



Kubai v Permanent Secretary Ministry of Public Health & 3 others (Environment & Land Petition 145 of 2018) [2023] KEELC 20087 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20087 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND PETITION 145 OF 2018
A OMBWAYO, J
SEPTEMBER 22, 2023**

BETWEEN

CHRISTINE KUBAI PETITIONER

AND

**PERMANENT SECRETARY MINISTRY OF PUBLIC HEALTH 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

THE COUNTY GOVERNMENT OF NAKURU 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT

RULING

1. This ruling is in respect of the 3rd respondent's Notice of Motion application dated 12th July 2023. The said application is expressed to be brought under Section 80 of the *Civil Procedure Act*, Order 45 Rule 1, Order 50 Rule 6 of the *Civil Procedure Rules* and Section 8(1)(a) of the Office of the County Attorney Act 2020. The application seeks the following orders;
 - a. Spent
 - b. That this honourable court be pleased to enlarge the time for the 3rd respondent to file this application for review of the judgement and decree issued by this honourable court on 5th May 2022.
 - c. Spent
 - d. That this honourable court do review, vary and set aside its decision and/or judgement issued on 5th May 2022 and do rehear this case on merit.



2. The grounds on the face of the application are that health was previously a National Government function and since devolution, the documentation relating to the purchase of land for the construction of the Maai Mahiu Health Centre had not been submitted to the 3rd Respondent. That a period of nine months has lapsed since the delivery of judgement in this matter. That the 3rd Respondent has obtained new and important information that demonstrates that the Petitioner had sanctioned the sale of the disputed property to the then Maai Mahiu Health Centre Committee.
3. That the 3rd Respondent has obtained minutes dated 17th October 1990 where the late Hon. Fred Kubai expressed willingness to sell the disputed property for the benefit of the people of Maai Mahiu. That the purchase price was agreed to be kshs. 20,000 per acre. That the petitioner acknowledged receipt of Kshs. 100,000/= as part of payment of the purchase price. That the petitioner consequently issued consent to the Maai Mahiu Health Centre Committee to proceed and enter the disputed property and start developing the Health Centre. That there is a correspondence from the Petitioner and one Leonard Kiragu Kagotho addressed to the District surveyor requesting that the titles be produced urgently to allow them to transfer the same to the Maai Mahiu EEC Health Centre. That the Petitioner was aware of the sale and falsely represented her position before this Court. That the petitioner did not come to this court with clean hands and that there is high public interest given that the health centre is the main hospital in Maai Mahiu sub-county which the 3rd respondent has allocated a lot of finances towards its improvement.
4. The application is supported by the affidavit of James Newton Karanja sworn on 12th July 2023. He deposed that he is the former secretary of the Maai Mahiu Health Centre Committee. He also deposed that he was present during the discussions pertaining to the purchase of the land for the health centre. That sometime in the 90's, the government got a donation from a Swedish based organization to develop a health centre for the people of Maai Mahiu. That they needed a large parcel of land so they approached the late Fred Kubai whose family had land that the committee believed would be ideal for the project. That the land identified was registered in the name of the petitioner and her son Leonard Kiragu Kagotho which properties were subject to this suit. That the properties were formerly known as Kijabe/Kijabe Block 1/3867 and 3868. That the members of the hospital committee together with the then District Officer held a number of meetings with the late Fred Kubai that culminated in the purchase of the suit properties measuring 10 acres. That the petitioner and her son had appointed Fred Kubai to act as their agent in the negotiations with the committee on acquisition of the land. That the purchase price was agreed to be Kshs. 225,000 per acre and the hospital committee organized fundraisings that involved the local community in order to raise the agreed purchase price.
5. He deposed that Kshs. 100,000/= was paid as deposit and the petitioner gave consent for the construction to commence. That the balance of kshs. 125,000/= was to be paid upon successful handing over of the necessary completion documents. That the petitioner wrote to the District Surveyor, Ardhi House Nakuru acknowledging the selling of the suit properties and requesting for the processing of the mutation forms and title deeds. That to date the committee has not received the completion documents from the petitioner. That the award from the court would not have been issued if all the evidence had been availed. That the petitioner misrepresented facts and was not entitled to the orders sought and that the 3rd respondent's application be allowed and the case be heard on merit. There is no response to the application on record.
6. No other party filed their submissions to the application except for the petitioner who filed her submissions on 7th August 2023.



