



REPUBLIC OF KENYA



Wasike & 11 others (Suing as members of Matisi Centre Self-help Group) v Ministry of Interior And Coordination & another (Petition 2 of 2020) [2023] KEELC 21138 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21138 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
PETITION 2 OF 2020
FO NYAGAKA, J
OCTOBER 31, 2023**

BETWEEN

**WILFRED JUME WASIKE 1ST PETITIONER
JOSEPH JUMA WASIKE 2ND PETITIONER
JOSEPH WANJALA KHAEMBA 3RD PETITIONER
JOHN WANYOYI KHISA 4TH PETITIONER
ISAAC WEKESA MAKOKHA 5TH PETITIONER
WILLIAM KUNDU AYUMA 6TH PETITIONER
STANLEY SHIKUKU 7TH PETITIONER
PIUS WANYAMA MABONGA 8TH PETITIONER
JOSPEHAT MAKOKHA 9TH PETITIONER
COSTANT SIMIYU KHAEMBA 10TH PETITIONER
NASHON WANJALA 11TH PETITIONER
PIUS WALUCHO 12TH PETITIONER
SUING AS MEMBERS OF MATISI CENTRE SELF-HELP GROUP**

AND

**MINISTRY OF INTERIOR AND COORDINATION 1ST RESPONDENT
THE ATTORNEY GENERAL 2ND RESPONDENT**



RULING

Background

1. On 16th March 2022, this Court delivered its Judgment herein where it *inter alia* found and declared The Ministry of Interior and Coordination and The Attorney General, (The Respondents herein) to have illegally invaded the Petitioners' Land, LR No. Kiminini/Kinyoro Block 3/Matisi/561 (hereinafter The Suit Land) by trespassing thereon and erecting a Police Post.
2. Having so found, the Court made an order of eviction of the Respondents from the suit land. In the alternative, it set the parties at liberty to negotiate on appropriate compensation with a view to compulsorily acquiring the suit land.
3. As regards violation of the Petitioners' right to Fair Administrative Action, the unlawful trespass and their entitlement to the right of protection of property this Court awarded them damages of Kshs. 2,000,000/-.
4. Against this background, it is pleaded by the Applicants that execution had been commenced and that in the course of time they have discovered new evidence which was withheld by the Respondents, which if it had been availed would have made the Court to reach a different finding.

The Application

5. Through the Notice of Motion Application dated 20th March 2020, (hereinafter 'The Application') supported by the Affidavit of Elizabeth Marube, the head of Legal Unit in the Office of The Deputy Inspector General, Kenya Police Service, deposed to on a similar date, the Respondents sought the following Orders;
 - a. Spent
 - b. Spent
 - c. That the Judgment dated 16-03-2022 entered herein or decree extracted therefrom and or all consequential orders made herein be reviewed, varied, set aside and or vacated forthwith and the matter be ordered *de-novo*.
 - d. Trans-Nzoia Conty Director of Social Service to avail the entire file of Matisi Centre Self Help Group.
 - e. That the Respondents be granted leave to file a Replying Affidavit to introduce evidence to show that the suit property was given to the Respondents as a gift.
 - f. Costs of this Application be provided.
6. As can be gleaned from the grounds in support of the Application and the Affidavit, the Respondents asserted that they had unearthed fresh evidence which was not available at the time Judgment. That the evidence was to the effect that the suit property was donated by the local community for public use as a market place and it was subsequently given over for use by the Applicants.
7. It was their case that in order to address the rampant insecurity, the local community agreed to reassign the suit property as a police post which was subsequently gazetted in the year 2008.



