



**Aloka Limited v National Land Commission & another (Environment & Land
Petition 31 of 2020) [2023] KEELC 19833 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19833 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 31 OF 2020
SM KIBUNJA, J
SEPTEMBER 20, 2023
IN THE MATTER OF ARTICLES 2,10, 21, 23, 28, 35, 40, 47, 60, 64, 65,
& 67 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 40, 47, & 60 OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA
AND
IN THE MATTER OF SECTIONS 111, 112, & 120(1) OF THE LANDS ACT,
NO. 6 OF 2012
AND
IN THE MATTER OF KENYA ROADS ACT NO. 2 OF 2007**

BETWEEN

ALOKA LIMITED PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

KENYA NATIONAL HIGHWAY AUTHORITY 2ND RESPONDENT

RULING

1. The petitioner has moved the court through the notice of motion dated the February 17, 2023 seeking for among others the review, setting aside and or varying the judgment and or orders given on February 8, 2023 and replacing it with appropriate relief and award the petitioner Kshs 180 million as pleaded in



the petition with interest and costs. The application is based on the eight (8) grounds on its face marked (1) to (8) and supported by the affidavit of David Oyatta, Advocate, sworn on the February 17, 2023. It is the petitioner's case that the court in its judgement delivered on the February 8, 2023 inadvertently concluded that the documents marked as SS01 to SSO9 were not annexed in support of the petition, while in actual fact they had been filed through the e-filing portal on October 6, 2020 in the Nairobi High Court Constitutional & Human Rights Division, where the petition was initially filed before being transferred to this court. That unfortunately the documents were either never downloaded and or attached to the supporting affidavit when downloading the documents to be placed in the court original file at the Nairobi court's registry after the e-filing, or when transferring the file to this court. Therefore, there was clear error on the face of the record because the supporting affidavit filed in court on the October 16, 2020 had the said documents attached and or annexed to it evincing the merits of the petition. That the mistake should not be visited upon the litigant and the judgement should be reviewed, set aside and or varied and the petitioner be awarded Kshs 180 million. That the application has been filed without delay.

2. The application is opposed by the 2nd respondent through the affidavit sworn by Daniel Mbuteti, a Senior Surveyor in the Directorate of Highway Design & Safety, sworn on the March 22, 2023. He inter alia deposed that contrary to the court's determination that none of the respondents had filed replying affidavits or submissions, the 2nd respondent had on December 22, 2020 filed a replying affidavit sworn by the same deponent on the December 2, 2020; that the suit property, MN/V/1052, that adjoins or otherwise shared a common boundary with Mombasa-Mariakani [A109] Road Project Lot 1: Digo Road/Kenyatta Avenue Junction-Kwa Jomvu, was utilized for the construction of the said project; that the 1st respondent had acquired the said land and the owner compensated in accordance with the law; that the petitioner who was a tenant on the suit property was invited to an inquiry meeting in 2017 for assessment of compensation payable for their developments that was carried out by the 1st respondent and an offer of 9 million made; that the 9 million offer was rejected by the petitioner and the amount was deposited in the 1st respondent's Escrow Account; that the petitioner complaint led the 1st respondent re-inspecting the property and revised the award to Kshs 180 million; that the 2nd respondent was aggrieved with the enhanced award and requested the 1st respondent to address the disparity in the awards; that the 1st respondent carried out valuation of the affected business and adjusted the offer to Kshs 49,492,800 making the total award to the petitioner to Kshs 58,492,800 communicated through the letter dated September 9, 2019; that the petitioner accepted the revised award of Kshs 58,492,800 and signed the acceptance statutory forms and is estopped in law from claiming Kshs 180 million; that the 2nd respondent transmitted the Kshs 49,492,800 in two tranches to the 1st respondent and was granted vacant possession of the suit property to construct the project; that the court having made a finding that the petition was supported by undated affidavit, then the said affidavit is defective and should be expunged from the record; that there was no error apparent on the record as the annexures accompanying the petition were not downloaded and placed on the court file; that the 1st respondent having revised the award payable to the petitioner from Kshs 180 million to Kshs 58,492,800, then the former amount is not available to the petitioner; that as the Kshs 180 million is not a liquidated claim, the petitioner has the burden to prove its case to succeed.
3. The petitioner filed a supplementary affidavit sworn by Samir Shah, managing director of the petitioner sworn on the June 6, 2023 without seeking and or obtaining leave from the court.
4. That pursuant to the directions issued on the April 20, 2023, the learned counsel for the petitioner and 2nd respondent filed their submissions dated the June 8, 2023 and July 7, 2023 respectively which the court has considered.



