Mbiyu v Kamau (Environment & Land Case 403 of 2017)
[2023] KEELC 18537 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18537 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT & LAND CASE 403 OF 2017

BM EBOSO, J

JUNE 29, 2023

BETWEEN

PRISCILA WANJIKU MBIYU ..... PLAINTIFF

AND

JOSEPH MUIGAI KAMAU ..... DEFENDANT

RULING

1. Judgment in this suit was rendered by Gacheru J on July 15, 2021. One year later, the plaintiff brought a notice of motion dated July 15, 2022, inviting this court to review the said Judgment in the following verbatim terms:

    1. That the honourable court be pleased to review its Judgment delivered on July 15, 2021 and grant the applicant hearing on grounds set out herein.

    2. That as a consequence, judgment be entered in favour of the plaintiff/applicant as prayed for in the plaint.

    3. That costs of this application be provided for.

2. The said application is the subject of this ruling. It is based on the grounds set out in the motion and in the applicant's supporting affidavit sworn on July 15, 2022. The application was canvassed through written submissions dated November 22, 2022, filed by M/s Githuku & Githuku Advocates LLP.

3. The case of the plaintiff/applicant is that there has been a discovery of new important evidence which, on exercise of due diligence, could not be produced during trial and at the time Judgment was entered in this suit. She contends that the new evidence is a certificate of lease relating to the suit property, issued on July 30, 2019. She further contends that the title was issued to her on July 30, 2019 but it was not in her possession at the time of hearing of this suit, hence she could not produce it during trial and at the time Judgment in this suit was rendered.

4. It is the case of the applicant that had the certificate of lease been tendered and considered, the court would have arrived at a different decision. She adds that the consent recorded in this court on May 17, 2022 was entered into without her knowledge and without her instructions, hence it should be set aside, given that she had withdrawn the appeal.

5. She deposes in her supporting affidavit that the certificate of lease was issued to her on July 30, 2019, thirteen (13) days after hearing of the suit had closed, hence it was not in her possession at the time of the hearing of the suit. She adds that she immediately forwarded the certificate of lease to her advocates who informed her that they were going to "present it to the court". She contends that in May 2022, she got to learn that her Advocates "did not attempt to legally introduce the title document to the court to be considered in evidence by the honourable Judge before she delivered the Judgment". The applicant adds that she had opted to withdraw her appeal and elected to pursue a review of the Judgment by this court.

6. The defendant/respondent opposes the application through: (i) a replying affidavit sworn on November 23, 2022; (ii) a further affidavit sworn on February 6, 2023; and (iii) a written submissions dated February 6, 2023, filed by M/s Kanyi Kiruchi & Co Advocates. The case of the defendant is that the certificate of lease which the plaintiff is waving was fraudulently obtained by the plaintiff during the pendency of the suit and was deliberately withheld by the plaintiff for a period of over three (3) years. He adds that, having obtained the certificate of lease in July 2019, the plaintiff had more than two years prior to the delivery of judgment but deliberately elected not to tender it as part of her evidence. Further, the defendant contends that the post-judgment delay of one year is inordinate and has not been justified.

7. The defendant faults the plaintiff for deliberately withholding the formal instrument of lease together with the other documents which gave rise to the certificate of lease because she knows that exhibiting them would expose her improper conduct. He adds that the plaintiff has all along been dishonest, contending that whereas her case was that she bought the suit property in 2004, during trial she presented an allotment letter in her name backdated to indicate that she was allotted the suit property on 4/9/1998. The defendant urges the court to reject the application.

8. I have considered the application; the response to the application; and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. I will not rehash the submissions that were tendered. The single question that falls for determination in this application is whether the application meets the criteria which guides our trial courts when exercising jurisdiction to review a judgment under Section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the *Civil Procedure Rules*.

9. The jurisdiction of a trial court to review a judgment is donated by Section 80 of the *Civil Procedure Act* which provides as follows:

> " Any person who considers himself aggrieved—
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> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> 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."

10. The statutory principle that guides our courts when exercising jurisdiction to review a judgment is spelt out in Order 45 rule 1 of the Civil Procedure Rules which provides as follows:

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.

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."