8. The Respondents claimed further that the Petitioners were hellbent in coercing the Respondents to purchase the suit property which was reserved for public use, a move which could result in loss of public resources
9. The Respondent stated further that the Petitioners had not disclosed how they acquired interest to the suit property contrary to Article 40(6) of the Constitution and section 26(1) of the Land Registration Act 2012.
10. In the supporting Affidavit, Ms. Marube referred to the minutes dated 24th April 2008 to demonstrate that the land had been donated by the local community for a Police Post to be erected in order to alleviate the insecurity in the area.
11. She further referred to the Minutes of 2nd September 2008, which showed that the Petitioners were not entitled to acquire title to the property since from inception it was reserved for public use under the County Council of Kitale for use as a Market place.
12. Ms. Marube further deposed that none of the members who donated the land is among the Petitioners herein. It was the Applicant's case that the Petitioners had camouflaged themselves as officials of Matisi Centre Self Help Group to renege on the promises made by bonafide officials to gift the suit land to the Respondents.
13. Based on the provisions of Order 45 Rule 1 of the Civil Procedure Rules, it was Ms. Marube's case that this Court has the jurisdiction to reopen its proceedings and review its judgment by varying or setting it aside in its entirety.

The Submissions

14. The Respondents urged their case further through written submissions dated 7th June 2023.
15. In asserting propriety of the Application, the Respondents stated that despite filing a Notice of Appeal dated 23rd March 2022, they neither prepared nor filed a Record of Appeal. They urged this Court to take judicial notice of Rule 83 of the Court of Appeal Rules which deems a Notice of Appeal filed in such circumstance to have been withdrawn.
16. To buttress the foregoing, the Respondent relied on the decision in Mae Properties Limited v Joseph Kibe & Another (2017) eKLR and the one in John Mutai Mangi & 26 Others v Ngure & 4 Others where in the latter case it was observed;

Under the rule, the Court deems an order that a notice unbacked by institution of appeal has been withdrawn. It essentially concludes that the intended appellant has abandoned his intention to appeal notwithstanding that he has not formally withdrawn the notice of appeal under Rule 81.

17. As regards the place of Order 45 Rule 1 of the Civil Procedure Rules, the Respondents submitted that the pertinent question is not whether fresh evidence obtained and filed is meritorious but rather whether the evidence is fresh and important in the circumstances.
18. To that end, the Respondents submitted that the new and important documents are the minutes of Matisi Locational Development Committee held at the Chiefs Office on 24th April 2008 as well as the meeting of the said committee of 2nd September 2008.



The Petitioners' Case

19. The Petitioners challenged the Application through the Replying Affidavit of Wilfred Juma Wasike, deposed to on 6th April 2023.
20. Mr. Wasike deposed that the Application is fatally defective and ought to be struck out since there is no new evidence to warrant the Court to review its Judgment.
21. It was his case that the Minutes filed as new evidence has no relevance to the case since the Community could not have given land belonging to the Petitioners to the Government.
22. Mr. Wasike faulted the Respondents for failing to file the new documents during the hearing yet they had all the time. It was his deposition that the Respondents were simply trying to buy time in a bid to continue staying in the land.
23. He further pointed out since the Respondents had lodged a Notice of Appeal at the Court of Appeal, they could not file the instant Application.
24. He urged the Court to vacate the Orders of 5th July 2022 and the ones of 21st March 2023 to enable the Petitioners enjoy the fruits of their Judgment.

The Submissions

25. In their written submissions dated 21st June 2023, the Petitioners impugned the new evidence (annexure EM4a and EM4b) by stating that the two are dated 17th May 2022, two months after the Judgment seeking to be reviewed was rendered.
26. It was their case that the evidence in two letters were not in existence at the time the decree was made and as such, they cannot be relied upon on an application for review as they do not form part of the evidence envisaged by Order 45 Rule 1.
27. As regards annexure marked EM2 and EM3, The Petitioners submitted that the Respondents did not demonstrate to Court that they ever conducted due diligence or challenges they faced in order to get evidence in support of their case.
28. It was their case that by failing to conduct due diligence, the Respondents could not rely on the ground of new evidence to have the Judgment reviewed. To that end, support was drawn from the decision in Miscellaneous Application No. 317 of 2018 *R v Advocates Disciplinary Tribunal Ex-Parte Appollo Mboya* where it was observed;

Mere discovery of new or important matter or evidence is not sufficient ground for review. The Party that is seeking review has also to show that such matter or evidence was not within its knowledge and even after exercise of due diligence, the same could not be produced before the Court/ Tribunal earlier.
29. The Petitioners further submitted that there had been inordinate unexplained delay in filing the instant Application, more that a year after delivery of Judgment.
30. The Petitioners sought temper its case by relying on the decision in *Fransis Origo & Another v Jacob Kumali Mungai* where it was observed that;

In an application for review, an applicant must show that there has been discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge at that time, or he must show that there is some mistake or error apparent on



the face of the record, or that there was any other sufficient reason and most importantly, the Applicant must make the Application for review without unreasonable delay.

