



**Republic v Deputy County Commissioner Igembe South Sub County & another;
M'mwereri (Interested Party); Kithure (Exparte Applicant) (Judicial Review
Application E16 of 2022) [2023] KEELC 20344 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20344 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
JUDICIAL REVIEW APPLICATION E16 OF 2022
CK NZILI, J
SEPTEMBER 27, 2023
IN THE MATTER OF AN APPLICATION FOR
JUDICIAL REVIEW BY MOSES NTONJIRA KITHURE
BY WAY OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF THE DECISION BY THE DEPUTY COUNTY COMMISSIONER
IGEMBE SOUTH SUBCOUNTY IN THE APPEAL TO THE MINISTER CASE NO. 68 OF 2019
IN RESPECT OF P/NO.2448 MERU NORTH/KIRINDINE "B" ADJUDICATION SECTION**

BETWEEN

REPUBLIC APPLICANT

AND

**DEPUTY COUNTY COMMISSIONER IGEMBE SOUTH SUB
COUNTY 1ST RESPONDENT**

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

AND

HUMPHREY KUBAI M'MWERERI INTERESTED PARTY

AND

MOSES NTONJIRA KITHURE EXPARTE APPLICANT

RULING

1. The court is asked to stay the execution and review the judgment delivered on 26.7.2023. The application is supported by the grounds on its face, and the affidavit sworn by M.D Maranya advocate



- on 18.8.2023. The applicant, who was the interested party in the proceedings, averred that the court made an error in the judgment in concluding that the Land Adjudication Officer's award was read on 7.4.2018 instead of 7.11.2018. that the appeal before the Minister was filed eight days after the decision as per annexure marked MNK "3". The applicant has discovered new evidence, namely; a receipt for the appeal to the Minister, which he could not produce when he filed his response to the notice of motion.
2. Further, the applicant averred that the mix-up of dates by the court constituted an error on the face of the record, and had the court considered the date of the delivery of judgment, it may have arrived at a different decision. Lastly, the applicant averred that the implementation of the judgment was imminent; his application was filed in good faith, in the interest of justice, and without undue delay.
 3. Regarding the affidavits in support, Mr. Maranya, advocate for the applicant, averred that the judgment by the Land Adjudication Officer was made on 7.11.2018 after a scene visit on 17.10.2018, and an appeal was filed on 15.11.2018 as per a receipt annexed as HK "2". Therefore, the applicant states that it was not true that the appeal had been filed out of time.
 4. As to the reason that the receipt was not filed with the responses, the deponent averred that the applicant could not obtain the receipt from the land office within the timelines set by the court, and he always believed that the 1st and 2nd respondents would produce documents to clear the doubt in respect to the date which they never did.
 5. Moses Ntonjira Kithure, the exparte applicant, has opposed the application by a replying affidavit sworn on 30.8.2023, terming annexure MNK "3" as uncertified and similar to annexure HKM "9(b)", which was included in the replying affidavit to his notice of motion hence could not amount to newly discovered evidence to warrant a review.
 6. The exparte applicant averred that the proceedings supplied to him by the Land Adjudication Officer indicated that the decision was made on 7.4.2018 and that no explanation has been offered as to why the payment receipt was not brought before the court during the hearing. The exparte applicant averred that the court considered the appeal had not been dated or stamped to show when it was filed with the Minister or received in 2019, yet it was purportedly filed in 2018. Therefore, the respondents averred that the application by the applicant was full of lies, inconsistencies, unjustified and that other than the date, the court considered other factors why the Minister's decision would not stand the test of law, making the court found that the interested party now applicant had violated Section 29 of the [Land Adjudication Act](#).
 7. The respondent averred that the allegations in the application were more of the grounds for appeal than for review, and this court should not sit on appeal of its judgment. He termed the application as an afterthought, filed with delay lacking merits or justification, incompetent, factually and legally baseless, based on false affidavits, and within the subordination of perjury.
 8. Order 45 of the [Civil Procedure Rules](#), as read together with Sections 80 of the [Civil Procedure Act](#), provides that a party aggrieved by an appealable decree but from which no appeal has been preferred or where no appeal is 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 on account of some mistake or error apparent on the face of the record, to apply to the court which passed the decree without unreasonable delay.
 9. Further, Order 45 Rule 3 of the [Civil Procedure Rules](#) provides that no such application shall be granted on the ground of discovery of a new matter of evidence which the applicant alleges was not within his knowledge or could not be adduced when the decree was passed or made without strict proof of such allegation.



