



**Omar v Rotich & 3 others (Environment & Land Case E15 of 2021)
[2023] KEELC 19977 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19977 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E15 OF 2021
FM NJOROGE, J
SEPTEMBER 22, 2023**

BETWEEN

OMAR MOHAMED OMAR PLAINTIFF

AND

JOHN KIBET ROTICH 1ST DEFENDANT

DANIEL KIPKORIR NGERECHI 2ND DEFENDANT

THE CHIEF LAND REGISTRAR 3RD DEFENDANT

THOMAS KIPROP KIRUI 4TH DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's Notice of Motion application dated 5/05/2023 which is expressed to be brought under Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 45 Rules 1, 2, Order 50 Rule 1 of the *Civil Procedure Rules*, Sections 68, 79, 80 and 81 of the *Evidence Act* and Article 50 of the *Constitution* which sought the following prayers;
 - a. An order be and is hereby issued reviewing and or varying the order issued by the court on 24th April, 2023 to the extent that the certified copy of grant number IR 47995 in relation to LR No. 13287/34 as contained in the plaintiff's list and bundle of documents dated and filed in court 8th May, 2023 be deemed as properly filed and produced in evidence as plaintiff's Exhibit number 6.
 - b. In the alternative to prayer (1) above, leave be and is hereby granted to the plaintiff to file an additional bundle of documents containing a certified copy grant number IR 47995 in relation to LR No. 13287/34.
 - c. The costs of the application be provided for.



2. The application is supported by the affidavit of Omar Mohamed Omar sworn on 8/05/2023. The grounds on the face of the application and the supporting affidavit are that the dispute in the present case is over land parcel No. Njoro/Ngata Block 27/20 (formerly LR No. 13287/34); that the plaintiff purchased the suit property vide an agreement dated 12/05/2004 from Francis Bor Changwony; that after purchase, he was registered as the proprietor on 24/08/2005 and issued with grant number 47995 that was previously issued to the vendor; that vide an instrument of transfer dated 15/10/2019 that was registered on the said date, he surrendered the original grant for LR No. 13287/34 to the 3rd defendant for conversion to give rise to Njoro/Ngata Block 27/20 on 15/10/2019; that he is not able to produce the original grant given that he had surrendered it to the 3rd defendant; that he had filed in court a copy of the title for LR No. 13287/34 which was not certified as a true copy of the original; that on 24/04/2023, the court upheld an objection by the 1st, 2nd and 4th defendants that the uncertified copy of the title for LR No. 13287/34 should not be produced in evidence but instead be marked as PMFI6; that his failure to obtain a certified copy was an honest and mistaken belief that no objection would be raised on its production given that the defendants in the matter had already filed a certified copy thereof; that after the court issued the orders of 24/04/2023, he applied to the Chief Land Registrar for certification of the copy of the grant as a true copy of the original; that vide a letter dated 4/05/2023, the Chief Land Registrar supplied his advocates on record with a certified copy of grant number IR 47995; that on 08/05/2023 the plaintiff filed a further bundle of documents containing the certified copy of grant number IR 47995 in respect to LR No. 13287/34; that it is in the interest of justice that the court reviews its order issued on 24/04/2023 to the extent that the bundle of documents containing the certified copy of grant number IR 47995 is admitted and produced as exhibit No. 6; that the defendants will not be prejudiced in any way if the orders sought are granted as he is still giving his evidence and the defendants have an opportunity to cross-examine him on the same and that Sections 68, 79 and 80 of the Evidence Act bestows this court with jurisdiction and discretion to allow the production of the certified copy of the title.
3. The 4th defendant filed a replying affidavit sworn on 16/05/2023 on 18/05/2023. He deposed that the plaintiff's application does not have grounds for review; that the court's ruling delivered on 24/04/2023 upholding the objection on the production of the said document was based on Sections 35 and 38 of the Evidence Act; that since the maker of the document is the Department of Lands, they should produce it; that the proviso of Section 35 of the Evidence Act does not come to the aid of the plaintiff as he has not demonstrated that it will lead to an expense that the court considers unreasonable if someone from the Department Of Lands was summoned to produce the said document in evidence; that the said document is a public document within the province of Section 38 of the Evidence Act and can be produced in evidence by a public official so long as it is in the custody of the public official; that the plaintiff is not a public official within the meaning of Section 38 of the Evidence Act; that if the court made an error in its ruling delivered on 24/04/2023, then it was an error of law which can only be subject to an appeal and not a review application and that the court is functus officio in regard to its ruling delivered on 24/04/2023 and should not be asked to sit on appeal on a matter it had already decided.
4. The 2nd defendant filed a replying affidavit sworn on 12/05/2023 on 31/05/2023. He deposed that he is advised by his advocates on record that all documentary evidence should be produced by the author unless the applicant can show that it will take time for the author to produce it; that the author of the said letter who is the Land Registrar- Nakuru is a party to the suit and can produce the said document; that with regard to the document filed on 08/05/2023, he is advised by his advocates on record that a document cannot be filed at this stage of the proceedings and ought to have been filed at the pre trial conference and sought that the application be dismissed with costs.