31. In the end, the Petitioners urged the Court to dismiss the Application with costs.

Issues for Determination

32. From the foregoing, the only issue that arises for determination is;

- i. Whether the Respondents' Application meets the threshold for review of the Judgment of 16th March 2022.

Analysis and Determination

33. The process that culminates in the review of a Judgment is guided by law. Order 45 of the [Civil Procedure Rules](#) provides for Review in the following terms;

“(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, 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.

(2) A party who is not appealing from a decree or order may apply for a 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”

34. In the case of [Sanitam Services \(E.A.\) Limited V Rentokil \(K\) Limited & Another](#) (2019) eKLR, the Court of Appeal spoke to the Jurisdiction of a Court in reference to section 80 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules](#). It observed as follows;

“Jurisdiction to review a judgment or order of a court is donated by Section 80 of the [Civil Procedure Act](#) and Order 45 [Civil Procedure Rules](#). By those provisions of law any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which 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 the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason – a person who fits



within those categories may apply for a review of judgment or to the court which passed the decree or made the order and this should be done without unreasonable delay”.

35. It can be synthesized from the foregoing that a party seeking review must meet the following requirements;
- i. Demonstrate discovery of new and important matter or evidence which after due diligence, was not within the applicant’s knowledge or could not be produced at the material time;
 - ii. That there is some mistake or error apparent on the face of the record; or
 - iii. There was any other sufficient reason;
 - iv. There has been no unreasonable delay.
36. Having said so, I now look at the evidence presented by the Respondents.
37. I have keenly interrogated the evidence in question, namely; The Minutes of Matisi Location Development Committee held on 24th April 2008 and the Statement of the area chief dated 17th may 2022.
38. Both documents, on face value, bear crucial leads in unravelling how the suit land changed hands if at all.
39. That process remains a preserve of Examination of the evidence and witnesses by advocates of both parties, a benefit which this Court was not accorded previously.
40. Having said so, it is important to note that the Petitioners do not contest that that Respondents have brought forth evidence that was not there at the hearing of the dispute.
41. Their contention is that the evidence is not new. They refer to the Statement of the area Chief, one Janet Nafula and point out that since it is dated 17th May 2022, two months after delivery of the Judgment, it was not there at the time of the hearing of the dispute and as such do not fall within the purview of Order 45 of the Civil Procedure Rules.
42. Order 45 of the Civil Procedure Rules does not give a proviso as regards the time when a discovery of a new and important matter is made. It only states that, despite due diligence, such discovery was not within the knowledge of the Applicant.
43. In that case, therefore, the Petitioners’ contention that the Statement by the area chief is not new does not hold. The discovery is indeed new and important in the case.
44. The Petitioners further faulted the Application on the grounds that that the Respondents did not exercise due diligence. It was their case that had they been more prudent, they would have found the evidence sought to be relied on now.
45. The Petitioners’ claim brings to fore the concept of burden of proof. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides:
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.”

46. Essentially, the Petitioners assert the non-occurrence of due diligence. It is a negative task. They have not brought forth any evidence to corroborate their case.
47. The corresponding evidential burden imposed upon the Respondents to disprove the Petitioners’ negative claim, is an onerous task.
48. The foregoing difficulty was captured by the Court in Civil Appeal No. 345 of 2000, *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* where reference was made to the Ugandan decision in *JK Patel vs Spear Motors Ltd* SCCA No. 4 of 1991 [1993] VI KALR 85 where it was observed;

“The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat not ei qui negat incumbit probatio*. It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons”.
49. Lastly, the issue of protracted lapse of time was raised by the Petitioners. It was their case that the Application was instituted unreasonably long after judgment was rendered.
50. The question whether delay is excusable or not was aptly discussed by the Court of Appeal in Civil Application Nai E049 of 2022 *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022)

Excusable delays are delays that are unforeseeable and beyond the control of the party. Non-excusable delays are delays that are foreseeable or within the party's control. Obviously, the distinction between these two is significant in that it determines whether a party is liable for the delay.

