined and for that reason, the consent is based on misrepresentation, as there is still a pending dispute in regards to the land. The fact that the consent was entered into when the land was unsurveyed has caused many difficulties for the plaintiff, as the defendant continues to claim all the portion of the land.
 8. The respondent is of the view that reviewing the orders in place will amount to reopening the matter afresh. The reasons proposed are the same – the relationship between the client and advocate, which the court dealt with in the ruling to set aside the consent order, dated November 10, 2022 – (now the impugned order). The respondent thinks that reopening of a matter on review cannot be allowed for failure to meet the criteria for the same as held in the case of *Hosea Nyandika Mosagwe & others v County Government of Nyamira* [2022]eKLR.
 9. This court - Odeny J. by the ruling dated November 10, 2022 declined to set aside a consent entered by the parties herein dated and filed and endorsed by this court on January 21, 2020. The court was of the view that no evidence was adduced concerning the bad blood between the lawyer and the client. Nothing was tendered to show the lawyer acted fraudulently on behalf of the client. The court was of the view that the allegations put onward against the lawyer were serious and could easily lead to an advocate being sanctioned and disciplinary action being taken against the counsel. They were mere allegations without proof.
 10. The court was also of the view that the application was brought quite late the consent was entered on January 21, 2020 and the title complained about was issued on October 31, 2017 and therefore not a product of the consent judgment as deposed by the applicant herein. It took two years to approach the court to set aside the consent judgment. The court was not convinced or at all to set aside the consent judgment and was guided by the authorities on the dynamics to consider setting aside consent



judgment (see *SMN v ZMS & 3 others* [2017] eKLR, *KCB v Specialized Engineering Co Ltd* [1982] KLR 485, the application was dismissed.

11. The applicant approached the court for review of those orders citing new grounds and that the orders in place if left unchallenged will, cause adversity for the applicant as he thinks he will be deprived of his rightful ownership of the suit property.
12. The principles to guide the court in the exercise of review jurisdiction under section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules*, is as restated in the case of *Hosea Nyandika Mosagwe & others v County Government of Nyamira* [2022]eKLR where Mugo J. held as follows:

“in *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi judicial review division Misc application No 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -

- i. A court can review its decision on either of the grounds enumerated in order 45 rule 1 and not otherwise.
- ii. The expression "any other sufficient reason" appearing in order 45 rule 1 has to be interpreted in the light of other specified grounds.
- iii. 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.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. 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.
- vi. 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.
- vii. 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.
- viii. 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 detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the Civil Procedure Code 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 Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in order 45 rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in section 80 CPC. The grounds on which review can be sought are enumerated in order 45 rule 1.”



13. The judge further stated:

In the case of *Evan Bwire v Andrew Aginda* civil appeal No 147 of 2006 cited in the case of *Stephen Githua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers* (2016) eKLR the Court of Appeal held as follows:

“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.”

14. Looking at the current application and the orders sought, and guided and persuaded by the authorities as cited in the decisions I have quoted, I do not see any new grounds advanced to warrant the court to exercise the powers of review under section 80 of the *Civil Procedure Act* and order 45 rule (1) of the *Civil Procedure Rules*. The reasons advanced before Odeny J. for setting aside the consent judgment are the same reasons allude to for review in the present application. Perhaps the only difference is new authorities have been quoted on what to consider in setting aside a consent judgment than what to consider on review. I conclude that this is one of those cases falling in the category of regenerating a matter afresh and having a second while on it. No new heights or frontiers have been achieved by the application to bring it within the bounds of review.

15. The application dated December 1, 2022 seeking review thus will not be allowed and it's hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 31ST DAY OF MAY 2023.

E. K. MAKORI

JUDGE

In the Presence of: -

Mr. Manguro for the Plaintiff

In the Absence of:-

Mr. Borona for the Defendant

