



**Harambee Children Therapy Centre Kinderhilfesprojekte v Kenya  
Railways Corporation & 2 others (Environment & Land Case  
1391 of 2016) [2023] KEELC 20262 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20262 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1391 OF 2016  
EK WABWOTO, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**HARAMBEE CHILDREN THERAPY CENTRE  
KINDERHILFESPROJKETE ..... PLAINTIFF**

**AND**

**KENYA RAILWAYS CORPORATION ..... 1<sup>ST</sup> DEFENDANT**

**NAIROBI CITY COUNTY GOVERNMENT ..... 2<sup>ND</sup> DEFENDANT**

**ELIZABETH WAMBUI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This court is called upon to review its own orders issued on vide judgment delivered on February 9, 2023. The application was supported by an affidavit sworn by Nicholas Omondi Ndiso dated May 2, 2023 on the following grounds that no interest was awarded while the same was merited in law and/or pleadings, that no award was made in respect to interest on the decretal sum of Kshs 2,600,000 and general damages of Kshs 2,000,000 in fair recompense to the Plaintiff at current commercial rates was made, that no judgment was entered against the 3<sup>rd</sup> Defendant who neither filed any pleadings nor denials to claims but participated at the hearing, that there are sufficient reasons to enter among them the Plaintiff's submissions at paragraph numbered 13 aiming other paragraphs 13(f) and (g) which showed the 1<sup>st</sup> Defendant was allocated this land on June 1, 2018 almost 2 years after suit was filed, that award on general damages at two million is also low, the pleadings, evidence and all circumstances considered, that there was no award on special damages/claims which were particularized and both documentary and/or oral evidence given and that there has been no unreasonable delay in making this application.



2. Pursuant to directions issued by the court, it was directed that the application be canvassed by way of written submissions filed by the parties for consideration. The Plaintiff/Applicant filed written submissions dated June 29, 2023.
3. Counsel for the Plaintiff/Applicant outlined two main issues for consideration by this court;
  - a. Whether the Applicant has satisfied the threshold for the review and/or set aside of order.
  - b. Whether the Applicant has demonstrated sufficient cause to warrant the relief sought.
4. It was submitted that lodging the notice of appeal dated February 14, 2023 with the Court of Appeal did not amount to the institution of formal substantive appeal but rather purely meant to express desire to appeal. It was submitted that the omission to award interests constitutes an error apparent on the face of the record which can happen even to the best of us.
5. Moreover, it was submitted that special damages pleaded and proved is to a tune of Kshs 20,639,600, land rates paid for the suit land from the date of purchase up to year of demolition (three years), rent paid for an alternative premises for a period of three years from the date of demolition.
6. The 1<sup>st</sup> Respondent's filed grounds of opposition dated July 14, 2023 and submissions of even date in which it was submitted that the prayers sought are on a point of law that can only be subject to an appeal and not review. It was further argued that allowing the application would amount to re-opening the case afresh since Parties should be bound by their pleadings and in this case where an award of interest was not sought, the same cannot be awarded.
7. The 4<sup>th</sup> Defendant opposed the application via a replying affidavit dated June 8, 2023 and submissions dated July 7, 2023. It was argued that an error apparent on the face of the record should be once which is so obvious and not require an elaborate argument to be established. Relying on Section 26 of the *Civil Procedure Act* it was argued that awarding of costs are discretionary and after rendering of the judgment, the Court should now be considered functus officio.
8. Having looked at the application and submissions, the singular issue that comes up for determination is whether the Plaintiffs have managed to convince this court to review its orders delivered vide a judgment on the 9<sup>th</sup> February 2023.
9. The decision of whether or not to allow an application for review of a judgment or an order of the court is within the wide discretion of the court. The discretion ought to be exercised judiciously as was stated in the case of *Shah -vs- Mbogo* (1979) EA 116. A basis for the exercise of the discretion has to be laid by the party inviting the court to exercise its discretion. In the present case, the question for the court to answer is whether the Plaintiff has satisfied the threshold by providing a rational basis for the court to review and or vary its orders.
10. Section 80 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya provides 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.
11. Order 45 Rule 1 (1) of the *Civil Procedure Rules* provides as follows:



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.

12. Rule 3(2) of the same Order provides that:

“Where the court is of the opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation”.

13. In *Salama Mahmoud Saad vs Kikas Investment Limited & Anor* [2014] eKLR review of Court orders is discussed as follows;

“...Before a review is allowed in the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.” [Emphasis Mine]

14. I have also considered the ground of sufficient reason. In *Michael Mungai v Ford Kenya Elections & Nominations Board & Others & 2 others* [2013] eKLR, the five judge bench discussed the grounds of “sufficient reason” as follows:

A decree or order may also be reviewed for any sufficient reason. In our opinion, sufficient reason can only be deduced from the facts and circumstances of a particular case before the court. For example, in the case of *Ngororo v Ndutha & Another* [1994] KLR 402 the Court of Appeal held that any person, though not party to a suit, whose direct interest is affected by a judgment is entitled to apply for review. Such a reason can be ‘sufficient reason’ for the purposes of Order 45 Rule 1(1) for reviewing a decree or an order. An applicant must indeed place convincing evidence before a court for the court to be satisfied that there is sufficient reason to review its decision [Emphasis Mine]

15. In the instant case, having carefully considered the application herein and being guided by the aforementioned authorities, the court finds that the Plaintiff has not met the threshold to warrant the grant of the orders sought.



16. In the end, the application dated May 2, 2023 is devoid of merit and the same is dismissed with no orders as to costs.

17. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> SEPTEMBER 2023.**

**E.K. WABWOTO**

**JUDGE**

**In the presence of;-**

**Ms. Odhiambo for the Plaintiff.**

**Ms. Akoth Alouch for the 1<sup>st</sup> Defendant.**

**N/A for the 3<sup>rd</sup> Defendant.**

**Ms. Kamau for the 4<sup>th</sup> Defendant.**

**Court Assistant – Caroline Nafuna.**