7. The petitioner in her submissions identified only one issue for determination which is whether the 3rd respondent/applicant is entitled to enlargement of time to enable it prosecute its case in light of new and important evidence.
8. The petitioner relied on Order 50 Rule 6 and Order 45 of the Civil Procedure Rules and submitted that the law does not provide for any time limits and so the application to enlarge time lacks merit. The plaintiff submitted that the 3rd respondent filed the application under consideration almost one year after judgement had been entered and a decree executed and has not given sufficient reasons for the delay. The petitioner further submitted that the matter was in court for eleven years before judgement was delivered and would be prejudiced if the application is allowed. The petitioner submitted that the 3rd respondent's counsel came on record on 1st December 2014 and points out that the petition was adjourned severally and the respondents given leave to file their responses. The petitioner submits that the circumstances of this case do not warrant the review of its judgement and sought that the 3rd respondent's application be dismissed.

Analysis and determination

9. After considering the 3rd respondent's application and the submissions, the only issue that arise for determination is whether the court should review its judgement delivered on 5th May 2022.
10. Section 80 of the Civil Procedure Act 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 of the Civil Procedure Rules 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...
 - (2) A party who is not appealing from a decree or order may apply for 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.”
12. The court in the case of *Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR* held as follows:

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on



account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

13. It is important to point out that the 3rd respondent is seeking for the court to enlarge time for it to file an application for review and as pointed out by the petitioner in her submissions, the law does not give a time limit within which a party can file an application for review.
14. The 3rd respondent is seeking that the court reviews its judgement on the ground that it has come across evidence that was not readily available at the hearing of the case. The alleged new evidence was annexed to the 3rd respondent’s application.
15. The 3rd respondent has attached to its application minutes of a meeting that was held on 13th August 1990 where the establishment of a health centre was discussed. Copies of minutes of a meeting held on 25th September 1990 were annexed together with a letter written by Christina Gakuhi Kubai and Leonard Kiragu Kagotho. The date on the said letter is not legible and was addressed to the District Surveyor Ministry of Land and housing. The letter indicated that plot numbers Kijabe/Kijabe/Block 1/3867 and 3868 had been sold to the health centre and sought for the processing of mutation forms.
16. A letter dated 27th March 1991 was annexed addressed to Fred Kubai written by District Officer Naivasha that forwarded Kshs. 100,000/= as part payment for ten acres that had been sold to the Maai Mahiu Health Centre. Another letter dated 2nd April 1991 was annexed written by Fred Kubai to the District Officer, Naivasha which acknowledged receipt of kshs. 100,000/= as part of the purchase price. As was held in the case of Republic v Public Procurement Administrative Review Board & 2 others (supra), the court can only review its orders upon discovery of new and important evidence which after the exercise of due diligence could not be adduced at the time the decree was issued, on account of mistake or error apparent on the face of the record and any other sufficient reason.
17. As indicated before, the 3rd respondent is seeking that the court reviews its judgement delivered on 5th May 2022 on the ground that it came across important evidence that was not available to it before. A perusal of the court record indicates that the 3rd respondent’s advocates filed a Notice of Appointment of Advocates on 1st December 2014 and grounds of opposition on 20th February 2018 and did not file any other pleadings.
18. The court in the case of [*Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others \[2021\]*](#) eKLR held as follows;
 20. Ordinarily, the expression 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 would refer only to a discovery made since the order sought to be reviewed was passed. An applicant alleging discovery of new and important evidence must demonstrate that he has discovered it since the passing of the order sought to be reviewed... To pass the test, it must be demonstrated that the applicant was prevented by circumstances beyond his control from tendering the evidence to the court at the time when the judgment sought to be reviewed was delivered against him.”
19. As was held in the above case, for a court to review its judgement and/or order on the ground of discovery of new evidence, the applicant must demonstrate that he was prevented by circumstances beyond his control from tendering the said evidence before the delivery of the judgement. In the present matter, other than alleging that it has come across evidence that was not available to it before, the 3rd respondent has not expressed any circumstances that was beyond its control that prevented it from adducing the said evidence before judgement was delivered. Considering that the said evidence



was letters written in the early 1990's, it is my view that the 3rd respondent has not indicated the difficulty it had in accessing the said documents before judgement was delivered. Consequently, the 3rd respondent's application dated 12th July 2023 lacks merit and is dismissed with costs to the petitioner.

RULING, DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER 2023.

A.O. OMBWAYO

JUDGE