11. In deciding whether sufficient cause has been shown, among the facts usually relevant are the degree of lateness, the explanation therefore, and the prospects of success. This list is not exhaustive and each case will depend on its peculiar facts and circumstances. In *National Union of Mineworkers v Council for Mineral Technology*[1998] ZALAC 22 at para 10, the court held: -“The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good



the explanation for the delay, an application for condonation should be refused.”

51. From the foregoing, it can be discerned that an assessment on whether a Court can excuse a delay is discretionary and tilts on degree of lateness, the explanation therefore, and the prospects of success.
52. Whereas the Application herein was instituted one year and 4 days after Judgment was rendered, it is incumbent upon this Court to ensure that justice is served to both parties.
53. Taking into consideration the emotive nature of land disputes in Kenya, it is my finding that the degree of lateness is not extreme. It also was explained that the information was not available at the material time. The Respondents have also asserted that the evidence warrants interrogation by this Court and that the Petitioners will not suffer any prejudice.
54. I must address one last issue that the Respondents raised in opposition to the Application. They deponed that the Applicants had, on 23/03/2022. Filed a Notice of Appeal against the judgment sought to be reviewed. The Applicants indicated in the supporting affidavit that they had expressed intention to lodge an appeal by filing a Notice of Appeal on the material date. They attached to the Affidavit a copy of the said Notice as annexure EM5. They indicated that they did not lodge the appeal and do not wish to pursue one, and that under Rule 83 of the Court of Appeal Rules the Notice is deemed to have been withdrawn since it was not filed in time.
55. Learned counsel submitted on the import of Rule 83 of the Court of Appeal Rules. The Rule provides that “If a party who had lodged a notice of Appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his own notice of appeal and the Court may on its own motion or on an application by any party make such an order.”
56. They relied on the case of Mae Properties Limited v. Joseph Kibe & another [2017] eKLR. They also relied in the case of John Mtai Mwangi & 26 others v. Mwenja Ngure & 4 others [2016] eKLR.
57. On their part, the Respondents, whether inadvertently or by design, did not submit at all on the pendency of an appeal although they raised the same in their relying affidavit.
58. I have carefully considered the issue. Indeed, under Order 42 Rule 6(4), the Civil Procedure Rules it is provided that for the purposes of applying for stay of execution or proceedings, when a party gives a Notice of Appeal, he/she/it is deemed to have lodged an appeal to the Court of Appeal. Under the Court of Appeal Rules, the appeal ought to be filed within sixty (60) days of the giving of the Notice as provide for under Rule 82(1) of the Court of Appeal Rules or such longer period as would be taken into account as to be excluded from counting, upon due certification by the Deputy Registrar of the superior Court as provided for in the proviso to the Rule 82(1), due to the typing of proceedings and/ or preparation of the decree or order appealed from.
59. With that delineation of the period of appeal in mind, Rule 83 of the Court of Appeal Rules kicks in. As cited above, in summary, the Rule is to the effect that an appeal will not be alive forever. Just like anything that is mortal or not divine, it dies after a while. It can die naturally or it is ‘killed’ through legal processes. Of relevance for the instant Application is the consideration whether or not the notice which was filed on 23/03/2022 is alive or dead.
60. It was submitted that the Applicants did not take steps to lodge the intended appeal from the judgment impugned now. That since that did not happen within sixty (60) days there is no appeal subsisting since the Notice of Appeal died naturally. The question is, when and how does the notice of appeal die? It was submitted that failure to take steps to lodge the appeal against the judgement herein lead to the natural death of the notice. I agree.



