



REPUBLIC OF KENYA



Curly Wurly Limited & 3 others v Kenya Ports Authority & another (Environment & Land Case 200 of 2021) [2023] KEELC 19007 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19007 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 200 OF 2021**

NA MATHEKA, J

JULY 26, 2023

BETWEEN

**CURLY WURLY LIMITED 1ST PLAINTIFF
EXON INVESTMENTS LIMITED 2ND PLAINTIFF
COAST CLAY WORKS LIMITED 3RD PLAINTIFF
FUEL HANDLING TERMINAL (KENYA) LIMITED 4TH PLAINTIFF**

AND

**KENYA PORTS AUTHORITY 1ST DEFENDANT
NATIONAL LAND COMMISSION 2ND DEFENDANT**

RULING

- 1 The application is dated March 21, 2023 and is brought under Orders 45 (1) (2) and 51(1), of the [Civil Procedure Rules](#), Sections IA, 1B, 3,3A and 80 (a) of the [Civil Procedure Act](#) Cap 21 Laws of Kenya seeking the following orders;
 1. That this application be certified as urgent and heard ex parte in the first instance.
 2. That this Honourable Court be pleased to review and vary the orders issued on March 21, 2023 transferring the instant suit to Kwale ELC.
 3. That the costs of this Application be borne by the 2nd Defendant.
- 2 It is based on the grounds that upon oral application by the 2nd Defendant, the Court issued an order transferring the suit to Kwale ELC for hearing and determination for lack of territorial jurisdiction. The decision was based upon the ruling of the Court issued on January 19, 2022 in Mombasa ELC Petition 9 of 2018; *Chunky Limited & Another vs Patrice Ndune & 10 Others*. The 2nd Defendant misled the Honourable Court into issuing the order for transfer by arguing that the suit properties in



the suit herein form part of the properties affected and referred to in Mombasa ELC Petition 9 of 2018; Chunky Limited & Another vs Patrice Ndune & 10 Others. In Mombasa ELC Petition 9 of 2018; Chunky Limited & Another vs Patrice Ndune & 10 Others, the suit properties affected by and referred to in the transferred suits are IVI/ 909 & 910 located in Kwale. The suit properties herein being Plots No. 500 Section VI/MN and 2424/Section VI/ MN are located within Mombasa. There is therefore need for the Honourable Court to review and vary its Order to revert the order for transfer which was issued in apparent error. It is in the interest of justice that this Application be certified urgent and the orders sought therein be granted.

3 This Court has considered the application and submissions therein. I have perused the court record and find that the Court issued an order transferring the suit to Kwale ELC for hearing and determination for lack of territorial jurisdiction. The 2nd Defendant stated that the suit properties were situated in Kwale and they were other related matters. The Applicant states that the suit properties herein being Plots No 500 Section VI MN and 2424/Section VI/ MN are located within Mombasa.

4 In the case of *Kwame Kariuki & Another vs Mohamed Hassan Ali & 4 Others* (2014) eKLR, the Court observed that;

It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal.

5 In the case of *Mwihoko Housing Company Limited vs Equity Building Society* (2007) 2 KLR 171 is relevant. It was held, that;

A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of *Rose Kaiza Vs Angelo Mpanju Kaiza* 2009, the Court was categorical that;

“An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made...”

6 Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section 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.”

7 The aforesaid rule is based on section 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya which states as follows:

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 Under Section 80 of the *Civil Procedure Act*, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. In *Court of Appeal, Civil Appeal No. 211 of 1996, National Bank of Kenya vs Ndungu Njau*, the Court of Appeal held that;

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law”.

9 I have perused the court record and find that counsel for the applicant misled this court as to the location of the subject matter in this suit. It would appear that Plots No. 500/Section VI/MN and 2424/Section VI/ MN are located within Mombasa within the territorial jurisdiction of this court. I find this application is merited and I grant it as prayed.

10 It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JULY 2023.

N.A. MATHEKA

JUDGE

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