10. In this proceedings, the ex parte applicant filed the ex parte chamber summons on 9.12.2022 and ground number (c) of the statement of facts raised the issue of the appeal being filed outside the timelines and filed without a memorandum of appeal. On grounds number (f – k) the ex parte applicant raised other issues apart from filing the appeal outside time. In the verifying affidavit by Moses Ntonjira Kithure, copies of the proceedings and ruling were attached as annexures marked MNK 02 – 06, among them the ministers' and land adjudication proceedings.
11. In response, the interested party filed a replying affidavit sworn by Humphrey Kubai M'Mwereria on 17.3.2023 and attached annexures marked HKM 9 (a) & (b) the objection summons and the proceedings which were not certified by the issuing office. Annexures marked HKM "10 (a) & (b)" were not dated or stamped on receipt by the receiving office.
12. The basis of the applicant's application is that there was an error apparent on the face of the record; the court mixed up the date, and that new and important evidence has been availed to cure the mistake on the date(s) which, if was available, the court would have reached a different decision.
13. In *Muyoki vs. DCDC Corp Ltd and another* (2006) 1 E. A 243, the court cited *Nyamogo & Nyamogo vs. Kogo* (2001) EA 174, that an error apparent on the face of the court has no indefiniteness and should be determined judicially on the facts of each case. Further, the court said an error that has to be established by a long-drawn process of reasoning or on points where there may be two opinions was not on such an error and that mere error or wrong view was no ground for a review but one for an appeal.
14. In *Pancreas T. Swai vs. Kenya Breweries Ltd (2014)* eKLR, the court held that if parties were allowed to seek review of decisions on the ground that the decisions were erroneous in law either because the judge failed to apply the law correctly or at all, a dangerous precedent would be set in which court's decisions that ought to be examined on appeal would be exposed to attacks in courts in which they were made under the guise of review when such courts were {{term{refersTo |title Once a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker; finality.

An enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.} functus officio}} and had no appellate jurisdiction.

15. In *National Bank of Kenya Ltd vs. Ndungu Njau (1997)* eKLR, it was held that an error on the face of the record should not require an elaborate argument and must be self-evident. Further, in *Francis Origo & another vs. Jacob Kumah Munyala Court of Appeal 149 of 2001*, it was observed that an erroneous conclusion of law or evidence was not a ground for review but may be a good ground for appeal.
16. Regarding new and important evidence, in *Turbo Highway Eldoret Ltd vs. Synergy Industrial Credit Ltd (2016)* eKLR, the court cited with approval *Rose Kaiza vs. Angelo Mpajaiza (2009)* eKLR, that applications on this ground must be treated with great caution.
17. In *D. J. Lowe Ltd vs. Bonguo Industries NRB C. A No. 217 1998*, the court said that a fact of the discovery of fresh evidence must be treated with the greatest care, for it was easy for a party who had lost to see the weak part of his case and the temptation to lay and procure evidence which would strengthen that weak part and put a different complexion and in which case such a party must show that there was no remissness on his part in adducing all possible evidence at the hearing.
18. In this application, the applicant blames strict court timelines for failing to procure, adduce, and avail the appeal receipt. He blames the 1st and 2nd respondents for not providing the documents to clear the doubt about when the appeal was filed. Annexures to the affidavit sworn by M.D Maranya advocate were not certified. The deponent of the affidavit is not the interested party. The issues deponed on were



not within the knowledge of the deponent. The deponent does not state if he was the one who filed the appeal in the first instance and or participated in the Land Adjudication Officer's proceedings. The deponent cannot and has not explained why the applicant had to wait and collect the receipt from the land's office when the proceedings were filed and raised the question of an appeal filed out of time. If the applicant was issued with a receipt when he filed the appeal, one would have expected he was the custodian of the receipt and would furnish it to the court or his lawyers on record. The deponent has not clarified as and when the same was procured from the land's office.

19. Order 45 Rule (3) of the *Civil Procedure Rules* requires strict proof of new and fresh evidence. The court had interrogated the notice of motion and the replying affidavit by the parties alongside the respective annexures. Other than the dates, the court considered other factors, which perhaps prompted the applicant to look for the alleged new and fresh evidence to cure the irregularities in his annexures. This goes against the very essence of new and fresh evidence. Had the applicant exercised due diligence, he would have addressed the issues raised in the statutory statement of facts, the verifying evidence, and procured a certified copy of the Land Adjudication Officer's decision and the receipt.
20. The alleged new and fresh evidence must also meet the threshold, namely that it could not be procured with reasonable diligence for use at the trial, must be able to influence the result of the case, and must be such as is presumably to be believed or apparently credible though not incontrovertible as held in *Tarmohamed & another vs. Lakhani & Co. (1958) E.A 567 & Alex Ounda Otieno vs. Orange Democratic Movement Kenya & another (2017)* eKLR.
21. Moreover, the court considered the motion before it alongside grounds other than whether the appeal was filed out of time, making the issues raised herein perhaps good grounds for an appeal instead of a review. The upshot is that I find the application lacking merits. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 27TH DAY OF SEPTEMBER 2023

In presence of

C.A Kananu

Nyamu Nyaga for Arithi for exparte applicant

Kava for Maranya for interested party

Mohamed for Mbaikyatta for respondent

HON. CK NZILI

ELC JUDGE