61. The reason for my finding is that once the requisite period ended for the filing of the appeal, there was no legitimate appeal that could be pursued in the Court of Appeal due to effluxion of time. And as long as there was no application for extension of time to deem the notice of appeal to be in existence it ceased to have life. Whether it be said to have died naturally by effluxion of time stipulated or constructively it is the same: the notice of appeal which was filed and not acted upon by way of lodging an appeal within time ceased to be a notice of appeal. It did not need a party to move the Court of Appeal to declare it so. Its death can be equated to abatement of suits when a party dies and there is no substitution of the deceased within twelve (12) months. The suit automatically abates: it does not require an order of the Court to be made, though for purposes of following up of costs it is apt to do so. But that is only a matter of course.
62. To date no application has been filed by the Applicants to revive and extend the life of the notice of appeal. For that reason, there is no live appeal from the judgment impugned. To make it clearer and for the sake of argument, in case a party filed a notice of appeal and the adverse party never moved the Court of Appeal to declare the notice as having been withdrawn, as provided under Rule 83 for as many as fifteen or twenty years, should the Court or any party keep deeming the appeal alive? I do not think so. If I am right in my finding regarding the 15 or 20 years, why would I not be right in deeming the notice as having been withdrawn immediately the sixty-day period lapses. Whether longer or shorter, any period of inaction in lodging an appeal of more than sixty days as explained above kills naturally, by way of withdrawal of, a notice of appeal.
63. As was held by the Court of Appeal in *Mae Property Limited* (*supra*)

“It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgement of the appeal within 60 literal days, or such longer time as may still amount to 60 days by operation of the proviso to Rule 82(1) on exclusion. It may also be resuscitated or vivified by an order extending time for the lodging of the appeal properly made by a single Judge on a Rule 4 application. Absent those supervening circumstances, the notice of appeal dies in the eyes of the law. Its interment may then take the form of an order of the court suo moto, on its own motion and at its sole discretion, presumably with neither notice having been deemed as withdrawn. It is a power meant to unclog our system and rid it of trifling notices of appeal lodged with no intention to lodge appeals. And it is a power that the Court ought to use vigilantly and more robustly as a regular house-cleaning measure.”

64. Similarly, in *John Mutai* (*supra*) the Court of Appeal held that

“This deeming provision appears to us to be inbuilt case-management system loaded into the Rules. It enables the Court, ideally, to clean up its records by striking out all the notices of appeals that have not been followed up, within 60 days, by records of appeal. It is a rule that telegraphs that notices of appeal should not be lodged in jest or frivolously, with no real or serious intention to actually institute appeals. The rationale of this is self-evident but made the more compelling by a recognition that mischievous or crafty litigants may be content to merely park the bus at appeal gate and not move thereafter – especially should they obtain some kind of stay or injunctive orders protective of their interests pending appeal. To that category of appellants, a delayed, snail speed or never-happen institution of the appeal means a perpetual enjoyment of interim relief. The rule was designed to give to such no succour. Under the rule, the Court deems and orders that a notice unbacked by institution of an appeal has been withdrawn. It essentially concludes that the intended appellant has



abandoned his intention to appeal notwithstanding that he has not formally withdrawn the notice of appeal under Rule 81. The Court makes the order upon being moved by any party or, significantly, on its own motion. It is a clean-up exercise born by the need for rationality in appellate litigation and practice”.

65. In the circumstances, therefore, having regard the totality of the circumstances as well as the dictates of Article 25(c) and 50(1) of *the Constitution* on the inalienable nature of the right to fair hearing, the discretion of this Court favours the calling of every relevant information as opposed to shutting its eyes to evidence that would potentially visit an injustice to a party.
66. In the premises, the Notice of Motion Application dated 20th March 2023 is hereby allowed.
67. The following final Orders hereby issue;
 - i. The Judgment of this Court rendered on 16th March 2022 is hereby set aside in its entirety.
 - ii. The Respondents are hereby granted leave to file the Affidavit in Reply together with new supporting annexures within 30 days of the date herein.
 - iii. This Petition will be mentioned on 4/12/2023 for further directions.
 - iv. Costs of the Application shall be in the cause.
68. It is so Ordered.

RULING DELIVERED, DATED, SIGNED AND DELIVERED AT KITALE VIA EMAIL THIS 31ST DAY OF OCTOBER, 2023

HON. DR. FRED NYAGAKA

JUDGE