Submissions

5. The plaintiff filed his submissions on 29/05/2023 while the 4th defendant filed his submissions on 24/05/2023. The other parties did not file their submissions to the application.
6. The plaintiff in his submissions submitted on whether the court should review its orders and grant him leave to produce a certified copy of the grant as an exhibit. The plaintiff reiterated the contents of his supporting affidavit, relied on the case of *Richard Kipkemei Limo v Hassan Kipkemboi Ngeny & 4 Others* [2019] eKLR and submitted that even though the 3rd defendant has indicated an intention to produce a certified copy of the grant, he is not sure whether eventually the certified copy of the grant would be produced. The plaintiff also submitted that he has the burden of proving his case on a balance of probabilities and if he fails to produce the grant which is now certified, he shall not have proved his claim. The plaintiff then sought that the court exercises its discretion and allows his application. The plaintiff relied on the cases of *Safaricom Limited v Josenga Company Limited & 4 Others* [2021] eKLR, *Re Estate of the late Alice Nyambura Wainaina (deceased)* [2021] eKLR, *Jemima Moraa Sobu v Trans National Bank Limited* [2016] eKLR, Section 68, 80 & 81 of the *Evidence Act*, Article 159 (2)(d) of the *Constitution* of Kenya and submitted that it is in the interest of justice that the court reviews its orders issued on 24/04/2023 and admit the certified copy of the grant as sought.
7. The 4th defendant in his submissions submitted on whether the plaintiff has demonstrated sufficient cause for the court to review its orders. The 4th defendant relied on Order 45 Rule 1(b) of the *Civil Procedure Rules*, the Supreme Court of India case of *Ajit Kumar Rath v State of Orisa & Others*, 9 Supreme Court cases 596, the Court of Appeal decision in *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR, Sections 80 and 81 of the *Evidence Act* and submitted that the document the plaintiff intends to produce is a public document whose original ought to be produced and in its absence a certified copy. The 4th defendant submitted that in the circumstances of this case, the court rightly upheld their objection to the production of a copy of the grant as a matter of law and procedure.
8. The 4th defendant also relied on the case of *Canon Assurance (K) Ltd v Ali Hamadi Mwangude & 4 Others* [2017] eKLR among other cases and reiterated the contents of his replying affidavit. He submitted that the plaintiff's application is meant to circumvent the rules of evidence and does not meet the threshold required for review. The 4th defendant relied on the cases of *Abasi Belinda v Fredrick Kangwamu and another* [1963] EA 557, *Menginya Salim Murgani v Kenya Revenue Authority* [2014] eKLR among other cases and sought that the plaintiff's application be dismissed with costs.

Analysis and determination

9. 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.”
10. 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.”
11. 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.”
12. The plaintiff in his application is seeking that the court reviews its ruling delivered on 24/04/2023 that upheld an objection to the production of an uncertified copy of grant No. IR 47995 LR No. 13287/34 on the ground that he has now obtained a certified copy of the said grant. The 2nd and 4th defendants opposed the said application on the ground that the plaintiff is not the maker of the said document and since it was authored by the Department of Lands, they are the ones who should produce it. They also argue that the plaintiff’s application has not met the threshold for review of the court orders issued on 24/04/2023.
13. The plaintiff while giving his evidence on 24/04/2023 tried to produce a copy of the certificate of title for LR No. 13287/34 issued to Francis Bor. Counsel for the 4th defendant opposed the production of the said document on the ground that it was not certified and sought that a certified copy be produced. Counsel for the 1st and 2nd defendants equally objected to the production of the said document. The court in its ruling upheld the objection and marked the copy of the certificate of title as PMFI 6.
14. 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.
15. In the present case, the plaintiff has not demonstrated that there has been discovery of new and important evidence and neither is there an apparent error on the face of the record but review can be allowed for any sufficient reason.
16. The Court of Appeal in the case of [*Shanzu Investments Limited v Commissioner for Lands*](#) (Civil Appeal No 100 of 1993) held as follows;
- “Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the [*civil procedure act*](#): and that the other grounds set out in the rule did not



in themselves form a genus or class of things which the third general head could be said to be analogous.”

17. The plaintiff has annexed to his application a certified copy of the certificate of title I.R No. 47995 issued to Francis Bor Changwony that was certified by the Land Registrar on 04/05/2023. Given that the 1st, 2nd and 4th defendants objection to the production of the said document was premised on the ground that the copy of the certificate of title was not certified and given that the plaintiff has now availed a certified copy, it is my view that the plaintiff has demonstrated a sufficient reason enable the court to vary the orders issued on 24/04/2023.
18. Consequently, the plaintiff’s application dated 5/05/2023 has merit and it is hereby allowed in terms of prayer No. 1.
19. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 22ND DAY OF SEPTEMBER 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