11. Kenyan courts have, in a line of decisions, adopted the following jurisprudential principle that was outlined by the Supreme Court of India in the case of *Ajit Kumar Rath v The State of Orisa & Others*, 9 Supreme Court Cases 596 at page 608 how when review jurisdiction should be exercised:

> " 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 for 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" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule."

12. Does the notice of motion dated July 15, 2022 satisfy the criteria for review of a judgment by a trial court? The plaintiff is a natural person. She filed this suit in April 2017. Hearing of the case started and was concluded on July 17, 2019. The plaintiff testified as PW1 and closed her case on the same day. She personally tendered the following documents as her evidence: (i) Letter of allotment dated September 4, 1998; (ii) Rates payment receipts; (iii) Photographs (iv) Beacon Certificate; and (v) Letter dated 8/8/2005. Upon closure of the plaintiff's case, the defendant testified on the same day, July 17, 2019, tendered his exhibits, and closed his case.

13. The plaintiff contends that 13 days after closure of trial, she was personally issued with the certificate of lease which she is now waving. It does emerge from the court record that judgment was not rendered in this suit until July 15, 2021, a period of two years from the time trial closed. It is also a period of about two years from the time the plaintiff alleges that she obtained the certificate of lease which she is now waving. She did not bother to file an application for an order re-opening the trial for the purpose of producing the certificate of lease as part of her evidence.

14. The plaintiff blames her previous advocates for failure to tender the certificate of lease as evidence prior to the delivery of Judgment. I do not think the plaintiff is honest in shifting blame to her previous advocates. She was the only witness in this case. This was her case. Her advocate was not a witness. She

knew that there was no way her advocate was going to tender the certificate of lease as evidence without her stepping into the witness box to tender it and be cross-examined on it. She knows that to tender the lease as evidence, she needed to go back to the witness box. Her attempt to blame her previous advocates cannot be accepted as a ground for reviewing the Judgment.

15. It is clear from the evidence before this court that close to two years prior to the delivery of the Judgment in respect of which the plaintiff seeks a review, she had the certificate of lease. The certificate of lease cannot therefore be said to be a newly discovered piece of evidence that was not available at the time the judgment or decree in this suit were passed. She had the certificate from July 30, 2019. Judgment in this suit was rendered on July 15, 2021. In the circumstances, the applicant cannot be said to have satisfied the requirement of Order 45 rule 1 of the Civil Procedure Rules.

16. That is not all. Even after judgment was rendered on July 15, 2021, the plaintiff did not bother to bring the present application. She opted not to pursue the review mechanism for more than one year post-judgment. It does emerge from the court record that she elected to pursue an appeal in the Court of Appeal. The delay of three years is clearly unjustifiable.

17. Lastly, I have looked at the pleadings in this suit and the Judgement rendered by Gacheru J The court considered the roots of the parties' claims of ownership of the suit property. The court came to the following conclusion:

> "In this instant the defendant has been able to prove that he was allotted the suit property and he has further met the conditions. The Court notes that the conditions for payment were met late in the day. However, no evidence has been adduced that his allotment was ever cancelled and or issued to another party and it is not in doubt that only the allotting authority can cancel the allocation. The above coupled with the fact that the Plaintiff has failed to prove that she was ever allotted the suit property procedurally and or the said Derrick Nyaga was ever allotted the suit property, the Court finds and holds that the Defendant has satisfactorily proved his root of title and therefore he is the absolute and indefeasible owner of the suit property. Being the rightful owner of the suit property, the Defendant cannot be evicted nor injuncted from his own property."

18. In my view, the above finding is not one that can be changed by the mere production of the certificate of lease which is founded on an allotment letter that was found to have been procured unprocedurally and backdated to read September 4, 1998, considering the fact that the certificate of lease which the applicant is waving now did not exist at the time of trial and was deliberately procured post-trial for the sole purpose of influencing the ultimate outcome of the concluded trial.

19. For the above reasons, I do not find merit in the plaintiff's notice of motion dated July 15, 2022. The same is dismissed for lack of merit. The plaintiff shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 29TH DAY OF JUNE 2023

B M EBOSO

JUDGE

In the Presence of: -

Ms Odhiambo for the Plaintiff

Court Assistant: Ms Osodo