



**Habib & another v Okumu & 3 others (Environment & Land Case E001 of 2023) [2023] KEELC 18823 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18823 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE E001 OF 2023**

**E ASATI, J  
JULY 13, 2023**

**BETWEEN**

**SHABAN OKUMU HABIB ..... 1<sup>ST</sup> PLAINTIFF**

**SHABAN ABDI OKUMU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MOHAMED SHABAN OKUMU ..... 1<sup>ST</sup> DEFENDANT**

**YUSUF KWEYU GANGUU ..... 2<sup>ND</sup> DEFENDANT**

**FATUMA SHABAN OKUMU ..... 3<sup>RD</sup> DEFENDANT**

**SAFI SHABAN OKUMU ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the Plaintiffs' Notice of Motion application dated March 16, 2023 expressed to be brought pursuant to the provisions of the Fair Administrative Actions Act 2015, Sections 80, 1A, 1B, 3A 63(e) and 100 *Civil Procedure Act* Cap 21 Laws of Kenya, Order 45 (1) (b) and Order 51 Rule 1 of the *Civil Procedure Rules* and the inherent jurisdiction of the court. The application seeks for an order that the court reviews its ruling and orders made on February 7, 2023 and issue prayers 2 of the application dated January 17, 2023 on interim basis pending the hearing of the suit and costs of the application.
2. The grounds upon which the application was brought are that by its ruling dated February 7, 2023 the court dismissed the Plaintiffs' application dated January 17, 2023. That the applicants are greatly prejudiced and will suffer irreparable damage if the ruling is not reviewed. That no prejudice will be suffered by the Respondents as they are not the genuine beneficiaries. That the court has power to review its judgements and orders under Order 45 Rule 1 (b) of the *Civil Procedure Rules*. That the Respondents have started the process of sharing out the property as per the judgement of the Kadhi



which was arrived at on the basis of non-disclosure of material facts. That a search from the lands office shows that ownership of the suit land has since changed. That the present application has been made without unreasonable delay as the applicants were awaiting the judgement of the Kadhi's Case No 4 of 2018 which was missing or misplaced at the Registry.

3. The application was supported by the contents of the Supporting Affidavit sworn jointly by Shaban Okumu Habib and Shaban Abdi Okumu on 16<sup>th</sup> March 2023. The applicants deposed that they have at all material times been the beneficiaries of the piece of land known as Kisumu/mkendwa/1 (the suit property). That they have been supplied with documents which can be relied on by themselves in this case so as to safeguard the property. That after the ruling of this court, they came across a postal search which shows that the Kadhis Judgement has been lodged in the land registry and that the records now show the names of the beneficiaries and the sizes of the land they inherited. That the Kadhi's judgement was delivered on assumptions because the Kadhi did not see or call the heirs. That the judgement of the Kadhi was delivered on 29<sup>th</sup> March 2019 without the knowledge of the applicants and other heirs. That the Kadhi distributed the property among people who were not supposed to inherit the property. That on 17/2/2023 the applicants found out that the suit property had been fenced by an individual who is unknown to them so they pulled down the fence. That the suit property has never belonged to Mwanahawa Lona Hussein (deceased). That the original title bearing the names of the registered owners of land is in possession of the applicants and that the same was never lost as alleged by the Respondents.
4. Though served with both the application and the hearing notice, the Respondents neither filed response to the application nor attended court for the hearing thereof. Affidavit of Service sworn on May 26, 2023 by Morris Mwasagua and filed in court on 29<sup>th</sup> March 2023 indicates that the Respondents were served with the application on May 24, 2023.
5. The application was argued orally on 31/5/2023. Counsel submitted that since delivery of the ruling sought to be reviewed, the applicants have acquired some documents including the judgement of the Kadhi, Certificate of official search and photographs. That the plaintiffs were made aware of the Kadhi's judgement 2 years after delivery. That the Registrar is about to issue new titles. Counsel prayed for an order of injunction or status quo so as to safeguard the property and an order barring the Land Registrar from issuing other titles in respect of the suit land.
6. The main order sought in the application is review of the court's ruling dated February 7, 2023. The ruling dated February 7, 2023 was in respect of the application dated January 17, 2023 which sought for an order of temporary injunction restraining the Respondents from in any way interfering with the suit land. After considering the application, the court found that the applicants had not demonstrated that they had capacity to file the suit, no evidence to support the allegations in the application and that in the absence of the decision of the Kadhi the court was unable to ascertain whether the matter was res judicata or not. The court concluded that the grounds for issuance of a temporary order of injunction had not been demonstrated and dismissed the application with no order as to costs.
7. Review and setting aside of judgements, decrees and orders is provided for in Section 80 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules 2010](#). Section 80 provides that: -
  - “ 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 review of the judgement to the court which passed the decree or made the Order, and the court may make such order thereon as it thinks fit

Order 45 Rule 1 (1) provides:-

“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 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 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 judgement to the court which passed the decree or made the order without unreasonable delay.”

From the above-quoted provisions of the law, it is clear that the grounds upon which an application for review of a judgement, order or decree can succeed are:

- a) discovery of a new and important matter or evidence
  - b) some mistake or error apparent on the face of the record
  - c) any other sufficient reason
  - d) the application must be brought without unreasonable delay.
8. The present application appears to be premised on the ground of discovery of new and important matter or evidence. Counsel submitted that after delivery of the ruling, the applicants have found documents inclusive of the judgement of the Kadhi, certificate of official search and photographs. I have carefully read the judgement in Kisumu Kadhi’s Court Succ Case No 04 of 2018 annexed to the application and marked “S3”. It is dated March 29, 2019. Counsel submitted that the applicants became aware of the judgement of the Kadhi 2 years after delivery. This means that by around the month of March 2021, the applicants were aware of the existence of the Kadhi’s judgement and indeed mentioned it in the application dated January 17, 2023. As concerns the certificate of official search attached to the application and marked “S2”, the same was dated January 11, 2023. This means that by the time of filing the application dated January 17, 2023 the certificate of official search was already in the possession of the applicants. Concerning the photographs attached to the application and marked “S4” there is no dispute that they are in respect of events or features (fencing) that occurred after the ruling. (See paragraph 7 of the Supporting Affidavit). It therefore cannot be said that the said documents (Kadhi’s judgement, certificate of official search dated 11/1/2023 and photographs) are new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicants or could not be produced by them at the time when the ruling sought to be reviewed was made.
9. The applicants have the burden of proof to prove discovery of the new and important matter or evidence and that the discovery happened after delivery of the decision sought to be reviewed had been made. The applicant must also demonstrate the due diligence done to try to obtain the said new and important matter or evidence before the decision sought to be reviewed was made.



10. In the present case, the applicants have not discharged this burden. Secondly the applicants have not addressed the issue of capacity to sue which was one of the reasons why the application dated 17/1/2023 was dismissed. Finally, in view of the fact that there is an existing judgement from the Kadhi's court concerning the same subject matter and parties, the proper avenue for redress ought to have been an appeal against or review of that judgement in accordance with the Kadhi's Court Act and the Rules made thereunder.
11. I find that the application lacks merit. The application dated March 16, 2023 is dismissed. No order as to costs as the respondents did not respond to the application.
12. It is so ordered.

**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 13<sup>TH</sup> DAY OF JULY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

**IN THE PRESENCE OF:**

**NEVILLE - COURT ASSISTANT.**

**WAMBUI FOR THE PLAINTIFFS/APPLICANTS.**

**NO APPEARANCE FOR THE DEFENDANTS/RESPONDENTS.**