5. The following are the issues for the court's determinations in the application dated the February 17, 2023;
 - a. Whether the petitioner has met the threshold for reviewing, setting aside or varying the judgement delivered by the court on the February 8, 2023 and if so, what order is just in the circumstances.
 - b. Who pays the costs in the application.
6. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the two learned counsel, superior courts decisions cited thereon and come to the following determinations;
 - a. That as submitted by counsel for the petitioner, section 80 of the *Civil Procedure Act* chapter 21 of Laws of Kenya allows any party who considers himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or in which no appeal is allowed may apply for a 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 deems fit. Order 45(1) of the *Civil Procedure Rules* sets out three situations where review may be sought to be firstly, where there has been discovery of new and important matter of evidence, secondly, on account of some mistake or error apparent on the face of record or thirdly, for any other sufficient cause. It further requires the review application to be filed without unreasonable delay.
 - b. That from the copy of the fees e-receipt marked "DO-1" and referred to in paragraph 7 of the supporting affidavit sworn by David Oyatta Advocate in support of the application, only two (2) annexures were uploaded and filed and not eight (8) as alleged. The two annexures appear as items 4 and 5 on the said receipt and are at pages 17 and 21 of the bound document carrying the application, supporting affidavit and annexures. These documents were not in the court record and were not considered when the judgement delivered on the February 8, 2023 was written.
 - c. That the petitioner has confirmed to the court that the petition was initially filed at Nairobi High Court Constitutional & Human Rights Division as petition No E290 of 2020 through e-filing. That fact has not been disputed, and the court finds it is probable that the said two annexures were probably not downloaded, and if they were, then they were not placed on the court record before the petition file was transferred to this court pursuant to the order of September 29, 2020. This court could not have known of the existence of the two annexures in the e-filing system as it did not have access to the e-filing portal. The counsel for the parties did not direct the court to the said portal. The even if counsel for the 2nd respondent has submitted that no affidavit has been availed from the registry staff, the absence of the two annexures from the record was definitely due to a mistake on the part of whoever was responsible in compiling the petition record to be forwarded to this court after the order of September 29, 2020.
 - d. The petitioner should not be blamed for the mistake by the registry staff, though its counsel ought to have been more diligent in ensuring a complete record had been placed before this court by for example perusing the record and taking action to ensure any missing document was brought to the court's attention. The 2nd respondent's counsel has correctly submitted that even if the court was to find that the petitioner's documents had been left out in error, their prayer for an award of Kshs 180 million cannot be given without proof of their claim to the standard by the law. The court is of the view that while the petitioner has established a reasonable case for the court to either review, set aside or vary the judgement entered on



February 8, 2023, this is not a case whether the court can proceed to enter judgement for Kshs 180 million without proof being tendered as the claim is evidently contested.

- e. That the 2nd respondent has at paragraph 6 of the replying affidavit deposed that it had filed a replying affidavit sworn on December 2, 2020 in answer to the petition. The court has perused the said affidavit and noted from the contents of paragraph 3 that it was meant as a response to the application dated the September 22, 2020 and not an answer to the petition. The court's finding at paragraph 3 of the judgement that none of the respondents had filed a response or submissions to the petition therefore remains valid.
 - f. That as none of the parties is entirely to blame for the failure to place the two annexures noted above on the court record, the costs in the application will abide the outcome of the petition, the provision of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya notwithstanding.
7. That in view of the foregoing determinations, the court finds and orders as follows;
- a. That the judgement of this court delivered on the February 8, 2023 be and is hereby set aside.
 - b. That the hearing of the petition to commence de novo.
 - c. The costs in the application to be in the cause.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 20th DAY OF SEPTEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF:

Petitioner : Mr. Oyatta Advocate.

RESPONDENTS : Mr. Mavuti for 2nd Respondent

WILSON – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

